UNITED STATES DISTRICT COURT FOR THE NORTHERN DISTRICT OF ILLINOIS - EASTERN DIVISION

BD. OF EDUCATION OF OTTAWA TOWNSHIP HIGH SCHOOL DISTRICT 140, et al. Plaintiff, v. THE U.S. DEPARTMENT OF EDUCATION, et al. Defendant	Case No. 05 C 0655 Hon. David H. Coar Judge Presiding

MEMORANDUM OF LAW IN SUPPORT OF THE MOTION TO DISMISS AMENDED COMPLAINT PURSUANT TO FED. R. CIV. P. 12(b)(1) AND 12(b)(6) OF DEFENDANTS THE U.S. DEPARTMENT OF EDUCATION AND MARGARET SPELLINGS IN HER OFFICIAL CAPACITY

INTRODUCTION

This case addresses requirements of two major educational reform statutes enacted by Congress in the past four years: the No Child Left Behind Act of 2001 ("NCLB") and the Individuals with Disabilities Education Improvement Act of 2004 ("IDEA"). The former seeks to improve the educational performance of elementary and secondary school students in states and school districts that receive federal funds by measuring student academic progress and holding states, school districts, and schools accountable for improving their students' academic performance. The latter modifies and strengthens prior requirements that states and school districts provide their students with disabilities with a free, appropriate public education that includes the provision of required instruction and services in accordance with individualized education programs ("IEPs"). Both statutes provide significant amounts of federal funding to states and local school districts in exchange for satisfying the requirements of the statutes.

The Court dismissed plaintiffs' initial complaint because of plaintiffs' lack of standing. Plaintiffs have now filed an amended complaint. Like their initial complaint, the amended complaint alleges that the key accountability provisions of the NCLB should be declared "invalid" because they are purportedly inconsistent with the individualized treatment required by the IDEA. The new complaint also fails to establish plaintiffs' standing. Plaintiffs still cannot explain how the NCLB's accountability provisions require them to make changes that disregard students' IEPs. Plaintiffs have added new allegations that changes to the IEPs of students who are allegedly incapable of becoming proficient will be harmful to those students, but they fail to point to anything in the NCLB that requires changes to IEPs that will not help students to achieve proficiency.

Plaintiffs' complaint also remains subject to dismissal for additional reasons that it was unnecessary for the Court's prior order of dismissal to address. In particular, there is no basis, as a matter of law, for plaintiffs' claim that the IDEA impliedly repealed the NCLB as it applies to students with disabilities. Indeed, plaintiffs previously conceded that Congress intended to "align IDEA with NCLBA requirements." Courts rarely find implied repeals under any circumstances, and, to defendants' knowledge, have never found such a repeal where, as here, Congress was specifically attempting to reinforce the statute that it is alleged to have repealed.

Far from accidentally repealing the NCLB, the IDEA expressly incorporates the NCLB standards, assessment, and accountability requirements that plaintiffs seek to invalidate.

Plaintiffs also lack standing because they cannot explain how their alleged injury is fairly attributable to the requirements of the NCLB. The school districts voluntarily accepted federal funding under *both* statutes and agreed to, and provided assurances that they could satisfy, the requirements of *both* statutes. Any alleged injury resulting from purported inconsistency between the statutes would be fairly traceable to those decisions, not to the requirements of the NCLB. Plaintiffs' alleged injury would also be attributable to their failure to make AYP and decision to address the failure in a particular way that the NCLB does not require.[1]

FACTUAL BACKGROUND AND PROCEDURAL HISTORY

The plaintiffs in this case are the Boards of Education for the Ottawa Township High School and Elementary School Districts in Illinois, the Boards of Education for Streator and Queen Bee Elementary School Districts, and four special-education students (and their parents) at schools in the districts. Amended Complaint ("Am. Compl.") ¶¶ 1-15. The plaintiff school districts have been identified for improvement under the NCLB because of their failure to achieve AYP for their population of students with disabilities. *Id.* at ¶¶ 36-37. Plaintiffs assert that, as a result of their failure to achieve AYP, the school districts must change their schools' curricula, and that the curricular changes will require IEP modifications that would violate the IDEA. *Id.* at ¶¶ 49-60, 77-89, 90-94. On July 20, 2005, the Court dismissed plaintiffs' initial complaint in this matter without prejudice and allowed plaintiffs until August 25, 2005, to refile. On that date, plaintiffs filed the amended complaint that is the subject of this motion.

