

Date of Hearing: April 9, 2013

ASSEMBLY COMMITTEE ON ARTS, ENTERTAINMENT, SPORTS, TOURISM, AND
INTERNET MEDIA
Ian C. Calderon, Chair

AB 332 (Hall) – As Amended: April 1, 2013

REVISED

SUBJECT: Adult Film Regulation

SUMMARY: This bill would establish workplace standards and controls, as specified, for employers engaged in the production of adult films, and mandate that the California Division of Occupational Safety and Health Administration (CalOSHA) adopt these standards as emergency regulations by July 1, 2014. Specifically, this bill:

- 1) Requires that an employer shall maintain engineering and work practice controls sufficient to protect employees from exposure to blood and any potentially infectious materials.
Engineering and work practice controls shall include, but are not limited to, the following:
 - a) Simulation of sex acts using acting, production and post-production techniques.
 - b) Provision of and required use of condoms and other protective barriers whenever acts of vaginal and anal intercourse are filmed.
 - c) The provision of condom-safe water-based or silicone-based lubricants to facilitate the use of condoms.
 - d) Plastic and other disposable materials to clean up sets; and
 - e) Sharps containers for disposal of any blades, wires, or broken glass
- 2) Provides that an employer shall maintain an exposure control plan as specified.
- 3) Requires an employer to make the hepatitis B vaccination available for any employee engaged in the production of adult films, at the employer's expense.
- 4) Requires employer shall designate a custodian of records for purposes of this section. A copy of the original production shall be retained by the custodian of records.
- 5) Requires that an employer must pay the costs of required medical monitoring such as STD testing and keep confidential employee records.
- 6) In addition, the bill would require employers to adopt, implement, maintain, and update, as required a written health and safety program approved by the Department of Industrial Relations (Department) and that meets the requirements of the Injury and Illness Prevention Program and the blood-borne pathogens standard, as specified.

- 7) Maintains that an employer shall provide Department-approved information and training on health and safety, as specified, and that the training must be made at the employer's expense.
- 8) This bill contains the following definitions:
 - a) "Adult film" means the production of any film, video, multimedia, or other recorded representation of sexual intercourse for the sexual stimulation of the viewer that may involve exposure to blood-borne pathogens or other potentially infectious materials.
 - b) "Employee" means a person who is an employee, independent contractor, or unpaid individual, regardless of whether the person is shown in the adult film, who performs a penetrative sexual act or an act for the sexual stimulation of the viewer that involves exposure to blood-borne pathogens or other potentially infectious materials.
 - c) "Employer" means a company, partnership, corporation, or individual engaged in the production of an adult film.
 - d) "Sexually transmitted disease" or "STD" means any infection commonly spread by sexual conduct, including, but not limited to HIV/AIDS, gonorrhea, syphilis, chlamydia, hepatitis, genital human papillomavirus infection, and genital herpes.
- 9) Declares that the protection of workers in the adult film industry (AFI) is the responsibility of multiple layers of government and that this section shall not be construed to prohibit a city, county, or city and county from implementing a local ordinance regulating the AFI if the local ordinance is consistent with this section.
- 10) Requires that the Occupational Safety and Health Standards Board adopt emergency regulations to implement this section no later than July 1, 2014.
- 11) States that nothing in this section should be construed to require condoms, barriers, or other personal protective equipment to be visible in the final production of an adult film.

EXISTING FEDERAL LAW:

- 1) The First Amendment to the United States Constitution provides that Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof; or abridging the freedom of speech, or of the press; or the right of the people peaceably to assemble, and to petition the Government for a redress of grievances.
- 2) Producers of books, magazines, periodicals, films, videotapes, or other matter which contain visual depictions of actual, not simulated, sexually explicit conduct are required to maintain records of each performer portrayed in a visual depiction of sexually explicit conduct and to affix a statement to the product describing where the records are located. [Title 18 United States Code (USC) Section 2257.]
- 3) Each employer shall furnish to each of his employees employment in a place of employment which are free from recognized hazards that are causing or likely to cause death or serious injury or serious physical harm to his employees and shall comply with all occupational safety standards. [29 USC 654, Section 5(a).]

