

## New Jersey Commissioner of Education

### Decision

Stephen Klapach,

Petitioner,

v.

Board of Education of the Borough of  
Fort Lee, Bergen County,

Respondent.

### Synopsis

Petitioner, a science teacher in the respondent Board's school district, appealed the Board's decision to affirm the results of a harassment, intimidation, and bullying (HIB) investigation into petitioner's conduct. The HIB investigation concluded that the petitioner committed an act of HIB against a student when he read a confidential email from the student's parent to pupils in another of his classes. The Board affirmed the findings of the investigation, which stemmed from discipline the petitioner had threatened to impose upon three students after they allegedly misbehaved during a lesson with a substitute teacher. The parties filed cross motions for summary decision.

The ALJ found, *inter alia*, that: there are no material facts at issue here, and the matter is ripe for summary decision; the issue for determination in this case is whether the petitioner's reading of the confidential email in front of a classroom of students was reasonably perceived as being motivated either by any actual or perceived characteristic of student J.W.; Fort Lee's HIB policy is substantially similar to *N.J.S.A. 18A:37-14*; the Board's letter to petitioner informing him that the HIB charge had been sustained failed to state how his reading of L.C.'s email was motivated by an actual or perceived characteristic of J.W.; and the Board's argument that petitioner's status as a teacher created an imbalance of power which was the perceived characteristic is without merit. The ALJ concluded that power imbalance is not a perceived or actual characteristic defined in Fort Lee's HIB policy, nor in the relevant statutes and regulations; the Board failed to establish that there was an act of HIB motivated by an actual or perceived characteristic; and the Board's sustaining of HIB charges against petitioner was therefore arbitrary and unreasonable. Accordingly, the ALJ granted summary decision in favor of the petitioner and denied the Board's cross motion.

Upon comprehensive review, the Commissioner agreed with the ALJ findings and conclusion, affirmed the Initial Decision of the OAL, reversed the Board's determination that the petitioner committed an act of HIB, and directed the Board to remove any reference to the HIB investigation and findings from the petitioner's personnel file. In so doing, the Commissioner noted that if the incident reported herein is included in petitioner's personnel file for other reasons, such as violations of Board policies other than its HIB policy, this decision does not extend to those references, as the only issue presently before the Commissioner is the HIB finding. The Commissioner further noted that she in no way condones petitioner's conduct discussed herein. Teachers are placed in a position of trust by the Board and the community. Petitioner in this matter demonstrated extremely poor judgment in singling out J.W. in front of other students and sharing information from an email written by J.W.'s mother that should have remained confidential.

This synopsis is not part of the Commissioner's decision. It has been prepared for the convenience of the reader. It has been neither reviewed nor approved by the Commissioner.

April 6, 2021

**New Jersey Commissioner of Education**  
**Decision**

Stephen Klapach,

Petitioner,

v.

Board of Education of the Borough of  
Fort Lee, Bergen County,

Respondent.

The record of this matter, the Initial Decision of the Office of Administrative Law (OAL), the exceptions filed by both parties pursuant to *N.J.A.C.* 1:1-18.4, and petitioner's reply to respondent's exceptions<sup>1</sup> have been reviewed.

This matter concerns an alleged act of harassment, intimidation, and bullying (HIB) by petitioner, a science teacher employed by the Fort Lee Board of Education (Board). Following his absence from school on October 18, 2019, petitioner received a note from the substitute teacher indicating that three students in his seventh period class had not behaved well. On October 21, 2019, the next school day, petitioner informed these students that he might decrease their class participation grades as a result. That night, J.W.'s mother, L.C., emailed petitioner, stating that the substitute teacher was misinformed about J.W.'s behavior. The following morning, petitioner read L.C.'s email aloud to his first period class, and one of the students in that class informed J.W., who became nervous about going to class and asked her mother to pick her up from school. J.W. was switched to another science class, and an HIB

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<sup>1</sup> Respondent did not file a reply to petitioner's exceptions.

investigation was opened against petitioner. The Board found that petitioner had committed an act of HIB. Petitioner appealed, and the parties filed cross motions for summary decision. The Administrative Law Judge concluded that the Board's decision was arbitrary and unreasonable because it did not establish an HIB act motivated by an actual or perceived characteristic. The ALJ found that the power imbalance between a teacher and a student is not an actual or perceived characteristic listed in the Board's HIB policy, or the applicable statute or regulations.