STANDARD OF REVIEW

In reviewing a motion to dismiss under Rule 12(b)(1), a court "must accept all well-pleaded factual allegations as true and draw all reasonable inferences in favor of the plaintiff." *Macchia v. Loyola Univ. Med. Ctr.*, No. 04 C 5049, 2004 WL 2392201, *2 (N.D. Ill. October 25, 2004). "[T]he plaintiff bears the burden of establishing that the jurisdictional requirements have been met" and "must provide competent proof of jurisdictional facts to support its allegations."

[1] Defendants incorporate by reference the statutory background section from their initial motion to dismiss. *See* Memorandum of Law in Support of the Motion to Dismiss Pursuant to Fed. R. Civ. P. 12(b)(1) and 12(b)(6) of Defendants the U.S. Department of Education and Margaret Spellings in Her Official Capacity at 2-7.

Id. Courts should "presume that [they] lack jurisdiction unless the contrary appears affirmatively from the record." *Renne v. Geary*, 501 U.S. 312, 316 (1991) (citation and internal quotation marks omitted). In reviewing a 12(b)(6) motion, a court must accept as true all well-pleaded allegations, and draw all reasonable inferences in the plaintiffs' favor, but need "'not strain to find inferences favorable to the plaintiffs which are not apparent on the face of th[e] . . . complaint.'" *Macchia*, 2004 WL 2392201 at *3 (quoting *Coates v. Illinois State Bd. of Ed.*, 559 F.2d 445, 447 (7th Cir. 1977) (ellipses and brackets in original)). The court also "is not required to accept conclusory legal allegations." *Vakharia v. Little Company of Mary Hospital and Health Care Centers*, 2 F. Supp. 2d 1028, 1030 (N.D. Ill. 1998). A court may also may "take judicial notice of matters of public record without converting a 12(b)(6) motion into a motion for summary judgment." *Henson v. CSC Credit Services*, 29 F.3d 280, 284 (7th Cir. 1994) (citation and internal quotation marks omitted).

ARGUMENT

I. PLAINTIFFS LACK ARTICLE III STANDING

To establish Article III standing, a plaintiff must have "suffered an injury in fact – an invasion of a legally protected interest which is (a) concrete and particularized and (b) actual or imminent, not conjectural or hypothetical." *Lujan v. Defenders of Wildlife*, 504 U.S. 555, 560 (1992) (internal quotation marks and citations omitted). In addition, "there must be a causal connection between the injury and the conduct complained of – the injury has to be 'fairly . . . trace[able] to the challenged action of the defendant. . . .'" *Id.* (brackets and first ellipses in original) (quoting *Simon v. Eastern Ky. Welfare Rights Org.*, 426 U.S. 26, 41-42 (1976)). Finally, "it must be 'likely,' as opposed to merely 'speculative,' that the injury will be 'redressed by a favorable decision.'" *Lujan*, 504 U.S. at 561 (quoting *Simon*, 426 U.S. at 38, 43).

A. The Reasoning of the Court's Prior Order Requires Dismissal of Plaintiffs' Amended Complaint

The Court's reasons for dismissing plaintiffs' initial complaint apply equally to their amended complaint. The Order states that plaintiffs "fail to establish that the NCLBA requires them to make systemic changes in violation of the IDEA," and identifies two specific deficiencies with plaintiffs' allegations of injury. Order Granting Defendants' Motions to Dismiss, July 20, 2005 ("Order") at 2. *First*, plaintiffs failed to show that the NCLB requires the

modification of IEPs at all. As the Court correctly recognized, the "NCLBA does not mandate the specific actions that a school district" that fails to make AYP "must take," but rather "leaves those pedagogical questions to the actors implementing it." *Id.* In addition, "nothing in the NCLBA keeps School District Plaintiffs from implementing changes that take into account the IEPs of students with disabilities." *Id.* The Court further noted that plaintiffs' contrary contention "is puzzling, to say the least," when remedial measures are available "that do not require the modification of individual IEPs, such as appointing an outside expert, decreasing managerial authority, or replacing ineffective staff." *Id.*