EXISTING STATE LAW:

- 1) Creates the Occupational Safety and Health Standards Board within the Department of Industrial Relations. (Labor Code Section 140.)
- 2) Provides that the board, by an affirmative vote of at least four members, may adopt, amend or repeal occupational safety and health standards and orders. [Labor Code Section 142.3(a)(1).]
- 3) Declares that the board shall be the only agency in the state authorized to adopt occupational safety and health standards. [Labor Code Section 142.3(a)(1).]
- 4) States that the board shall adopt standards at least as effective as the federal standards for all issues for which federal standards have been promulgated under Section 6 of the Occupational Safety and Health Act of 1970 (P.L. 91-596) within six months of the promulgation date of the federal standards and which, when applicable to products which are distributed or used in interstate commerce, are required by compelling local conditions and do not unduly burden interstate commerce. [Labor Code Section 142.3(2).]

FISCAL EFFECT: Unknown

COMMENTS:

- 1) Author and Supporter's Statement of Purpose: To Provide Workplace Safety for Workers in the Adult Film Industry:

According to the author, "The AFI generates an estimated \$14 billion a year in revenue. California based production of adult films account for the vast majority of this business, employing thousands of Californians and generating millions of dollars in tax revenue.

"Workers in agriculture, food services, healthcare, construction and many other industries benefit from stringent work place safety requirements that keep workers' compensation costs down and ensure a safe environment to earn a living. The AFI, given the type of work required, disproportionately exposes actors to a range of health and safety risks. The industry is largely self-regulated and has done an inadequate job of protecting its employees from disease infection.

"This measure, consistent with Los Angeles County's recent voter approved Measure B, will provide statewide uniformity needed to ensure that the thousands of actors employed in this multi-billion dollar industry are given reasonable workplace safety protections needed to reduce exposure to HIV and other blood-borne diseases."

According to information provided by the sponsor, AIDS Healthcare Foundation, "The AFI accounts for thousands of workplace disease infections in California every year. During the production of adult films, workers, including but not limited to performers, are exposed to a number of sexually transmitted diseases. ... At any given time, there are approximately

2,000-3,000 Californians who are employed as performers, but the roll call of performers is constantly shifting.

"According to the Los Angeles County Department of Public Health, workers in the AFI are ten times more likely to be infected with a sexually transmitted disease than members of the population at large. Also, a recent study found that 2/3 of the female study subjects and 1/3 of the male subjects had an STD, vastly exceeding the STD rates in the general population, and that 69% of them had worked in an adult film in the previous 30 days.

"In addition, similar to the garment industry, the AFI provides unusual obstacles to enforcement: there is not a clear employer-employee relationship and the filmmakers that actually employ the performers are often fly-by-night businesses that are hard to track down and may no longer exist.

"The AFI has steadfastly refused to take any steps to protect its workers from diseases spread by blood-borne pathogens. Therefore, this bill clarifies CalOSHA's authority relative to the AFI."

2) Opposition:

a) AB 332 Standard is More Dangerous to Adult Film Performers Than Existing Practice:

According to the Free Speech Coalition, AB 332 would substitute a less safe protocol for the existing test-based standard in place for adult film shoots, saying, "Currently, the adult movie industry does not require any performer to engage in filming with an HIV-positive individual. The industry adopted the blood-borne pathogen plan (BBP) in which EVERY performer is required undergo advanced and regular testing for HIV or wear condoms. Under industry testing protocols, all producers and/or directors require performers to confirm a current negative test panel prior to shooting. Each performer is also entitled to receive confirmation that her partner has current negative test results, thereby protecting EVERY performer from the risk of transmission. The testing protocols are based on recommendations of medical experts. In large part due to the testing protocols, there has not been a single reported incident of on-set transmission in over eight years.