In its exceptions, the Board argues that *N.J.A.C. 6A:16-7.7(a)(2)(iii)* provides that bullying is “unwanted aggressive behavior that may involve a real or perceived power imbalance,”<sup>2</sup> and that the Board properly considered the power imbalance between a teacher and a student – an imbalance that exists because of the very nature of the relationship – in reaching its conclusion that petitioner committed an act of HIB. The Board cites to precedents establishing that distinguishing characteristics are not limited to those enumerated in the statute, which applies to a broad range of characteristics. According to the Board, the power differential is a method of distinguishing the motivating characteristics of the aggressor, relative to a perceived status of power – or lack thereof – of the victim. The Board contends that a teacher abuses his power over students when he uses the imbalance to disrupt the student's learning environment. The Board argues that petitioner's conduct was motivated by J.W.'s challenge to his authority – an action that distinguished her.

In reply, petitioner argues that the regulatory addition of language indicating that bullying may involve a power imbalance does not eliminate or replace the statutory requirement that an act of HIB be motivated by a distinguishing characteristic of the student. Petitioner

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<sup>2</sup> Throughout its summary decision briefs and exceptions, the Board refers to this language as part of a 2018 amendment to the Anti-Bullying Bill of Rights Act. However, this language does not appear in the Act, but rather in the Department of Education's implementing regulations, in a provision outlining the required elements of district HIB policies.

therefore urges the Commissioner to accept the ALJ's conclusion that the Board failed to set forth any distinguishing characteristic, as required by the Act.

Petitioner also filed exceptions of his own, asking the Commissioner to not only affirm the Initial Decision and reverse the Board's decision, but also to rescind and expunge any reference to the HIB investigation and decision from petitioner's personnel file.

Initially, the Commissioner agrees with the ALJ that summary disposition is appropriate. Upon review, the Commissioner also concurs with the ALJ that the Board's decision, finding that petitioner committed an act of HIB, was arbitrary, capricious, and unreasonable because it did not establish any distinguishing characteristic of the alleged victim that motivated, or could reasonably be perceived to have motivated, the petitioner's conduct.<sup>3</sup>

The Anti-Bullying Bill of Rights Act (the Act) defines HIB as follows:

[A]ny gesture, any written, verbal or physical act, or any electronic communication, whether it be a single incident or a series of incidents, that is reasonably perceived as being motivated either by any actual or perceived characteristic, such as race, color, religion, ancestry, national origin, gender, sexual orientation, gender identity and expression, or a mental, physical or sensory disability, or by any other distinguishing characteristic, that takes place on school property, at any school-sponsored function, on a school bus, or off school grounds as provided for in section 16 of P.L. 2010, c.122 (C.18A:37-15.3), that substantially disrupts or interferes with the orderly operation of the school or the rights of other students and that:

- a. a reasonable person should know, under the circumstances, will have the effect of physically or emotionally harming a student or damaging the student's property, or placing a student in reasonable fear of physical or emotional harm to his person or damage to his property;
- b. has the effect of insulting or demeaning any student or group of students; or

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<sup>3</sup> Although the Commissioner concludes that the Board's decision must be reversed, the Commissioner in no way condones petitioner's conduct, or minimizes J.W.'s feelings regarding the incident. Teachers are placed in a position of trust by the Board and the community. Petitioner demonstrated extremely poor judgment in singling out J.W. in front of other students and sharing information from an email written by her mother that should have remained confidential.

c. creates a hostile educational environment for the student by interfering with a student's education or by severely or pervasively causing physical or emotional harm to the student.

*N.J.S.A.* 18A:37-14.

Therefore, a finding of HIB requires three elements.<sup>4</sup> First, the conduct must be reasonably perceived as being motivated by any actual or perceived enumerated characteristic or other distinguishing characteristic and, second, the conduct must substantially disrupt or interfere with the rights of other students or the orderly operation of the school. The third condition is that one of the three criteria enumerated in the Act regarding the effect of the conduct must also be satisfied. *Wehbeh v. Bd. of Educ. of the Twp. of Verona, Essex County*, Commissioner Decision No. 51-20 (decided February 4, 2020).