In an apparent effort to respond to this point, plaintiffs have added allegations that the plaintiff school districts do not effectively have the option of replacing staff because of collective bargaining agreements. Am. Compl. ¶¶ 49-53. Plaintiffs offer no explanation, however, for why they could not "appoint an outside expert" or "decrease managerial authority."[2] Nor do plaintiffs dispute the Court's conclusion that these options would not require the modification of individual IEPs. For this reason alone, plaintiffs have failed to establish standing, and their complaint must be dismissed. Moreover, even if the Court were to credit plaintiffs' conclusory statement that the "only reasonable change which Plaintiff School Districts can take (sic) in order to attempt to meet AYP is to change the curriculum of its (sic) students," this remedy also does not require particular modifications to IEPs.[3] Instead, the NCLB "leaves those pedagogical questions to the actors implementing" the remedy. Any changes to IEPs would be made because local educators determined that they were needed in order to provide better instruction to students with disabilities in order to improve their achievement.

Second, the Court held that plaintiffs failed to show "how IEP modifications necessarily designed to improve student performance would harm students." Order at 2. Plaintiffs'

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[2] The effects of the collective bargaining agreements are also fairly traceable to the independent actions of the school districts that negotiated the agreements, not the federal government.

[3] The Court properly found that the allegation from plaintiffs' first complaint that "Plaintiff School Districts are required to employ systemic remediation activities which require the modification of individual students' IEPs without regard to the student's disability," was "conclusory" and "insufficient to establish standing." Order at 2. Plaintiffs' amended complaint simply replaces the statement that the Court found to be inadequate with two other inadequate conclusory statements: *i.e.*, the quotation in the text and the statement that "Changing the curriculum of students with disabilities would entail changing the IEP of special education students." Am. Compl. ¶¶ 56-57.

amended complaint does nothing to remedy this deficiency. Plaintiffs acknowledge that the IDEA itself provides that schools should "hav[e] high expectations" for children with disabilities and "ensur[e] their access to the education general curriculum," to enable students to "meet developmental goals and, *to the maximum extent possible, the challenging expectations that have been established for all children*." 20 U.S.C. § 1400(c)(5)(A) (emphasis added). *See also* Am. Compl. ¶ 39 (referring to and paraphrasing section 1400(c)(5)(A)). Plaintiffs therefore do not and could not possibly allege that changes that will help students with disabilities to achieve grade-level proficiency are harmful or violate the IDEA.

Instead, plaintiffs' amended complaint alleges that it is impossible for certain students with disabilities to achieve proficiency, that any changes to IEPs designed to help such students achieve proficiency are doomed to failure, and that futile changes to IEPs would detract from other aspects of the students' education.[4] These allegations do not establish plaintiffs' standing because, *inter alia*, plaintiffs have not identified any NCLB provision that requires futile changes to IEPs, let alone futile changes that would harm students and violate the IDEA. It makes no sense to suggest, for example, that the pressure to make AYP will force school districts to make pointless changes to IEPs when those pointless changes (by definition) will not help school districts to make AYP. *See* Order at 2 ("in order to achieve adequate yearly progress, the academic performance of disabled students must improve. Presumably, if the school districts are attempting to comply with the NCLBA, they will aim to improve student academic

[4] Am. Compl. ¶ 80 ("increasing H.G.'s instructional program to make it commensurate with non-disabled children of her age will not be beneficial to her because she would not be able to cognitively recognize the skills which were being taught to her. It would essentially be the equivalent of placing a second grade student in a high school calculus class"); ¶ 83 ("These students would also be incapable of comprehending many of the topics which they would be required to comprehend at a commensurate grade level in order to meet standards on the ISAT or PSAE"); ¶ 89 ("Students such as H.G. and T.H. simply cannot make state standards as required by NCLBA regardless of" the remedy chosen); ¶ 91 (NCLB "holds all students, regardless of disability, to the same academic standard even though it is not possible for many disabled students to meet the standard"); ¶¶ 74-89 (describing harms that hypothetical changes to IEPs would allegedly cause); *see also* Am. Compl. ¶ 39 (emphasizing the words "to the extent possible").

performance.")[5] Because there is no NCLB provision that requires pointless changes to IEPs, plaintiffs have no basis for asserting that they are injured by the NCLB.