"Unfortunately, AB 332 will abandon this testing protocol, leaving performers without the ability to identify the status of their sexual partners. Instead, performers will be forced to engage in sexual activity with individuals who are HIV positive; a significant rollback of the industry's health and safety plan. According to the FDA, the proper use of condoms still carries a risk of transmission. Therefore, AB 332 will actually put performers in greater risk of infection than under the industry's own standards; currently, a performer is notified of his or her positive test BEFORE any sexual contact and the positive performer is prohibited from participating in a movie shoot."

This sentiment is echoed, and a further concern is raised by opponents, best stated in an editorial written in response to an earlier proposal, similar that in AB 332, which points out that if the safety standard in AB 332 is adopted, HIV positive actors MUST be allowed to return to the set, saying, "Condoms undeniably help lower the risks of HIV infection. But that doesn't mean the government should mandate condom use in adult

movies - and it certainly doesn't mean that such regulation is a good idea. For one, the AFI would have to make every performer an employee to satisfy the California's Division of Occupational Safety and Health, better known as CalOSHA, laws. This would be detrimental: California's anti-discrimination laws prohibit requiring an HIV test as a condition of employment; therefore the AFI's current testing process, in which every performer is tested for HIV monthly, would be illegal. Nor would adult film producers be allowed to 'discriminate' by refusing employment to HIV-positive performers. As a result, untested and HIV-positive performers would be able to work in the industry, raising the risks of HIV outbreaks - particularly since condom breakage or slippage can occur." *Not-So-Safe Sex* (Padilla) Jan.2009, Forbes.com.

b) AB 332 is Unnecessary and Will Drive an Important Industry Away:

The Valley Industry and Commerce Association (VICA) writes the committee in order to strongly oppose AB 332 (Hall), based upon their belief, "It creates an unnecessary additional workplace safety standard on adult film production under the guise of HIV prevention." In support of their position, they offer the following, "Between April of 2006 and December of 2012 there have been 46,283 new cases of HIV reported in the state of California. During that same time period only two adult film performers contracted HIV - off set - in their personal lives. No transmission of HIV has occurred on an adult set since 2004 nationwide.

"Furthermore, LA County developed an epidemiological profile in 2009 and a comprehensive HIV plan for 2012-14. Neither of these documents identified the AFI as a risk or a place where the county should focus any of its resources for HIV prevention. ... AB 332 is a bureaucratic solution without a problem. The best way to prevent the transmission of HIV and other STDs is by providing quality information and sexual health services. All of these services are successfully provided through industry protocols and best practices, which were created out of the necessity to protect actor health."

They conclude by sharing their concern that the bill will drive industry out of California, noting, "This six billion dollar industry generates millions in state and local tax revenue annually. Adult film production is responsible for a sizable number of jobs in the San Fernando Valley and Los Angeles County, including but not limited to actors, producers, directors, editors, cinematographers, sound technicians, costumers and craft services who would otherwise be out-of-work due to the runaway of mainstream film production. We ask that you oppose AB 332 and protect film production of all types in California."

3) Background:

a) Incidents of Adult Film Performers' Exposure to HIV and Other STD's Gives Rise to Concerns Over Industry Practices:

According to information submitted by the bill's supporters, "The US AFI produces 4,000 to 11,000 films and earns an estimated \$9 to \$13 billion in gross revenues annually. California is the largest center for adult film production worldwide, although adult film production occurs throughout the United States. An estimated 200 production companies in Los Angeles employ up to 1,500 workers.

The supporters and opponents of this measure provided the committee with voluminous and often contradictory statistics about the incidence of STDs in the AFI, and the threat that exists for performers in being exposed to these pathogens. There is consensus however, that a number of highly publicized events surrounding outbreaks of the HIV virus within the community of adult performers raised the public profile of this intra-industry issue, and have drawn the attention of various regulatory bodies. A brief recitation of these events includes a 1980's outbreak which led to a number of deaths and led to the current system of testing within the industry. Another outbreak in 2004 saw three actors test positive for HIV, and resulted in a voluntary month long shut down of the industry. In both 2009, and 2010, one person was discovered to be infected by the industry testing process, however according to a Los Angeles Times story, LA County Public Health officials believe unreported incidents may be as high as 16 in 2009.