Beginning with the first element required by the Act – that the conduct be reasonably perceived as being motivated by a distinguishing characteristic – the Act “has not limited ‘distinguishing characteristic’ to those specifically enumerated, but it has consistently required such a perceived motivation.” *K.L. v. Evesham Twp. Bd. of Educ.*, 423 *N.J. Super.* 337, 351 (App. Div. 2011). While HIB can be found based on a broad range of distinguishing characteristics, the Commissioner finds that the power imbalance inherent in the relationship between a teacher and a student cannot, by itself, be a distinguishing characteristic sufficient to prove an act of HIB. Because only students can be the victims of HIB under the Act, status as a student cannot be sufficient to substantiate an HIB finding, or there would be no reason to include an additional requirement that the conduct be reasonably perceived as being motivated by a distinguishing characteristic. See *J.E. and R.E. v. Hunterdon Central Regional Bd. of Educ.*, OAL Dkt. No. EDU 188-14 (Initial Decision, Sept. 28, 2017), *aff’d*, Commissioner Decision No.

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<sup>4</sup> The statute also requires that the conduct take place on school property, at a school-sponsored function, on a school bus, or off school grounds as provided for in *N.J.S.A.* 18A:37-15.3. The parties do not contest that this requirement has been met in this matter.

366-17 (decided Dec. 21, 2017) (finding, among other things, that a baseball coach’s comments did not constitute HIB because the alleged target’s status as a student was not a sufficient distinguishing characteristic to support such a finding).

When the Department of Education updated its HIB regulations in 2018, it added a requirement that district HIB policies include a statement that “bullying is unwanted, aggressive behavior that may involve a real or perceived power imbalance.” *N.J.A.C. 6A:16-7.7(a)(2)(iii)*. In response to public comments regarding the inclusion of power imbalance in the rule, the Department stated, “The intent of the proposed rule is to assist school officials in identifying HIB within the context and relative positions of the alleged aggressor and target, rather than focusing *solely* on the real or perceived characteristics.” (emphasis added). *50 N.J.R. 155(b) (2018)*. The Department also noted that, for an incident to be deemed HIB, it must fulfill the criteria at *N.J.A.C. 6A:16-3*, which mimics the criteria of the Act set forth above and includes that the act be reasonably perceived as being motivated by a distinguishing characteristic. *Ibid.* Notably, the Department further stated, “The mere existence of a real or perceived power imbalance without fulfilment of the other criteria is insufficient to find an incident of HIB.” *Ibid.* It is clear from the Department’s statements that a power imbalance can be a consideration in HIB determinations, but it cannot be the sole basis for a finding of HIB, and all other criteria, including the existence of a distinguishing characteristic of the alleged target, must be established.

Nor does the Commissioner find that J.W.’s “challenge” to petitioner’s authority distinguished her in the manner required by the Act. The series of events at issue here – alleged misbehavior by J.W. with the substitute teacher, petitioner’s remarks about decreasing participation grades, L.C.’s email in response, and petitioner’s in-class reading of and response to that email – are in the nature of a conflict, not bullying. As the Appellate Division has noted,

“harmful or demeaning conduct motivated only by another reason [other than a distinguishing characteristic], for example, a dispute about relationships or personal belongings, or aggressive conduct without identifiable motivation, does not come within the statutory definition of bullying.” *K.L. supra*, 423 *N.J. Super.* at 351.