B. Plaintiffs' Alleged Injury is Not Fairly Traceable to the NCLB

Plaintiffs' asserted injury is not "fairly traceable" to the requirements of the NCLB. *First*, as discussed in the previous section, any decision to modify IEPs in a way that would violate the IDEA would be the result of the school districts' "voluntary choice." *See* Order at 2 ("At best, Plaintiffs' complaint indicates that they will choose to implement systemic reform that may violate the IDEA; such a voluntary choice does not an injury make."). *Second*, any harm from any alleged inconsistency would be the direct result of Ottawa Township's independent (and also voluntary) decision to accept funds from the federal government under both the IDEA and NCLB. A plaintiff lacks standing when the injury upon which it premises its assertion of jurisdiction is "self-inflicted," regardless of whether the challenged action could also be deemed a "but for" cause of the harm.[6] In this case, any alleged intent to modify IEPs would be the result of the plaintiff school districts' voluntary pursuit and acceptance of funds under two statutes, each with its own funding and conditions – conditions that they only now allege they cannot fulfill. The plaintiff school districts could remove any alleged threat of future injury by declining funds under either statute if they do not believe that they could or should comply with both sets of requirements.

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[5] Plaintiffs also fail even to mention the provision of the NCLB that provides that a school or district will be considered to have made AYP if the percentage of students in the group measuring below proficient on the state assessments decreased by at least 10 percent from the preceding school year, and the students in that group made progress on one or more other academic indicators set forth in section 6311(b)(2)(C)(vi)-(vii). 20 U.S.C. § 6311(b)(2)(I)(i). This "safe harbor" provision allows plaintiffs and other school districts to demonstrate improvement of students with disabilities without meeting the state's annual targets for proficiency. *See* Am. Compl. ¶ 94. Thus, in addition to its other failings, which are set forth in the text, plaintiffs' complaint does not account for the fact that not every student with a disability (or even a substantial majority of students with disabilities depending upon the proficiency rate from the previous year) must become proficient for the plaintiff school districts to make AYP.

[6] *See Pennsylvania v. New Jersey*, 426 U.S. 660, 664 (1976) (*per curiam*) (plaintiff states lacked standing because the "injuries to the plaintiffs' fisc were self-inflicted, resulting from decisions by their respective state legislatures" to grant tax credits to residents for income tax paid to other states); *see also Petro-Chem Processing, Inc. v. Environmental Protection Agency*, 866 F.2d 433, 438 (D.C. Cir. 1989) (Hazardous Waste Treatment Council could not establish standing based on potential liability that was "incurred voluntarily" notwithstanding the allegation that it was "forced" to incur the liability by competitive pressures allegedly caused by the challenged EPA action).

The State of Illinois also voluntarily accepted the funds and requirements of the statutes. *See* 20 U.S.C. § 6311(a)(1); 20 U.S.C. § 1412(a). This decision – which the plaintiffs do not challenge – is an additional break in the causal chain that precludes standing. *See, e.g.*, *City of Detroit v. Franklin*, 4 F.3d 1367, 1373 (6th Cir. 1993) (city lacked standing to challenge the conduct of the census based upon the use of it to establish congressional districts because the use of the data for that purpose resulted from the independent decision of the Michigan legislature).[7]

II. PLAINTIFFS' COMPLAINT FAILS TO STATE A CLAIM BECAUSE THE NCLB IS NOT INCONSISTENT WITH THE IDEA

Plaintiffs seek a declaration that 20 U.S.C. §§ 6311 and 6316 "as currently implemented are violative of the Individuals with Disabilities Education Act" and "are invalid."[8] Am. Compl., Prayer for Relief. In essence, plaintiffs are arguing that the IDEA, as amended, impliedly repealed the NCLB provisions that hold school districts accountable for the academic progress of their students with disabilities. Such a claim is untenable.