Outbreaks such as those detailed above have drawn concern from many quarters, including the American Public Health Association, who wrote the following in their position paper entitled: *Prevention and Control of Sexually Transmitted Infections and HIV Among Performers in the Adult Film Industry*.

"The industry's method for responding to outbreaks of STDs and HIV among performers in the heterosexual segment of the industry is voluntary STD/HIV testing. Although testing can contain the spread of disease, it does not prevent its spread. Another limitation in the industry's use of STD/HIV testing is the time period in which tests are conducted. The current industry practice is to test performers every 30 days; however, a performer could be exposed to an STD infection immediately after testing, have no symptoms, be highly infectious, and unknowingly transmit the infection to others. The 30-day testing requirement is not consistent with incubation periods for most STDs and may therefore miss detection of disease.

"Despite repeated recommendations from local public health officials, Cal/OSHA, and a Legislative hearing on how to make the AFI safer, industry practices remain unchanged. ... Flagrant violation of other Cal/OSHA worker protections remains. Performers must still pay all STD screening tests - a violation of Cal/OSHA standards, which requires the employer to pay for medical monitoring. Further, to work, performers must take an STD/HIV test and furnish test results to their employer (production company) who posts and shares these results with other production companies in a database to which production companies and talent agencies subscribe. Performers with a negative test result can work, and those who are positive cannot work until they receive a negative test. This practice violates a worker's right to medical confidentiality and is not consistent with the Cal/OSHA Blood-borne Pathogen Standard, which requires employers to maintain a confidential medical record for each employee." American Public Health Association Policy Statement 20102, 11/9/2010.

b) Industry Response to Performer Exposure Events: Self-Regulation Through Testing:

The AFI has implemented voluntary compliance with CalOSHA's requirement for employers to have an exposure control plan (ECP) to minimize the risk of employee exposure to blood-borne pathogens. The following are excerpts from the AFI Blood-

borne Pathogens Exposure Control Plan, which was provided to the committee by the Adult Protection Health and Safety Services (APHSS).

Exposure Control Plan: This ECP is a key document to assist our company in implementing and ensuring compliance with the CalOSHA standard for blood-borne pathogens, thereby protecting our employees and contractors. This ECP contains the following:

- Determination of employee and contractor exposure
- Implementation of various methods of exposure control including:
 - Universal precautions
 - Work practice controls
 - Personal protective equipment
 - Housekeeping
- Post exposure evaluation and follow-up
- Communication of hazards to employees and contractors
- Employee and contractor training/education
- Recordkeeping
- Procedures for evaluating circumstances surrounding exposure incidents

Testing: APHSS Testing Protocols require each performer to submit to regular testing for STDs, including HIV. According to information supplied by APHSS, performers must be tested at a minimum of every 28 days, and must take a blood test for HIV (by “PCR RNA” Aptima) and Syphilis (TREP-SURE™) cascading to RPR, and a urine test for Gonorrhea (by “ultra-sensitive DNA amplification”) and Chlamydia (by “ultra-sensitive DNA amplification”). Following the results of these tests, the performers are listed as “Available” or “Unavailable” to work on an APHSS database.

Additional testing is recommended for performers new to the industry, and includes the following for female performers (re-examinations recommended every 6 months): Pelvic exam that includes, evaluation for herpes, genital warts, Rectal Pap smear (thin-prep with reflex HPV), PAP smear (“thin-prep with reflex HPV”), Vaginal culture for bacterial vaginosis, trichomonas, Hepatitis A, B & C, and Syphilis (an “RPR” and Trep-Sure test). For male performers (re-examinations recommended every 6 months), a genital exam including an evaluation for herpes and genital warts and rectal pap smear if you are a “bottom” (thin-prep with reflex HPV) is recommended.