This matter is substantially similar to *M.R., o/b/o minor child, M.R. v. Bd. of Educ. of the Ramapo Indian Hills Regional High School District, Bergen Cty.*, Commissioner Decision No. 426-16 (decided Dec. 21, 2016). In that case, M.R. texted her cheerleading coach to inform him that she could not attend a basketball game due to other plans, and the coach responded that she was off the team. During a game after M.R. returned to the team, the coach told the team that he wanted his conversations with them kept private and not reported to parents. M.R. felt that she was being targeted and that the team was a hostile environment. In that case, the Board found, and the ALJ and Commissioner affirmed, that the coach did not commit an act of HIB because his actions were not motivated by a distinguishing characteristic of M.R. While the *M.R.* decision predates the addition of the “power imbalance” language to the Department’s regulations, that language does not alter the requirements of the Act, for the reasons stated above, and does not warrant a different outcome in this matter. Here, petitioner’s authority status was similar to that of the coach in *M.R.*, and he engaged in similar conduct, including imposing a consequence for misbehavior and discussing the issue with other students. Here, too, there is no evidence that petitioner’s conduct could reasonably be perceived as being motivated by a distinguishing characteristic of J.W., and so he has not committed an act of HIB.<sup>5</sup>

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<sup>5</sup> The Initial Decision, as well as the parties’ arguments, focused on whether petitioner’s conduct was actually motivated by any distinguishing characteristic of J.W. However, the plain language of the statute requires an analysis of how the actor’s motivation is perceived and whether that perception is reasonable. It does not require an analysis of the actual motivation of the actor. *Wehbeh, supra*. Certainly, evidence that the actor was motivated by a distinguishing characteristic would meet the standard of this section of the Act, but evidence that the actor was not so motivated does not end the analysis. Here, because the Board failed to establish any distinguishing characteristic, the Commissioner does not reach the issue of reasonable perception and raises it solely for the purposes of clarifying

The Commissioner is mindful of the applicable standard of review, such that when a local board of education acts within its discretionary authority, its decision is entitled to a presumption of correctness and will not be disturbed unless there is an affirmative showing that the decision was “patently arbitrary, without rational basis or induced by improper motives.” *Kopera v. W. Orange Bd. of Educ.*, 60 N.J. Super. 288, 294 (App. Div. 1960). However, because the Board has not provided any evidence of a distinguishing characteristic of J.W, which is required by the Act, the Commissioner concludes that the Board’s decision finding that petitioner committed an act of HIB was arbitrary and unreasonable.

Accordingly, the Initial Decision is affirmed, and the Board’s determination that petitioner committed an act of HIB is reversed. The Board shall remove any references to the HIB investigation and findings from petitioner’s personnel file.<sup>6</sup>

IT IS SO ORDERED.<sup>7</sup>

ACTING COMMISSIONER OF EDUCATION

Date of Decision: April 6, 2021  
Date of Mailing: April 9, 2021

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the criteria of the Act. Similarly, the Commissioner does not reach the issues of the second and third elements required to prove an act of HIB.

<sup>6</sup> However, if the incident is included in petitioner’s personnel file for other reasons, such as violations of Board policies other than its HIB policy, this decision does not extend to those references, as the only issue before the Commissioner is the HIB finding.

<sup>7</sup> This decision may be appealed to the Appellate Division of the Superior Court pursuant to *N.J.S.A.* 18A:6-9.1. Under *N.J.Ct.R.* 2:4-1(b), a notice of appeal must be filed with the Appellate Division within 45 days from the date of mailing of this decision.





**State of New Jersey**  
OFFICE OF ADMINISTRATIVE LAW

**INITIAL DECISION**

**SUMMARY DECISION**

OAL DKT. NO. EDU 5069-20

AGENCY DKT. NO. 79-4/20

**STEPHEN KLAPACH,**

Petitioner,

v.

**FORT LEE BOARD OF EDUCATION,**

Respondent.

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**Albert J. Leonardo**, Esq. for Petitioner (Zazzali, Fagella, Nowack, Klienbaum  
& Friedman, Attorneys)

**Raina Pitts**, Esq., for Respondent, (Methfessel & Werbel, Attorneys)

Record Closed: February 3, 2021

Decided: February 19, 2021

BEFORE **KIMBERLY A. MOSS**, ALJ:

This matter having been opened to the Court by respondent, Fort Lee Board of Education (Fort Lee) and petitioner Stephen Klapach (Klapach) on a motion for summary decision on February 1, 2021. Respondent filed opposition to petitioner's motion on February 16, 2021. Petitioner filed a reply to the respondent's motion on February 16, 2021. By way of background, the petition was filed at the Office of Administrative Law on June 2, 2020.