It is well established that "'when two statutes are capable of coexistence, it is the duty of the courts, absent a clearly expressed congressional intention to the contrary, to regard each as effective.'" *J.E.M. AG Supply, Inc. v. Pioneer Hi-Bred Int'l, Inc.*, 534 U.S. 124, 143-44 (2001) (quoting *Morton v. Mancari*, 417 U.S. 535, 551 (1974)).[9] Resort to this canon is not even

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[7] Defendants are not arguing in this case that the mere acceptance of federal funds deprives a recipient of the ability to challenge any conditions on the funds. There is no claim in this case that the conditions attached to NCLB or IDEA funding are unconstitutional. Instead, Ottawa Township's sole claim is that the conditions are inconsistent.

[8] Plaintiffs vaguely suggest in their amended complaint without elaboration that they are challenging the NCLB "as it is currently implemented." Am. Compl., Prayer for Relief. Plaintiffs, however, do not attempt to identify a difference between the requirements of the NCLB and the way it is being implemented, and there is none. Indeed, plaintiffs themselves make clear that their complaint is with the NCLB's actual requirements when, for example, they assert that the "NCLB should allow for separate measurable annual objectives for continuous and substantial improvement of students with disabilities but instead measures all students on the same criteria." Am. Compl. ¶ 92 (citing 20 U.S.C. § 6311[(b)](2)(C)(v)); *see also id.* at ¶¶ 26, 28 (offering a similar description of what the NCLB requires). Likewise, plaintiffs' opposition to defendants' initial motion to dismiss makes clear that plaintiffs are challenging the requirements of the statute itself. *See* Memorandum of Law in Opposition to Motion to Dismiss Pursuant to Fed. R. Civ. P. 12(b)(1) and 12(b)(6) of Defendants the U.S. Department of Education and Margaret Spellings in Her Official Capacity at 3.

[9] *See also id.*, 534 U.S. at 142 ("'The rarity with which [the Court has] discovered implied repeals is due to the relatively stringent standard for such findings, namely that there be an irreconcilable conflict between the two federal statutes at issue.'") (quoting *Matsushita Elec. Industrial Co. v. Epstein*,

necessary in this case, however, because there is no basis for asserting that the IDEA is inconsistent with the NCLB. To the contrary, plaintiffs have already conceded that Congress intended the IDEA to reinforce the NCLB.[10] *See* Memorandum of Law in Opposition to Motion to Dismiss Pursuant to Fed. R. Civ. P. 12(b)(1) and 12(b)(6) of Defendants the U.S. Department of Education and Margaret Spellings in Her Official Capacity at 10. Plaintiffs are therefore asking the Court to find that Congress accidentally repealed the NCLB while trying to reinforce it. Defendants are not aware of any court that has ever found a repeal in such a situation.

Even assuming that such an extraordinary claim could ever be valid, however, it certainly fails in this case where, *inter alia*, the IDEA expressly incorporates the NCLB's standards for measuring the educational progress of children with disabilities – *i.e.*, the very requirements that plaintiffs are now claiming are inconsistent with the IDEA. Indeed, even plaintiffs recognize that the IDEA itself provides that schools should ensure that students with disabilities meet, "to the maximum extent possible, the challenging expectations that have been established for all children." 20 U.S.C. § 1400(c)(5)(A); Am. Compl. ¶ 39 (paraphrasing this provision). Plaintiffs' allege that the NCLB accountability requirements require changes to the IEPs of students with disabilities that are incapable of achieving proficiency. *See* note 4, *supra* (listing statements from the amended complaint). As explained *supra*, however, plaintiffs have identified no section of the NCLB that requires futile changes to IEPs, and any suggestion that the general pressure to make AYP requires such changes is illogical.[11]

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516 U.S. 367, 381 (1996)) (brackets in original).

[10] The Senate Committee Report for the IDEA, explains that the IDEA:

> makes a series of significant modifications *to reflect the important changes to accountability that were enacted under the No Child Left Behind Act*. NCLB established a rigorous accountability system for States and local educational agencies *to ensure that all children, including children with disabilities, are held to high academic achievement standards and that States and local educational agencies are held accountable for the adequate yearly progress of all students. . . .* The bill *carefully aligns the IDEA with the accountability system established under NCLB* to ensure that there is one unified system of accountability for States, local educational agencies and schools.