4) Committee Comments:

a) The Model for AB 332 - Los Angeles County Ordinance Measure B - Facing a Pending Federal Lawsuit:

On November 6, 2012, voters in the County of Los Angeles approved Measure B, which makes findings and declarations regarding the AFI, and requires performers and certain others engaged in defined sexual activity in the making of adult films to wear condoms during production. Measure B also requires producers of adult films to pay an annual fee to the county's Department of Public Health and obtain a permit. Under Measure B, all principals and management-level employees of adult entertainment-producing companies must undergo blood-borne pathogen training. As the author has stated, AB 332 is intended to expand upon Measure B and take its worker protections statewide.

Measure B is currently facing a federal lawsuit, filed in January of this year. Adult filmmakers Vivid Entertainment and Califa Productions as well as adult entertainment actors Kayden Kross and Logan Pierce filed suit against Los Angeles County in the US Federal District Court, on the grounds that Measure B is unconstitutional. The suit argues that the law violates the First Amendment right to free expression and further claims the measure is unnecessary based upon existing industry regulations protecting against HIV/AIDS and other diseases. (Additionally, the lawsuit challenges the county's authority to regulate the industry under the new law.)

Given that Measure B and AB 332 contain similar provisions regarding work place safety standards for the AFI, and specifically the use of condoms by performers and others in adult film, it may be anticipated that the constitutional issues raised in the suit against Measure B would be similar to those raised against enforcement of AB 332.

Typically, it has been the policy of this committee to withhold action on issues which are currently pending before the courts.

b) CalOSHA is Already Drafting Workplace Safety Regulations Specific to the AFI:

According to the sponsors of AB 332, they petitioned CalOSHA to begin a rulemaking process to address the health and safety needs of the AFI. This process is ongoing, and CalOSHA has held hearings, solicited testimony, and is engaged in the rule-making process to determine an appropriate standard for a specific blood-borne pathogen control plan for the AFI.

According to their website, the mission of the Occupational Safety & Health Standards Board (Board) is "To promote, adopt, and maintain reasonable and enforceable standards that will ensure a safe and healthful workplace for California workers. The Occupational Safety and Health Standards Board conduct monthly open public meetings to consider proposed revisions of the California Code of Regulations." As public hearing regulations, their supporting documents (an informative digest and initial statement of reasons), and agenda of the meeting become available and are posted on their webpage.

Once a regulation is adopted by the Board, it is submitted to the Office of Administrative Law (OAL) for approval and submittal to the Secretary of State. OAL has 30 working days to approve or deny the regulation. Generally, if approved and submitted to the Secretary of State, the regulation becomes effective 30 days from the date of submittal.

AB 332 would provide that the Board shall adopt emergency regulations and implement its provisions by July 1, 2014. Adoption of AB 332 thus would circumvent the current CalOSHA public input and hearing procedure, and would substitute its provisions regarding the standard for prevention of the spread of infection and disease for that of the regulatory authority charged with making such determinations.

c) Constitutional Questions Raised by Proposed Legislation:

Most adult entertainment is entitled to some degree of First Amendment protection. For example, in *City of Erie, et al. v. Pap's A.M.* (2000) 529 U.S. 277, 289, the Supreme

Court noted that nude dancing is expressive conduct, although the Court found that it fell "within the outer ambit of the First Amendment's protection".

(It should be noted, however, that there are two types of pornography that receive no First Amendment protection - obscenity and child pornography. Under the Supreme Court's 1973 decision in *Miller v. California* (1973) 413 U.S. 15, jurors must consider several factors in determining whether matter is obscene. These include whether the average person, applying contemporary community standards, would find that the work, taken together, applies to prurient interests; the work depicts or describes, in a patently offensive way, sexual conduct specifically defined by state law; and, the work, taken together, lacks serious literary, artistic, political or scientific value.)