## **FACTUAL DISCUSSION**

Having reviewed submissions in support of and opposition to the within motion, I **FIND** the following **FACTS** in this case.

Klapach is a science teacher at the Lewis F. Cole school in Fort Lee, New Jersey. He was absent from school on October 18, 2019. A substitute teacher handled his class on that day. Klapach was informed by the substitute teacher that his seventh period class did not behave well. He was informed that three students including J.W. were playing music from their computers during class, talking during class and ignoring directives to turn off the music. On October 21, 2019, Klapach told the three students that he was informed that they had misbehaved, and he may be decreasing their class participation grade. That night J.W. informed her mother, L.C. about the decreased class participation grade. L.C. emailed Klapach on October 21, 2019, stating that the substitute teacher was misinformed about J.W.'s behavior.

On October 22, 2019, in Klapach's first period class, he read the email L.C sent him to the class. J.W. was not in that class. J.W. was informed by a student that Klapach had read her mother's email to the class. J.W. became nervous about going to class and asked L.C. to pick her up. L.C. spoke to the vice principal Joseph Finizio about the incident. J.W. was switched to a different science class.

On October 23, 2019 an HIB investigation was opened against Klapach. The Board concluded that Klapach had committed the following act of harassment, intimidation and bullying: "Student fearful to return to class, reading confidential email aloud to other students.

## **LEGAL ANALYSIS AND CONCLUSION**

Respondent and petitioner seek to summary decision. The rules governing motions for summary decision in an OAL matter are embodied N.J.A.C. 1:1-12.5. These provisions mirror the language of Rule 4:46-2 and the New Jersey Supreme Court's decision in Judson v. Peoples Bank and Trust Company of Westfield, 17 N.J. 67 (1954). Under N.J.A.C. 1:1-12.5(b), the determination to grant summary judgment should be based on the papers presented as well as any affidavits, which may have been filed with the application. In order for the adverse, i.e., the non-moving party to prevail in such an application, responding affidavits must be submitted showing that there is indeed a genuine issue of fact, which can only be determined in an evidentiary proceeding. The Court in Brill v. Guardian Life Insurance Company of America, 142 N.J. 520, 523 (1995), set the standard to be applied when deciding a motion for summary judgment. Therein the Court stated:

The determination whether there exists a genuine issue with respect to a material fact challenged requires the Motion Judge to consider whether the competent evidential materials presented, when viewed in the light most favorable to the non-moving party . . . are sufficient to permit a rational fact finder to resolve the alleged disputed issue in favor of the non-moving party.

There is no genuine issue of material fact in this matter.

N.J.S.A. 18A 37-14 defined Harassment intimidation and bullying as:

Harassment, intimidation or bullying” means any gesture, any written, verbal or physical act, or any electronic communication, whether it be a single incident or a series of incidents, that is reasonably perceived as being motivated either by any actual or perceived characteristic, such as race, color, religion, ancestry, national origin, gender, sexual orientation, gender identity and expression, or a mental, physical or sensory disability, or by any other distinguishing characteristic, that takes place on school property, at any school-sponsored function, on a school bus, or off school grounds as provided for in section 16 of P.L.2010, c.122 (C.18A:37-15.3),

that substantially disrupts or interferes with the orderly operation of the school or the rights of other students and that:

- a. a reasonable person should know, under the circumstances, will have the effect of physically or emotionally harming a student or damaging the student's property, or placing a student in reasonable fear of physical or emotional harm to his person or damage to his property;
- b. has the effect of insulting or demeaning any student or group of students; or
- c. creates a hostile educational environment for the student by interfering with a student's education or by severely or pervasively causing physical or emotional harm to the student.

N.J.A.C. 6A; 16-7.7(a) (i) (ii) & (iii) provides

Each district board of education shall have control over the content of the policy, except that the policy shall contain, at a minimum, the following components:

- i. A statement prohibiting harassment, intimidation or bullying of a student;
- ii. A definition of harassment, intimidation or bullying no less inclusive than that set forth in the definition at N.J.S.A. 18A:37-14 and N.J.A.C. 6A:16-1.3;
- iii. A statement that bullying is unwanted, aggressive behavior that may involve a real or perceived power imbalance.