S. Rep. No. 108-185, at 17-18 (2003) (emphasis added).

[11] Even assuming that there was any language in sections 6311 or 6316 that even arguably required changes to IEPs that would not help to increase proficiency – and there is not – the presumption

Various other provisions demonstrate that the IDEA and NCLB are mutually reinforcing rather than inconsistent. Section 1412(a)(15) of the IDEA requires that states "establish[] goals for the performance of children with disabilities in the State that," *inter alia*, are "*the same as the State's definition of adequate yearly progress, including the State's objectives for progress by children with disabilities*, under" 20 U.S.C. § 6311(b)(2)(C). Moreover, section 1412(a)(15)(B) requires states to establish "performance indicators" to use towards measuring the progress toward achieving those goals, "*including measurable annual objectives for progress by children with disabilities under*" 20 U.S.C. § 6311(b)(2)(C)(v)(II)(cc) – *i.e.*, the state AYP standards that, if not met, trigger the NCLB remedial measures in section 6316.

Section 1412(a)(16) also requires states to ensure that "[a]ll children with disabilities are included in all general State and districtwide assessment programs, including assessments described under" section 6311. Further, all IEPs must contain "a statement of any individual appropriate accommodations that are necessary to measure the academic achievement and functional performance of" students under the assessments required by the NCLB and IDEA. 20 U.S.C. § 1414(d)(1)(A)(i)(VI)(aa). Section 1413(d)(1)) requires states to withhold or reduce the funds of LEAs that fail to comply with state policies, including these IDEA and NCLB requirements. There is no basis for claiming that the IDEA and NCLB are inconsistent when both require states to establish the same goals and use the same assessments. The IDEA also incorporates the NCLB's standards in identifying the situations where the use of alternative achievement standards for students with disabilities may be used. The IDEA allows LEAs to measure the academic achievement of children with disabilities against "alternate academic achievement standards permitted under the regulations promulgated to carry out" section 6311(b)(1) of the NCLB. 20 U.S.C. § 1412(a)(16)(C)(ii)(II); *see* 34 C.F.R. § 200.13(c)(ii).

It is also consistent, more generally, to have basic educational proficiency goals for all students, including students with disabilities, while requiring individualized plans for students with disabilities that help them reach those goals. IEPs are not synonymous with lower expectations and lack of accountability, nor are they inconsistent with having basic proficiency requirements. IEPs are individualized plans designed, *inter alia*, to help students with

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against implied repeals, coupled with plaintiffs' prior admission that Congress did not intend to repeal the NCLB, would dictate that the Court adopt a construction that reconciles the two statutes, rather than declare "invalid" the NCLB's accountability measures.

disabilities "be involved in and make progress in the general education curriculum" and, "to the maximum extent possible," to meet the challenging expectations that have been established for all students. 20 U.S.C. §§ 1400(c)(5)(A); 1414(d)(1)(A)(i)(II) and (IV). Congress thus did not provide that IEP teams would have complete discretion to design the standards against which the performance of students with disabilities would be measured. Instead, it intended states to develop guidelines for providing appropriate accommodations to enable students who need such accommodations to be evaluated under statewide standards. *See* 20 U.S.C. § 1412(a)(16)(B); *see also* 20 U.S.C. § 6311(b)(3)(C)(ix)(II) (mandating that NCLB assessments provide for "reasonable adaptations and accommodations for students with disabilities" that are "necessary to measure the academic achievement of such students relative to State academic content and State student academic achievement standards").

In sum, Congress expected school districts that accept money under both the IDEA and NCLB to abide by the standards of both acts and viewed the acts to be mutually reinforcing. Even if there were any ambiguity on this point, the canon disfavoring implied repeals would require the Court to attempt to harmonize and uphold the provisions of both Acts. This can easily be accomplished because the Acts are in no way inconsistent. Ottawa Township and the other school district plaintiffs committed to abide by the requirements and goals of these acts, and agreed to accept the remedial measures and assistance that follow the failure to meet them. The remedies prescribed by Congress for schools and school districts that fail to make AYP do not include the abandonment of the individualized treatment of students with disabilities required by the IDEA.

CONCLUSION

For the foregoing reasons, plaintiffs' complaint should be dismissed pursuant to Fed. R. Civ. P. 12(b)(1) or 12(b)(6).

Respectfully submitted,

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