Fort Lee defines Harassment, Intimidation and bullying as:

Harassment, Intimidation and bullying means any unwanted aggressive gesture, written, verbal or physical act or any electronic communication, as defined in N.J.S.A. 18A: 37-14, whether it be a single incident or series of incidents that may involve a real or perceived imbalance of power and:

1. Is reasonably perceived as being motivated either by any actual or perceived characteristic, such as race, color, religion, ancestry, national origin, gender, sexual orientation, gender identity and expression, or a mental, physical or sensory disability, or by any other distinguishing characteristic
2. Takes place on school property, at any school-sponsored function, on a school bus, or off school grounds as provided for in N.J.S.A.18A:37-15.3,
3. Substantially disrupts or interferes with the orderly operation of the school or the rights of other students and that:

a reasonable person should know, under the circumstances, will have the effect of physically or emotionally harming a student or damaging the student's property, or placing a student in reasonable fear of physical or emotional harm to his/her person or damage to his/her property;

b. Has the effect of insulting or demeaning any student or group of students; or

c. creates a hostile educational environment for the student by interfering with a student's education or by severely or pervasively causing physical or emotional harm to the student.

In this matter, the issue is whether Klapach reading the email of L.C. was reasonably perceived as being motivated either by any actual or perceived characteristic of J.W. The Fort Lee HIB policy is substantially similar to N.J.S.A. 18A:37-14. Respondent in its letter to Klapach to informing him that the HIB charges were sustained did not state how Klapach's conduct of reading the email of L.C. was motivated by an actual or perceived characteristic of J.W. Fort Lee argues the fact that Klapach was a teacher and therefore there was an imbalance of power is the perceived characteristic. It bases this argument on the imbalance of power between teacher and student. However, the Fort Lee policy, N.J.S.A. 18A:37-14 and N.J.A.C. 6A; 16-7.7( a) (i) (ii) & (iii) do not include a power imbalance as an actual or perceived characteristic. It is to be considered regarding the incident or series of incidents.

I **CONCLUDE** that power imbalance is not a perceived or actual characteristic as defined in the Fort Lee policy, N.J.S.A. 18A:37-14 and N.J.A.C. 6A; 16-7.7(a) (i) (ii) & (iii).

In order to establish an act of HIB there must be an incident motivated by an actual or perceived characteristic. The reading of the letter was not motivated by a perceived or actual characteristic. Fort Lee did not establish that there was an act of HIB motivated by an actual or perceived characteristic.

I **CONCLUDE** that Fort Lee's sustaining HIB charges against Klapach was arbitrary and unreasonable because it did not establish an HIB act motivated by an actual or perceived characteristic.

Based on the foregoing, the Board's determination that Klapach had committed acts of harassment, intimidation and bullying by reading a letter must be **REVERSED**.

Accordingly, it is **ORDERED** that the Summary Decision motion of petitioner is **GRANTED**, and the Summary Decision of respondent be and is hereby **DENIED**.

I hereby **FILE** this initial decision with the **COMMISSIONER OF THE DEPARTMENT OF EDUCATION** for consideration.

This recommended decision may be adopted, modified or rejected by the **COMMISSIONER OF THE DEPARTMENT OF EDUCATION**, who by law is authorized to make a final decision in this matter. If the Commissioner of the Department of Education does not adopt, modify or reject this decision within forty-five days and unless such time limit is otherwise extended, this recommended decision shall become a final decision in accordance with N.J.S.A. 52:14B-10.

Within thirteen days from the date on which this recommended decision was mailed to the parties, any party may file written exceptions with the **COMMISSIONER OF THE DEPARTMENT OF EDUCATION, ATTN: BUREAU OF CONTROVERSIES AND DISPUTES, 100 Riverview Plaza, 4th Floor, PO Box 500, Trenton, New Jersey 08625-0500**, marked "Attention: Exceptions." A copy of any exceptions must be sent to the judge and to the other parties.

February 19, 2021



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DATE

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**KIMBERLY A. MOSS, ALJ**

Date Received at Agency:

February 19, 2021

Date Mailed to Parties:

February 19, 2021

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