Any law targeting the negative secondary effects of adult entertainment (such as the spread of infectious disease) will likely be subject to the intermediate level of review set forth in *United States v. O'Brien* (1968) 391 U.S. 367. In *O'Brien*, the Supreme Court applied a four-factor test in evaluating a restriction on symbolic speech. The first factor of the *O'Brien* test is whether the government regulation is within the constitutional power of the government to enact. The second factor is whether the regulation furthers an important or substantial government interest. Under the third factor, the government interest must be unrelated to the suppression of free expression. The fourth and final *O'Brien* factor is whether the restriction is no greater than necessary to the furtherance of the government interest.

The making of non-obscene pornographic films has been found to enjoy constitutional protection as an exercise of free speech. In the seminal case of the *People v. Freeman* (1988) 46 Cal.3d 419, the California Supreme Court stated, "Regardless of our view of the social utility of this particular motion picture, our analysis must begin with the premise that a non-obscene motion picture is protected by the guaranty of free expression found in the First Amendment."

In *Freeman*, the court was confronted with the question of whether the "making of a film" could be regulated as conduct apart from the first amendment protections afforded to the "content" of the film. Freeman was an adult film producer charged with pandering in the production of his films. The court held it could not, saying, "the People argue that there is a distinction between 'speech' (e.g., a film), which is constitutionally protected under the First Amendment so long as it is not obscene, and 'conduct' (the making of the film), which may be prohibited without reference to the First Amendment. Such a distinction is untenable in this case."

The court then further analyzed the question under the *O'Brien* test, wherein United States Supreme Court set forth standards to determine the constitutional propriety of governmental regulation of "conduct" which also contains elements of "speech." As is relevant here, the state's interest in prosecuting Freeman was asserted to be prevention of the spread of communicable disease, including HIV. However, the Court held that stated rationale would not overcome Mr. Freeman's rights to free expression under the First Amendment, stating, "Even if the regulation attempted here were within the constitutional power of the Legislature and the governmental interest could be found to be important, the application of Section 266i in the manner advocated would clearly run

afoul of the requirement that the governmental interest be unrelated to the suppression of free expression."

Here, the author has attempted to avoid constitutional pitfall by providing that "nothing in this section should be construed to require condoms, barriers, or other personal protective equipment to be visible in the final production of an adult film," suggesting that this language shields the bill from challenge based on the main thrust of the measure, which is the requirement that adult film actors must use "condoms and other protective barriers whenever acts of vaginal and anal intercourse are filmed."

In *Vivid Entertainment vs. County of Los Angeles*, an additional constitutional claim against Measure B is made which could be raised similarly against AB 332, based upon prior restraint upon protected free speech under 42 U.S.C. Section 1983. In their complaint Vivid asserts, "Measure B pre-emptively prohibits the production of and adult film...if the performers do not use condoms for all acts of anal or vaginal sex, even if in their sound discretion and artistic judgment they would opt to forgo doing so, Measure B thus violates the First Amendment by standing as an unconstitutional prior restraint upon protected expression and the creation and distribution of protected speech."

There are two ways in which the government may attempt to restrict speech. The more common way is to make a particular category of speech, such as obscenity, subject to criminal prosecution or civil suit, the second way is by prior restraint, which may occur in two ways. First, a statute may require that a person submit the speech that he wishes to disseminate - a movie, for example - to a governmental body for a license to disseminate it - e.g., to show the movie, or a court may issue a temporary restraining order or an injunction against engaging in particular speech.

With respect to both these types of prior restraint, the Supreme Court has written that "any system of prior restraint of expression comes to this Court bearing a heavy presumption against its constitutional validity." (Supra)

Prior restraints, it has held, are the most serious and the least tolerable infringement on First Amendment rights, finding "a prior restraint ... by definition has an immediate and irreversible sanction. If it can be said that a threat of criminal or civil sanctions after publication 'chills' speech, prior restraint 'freezes' it at least for the time." *Nebraska Press Association v. Stuart*, 427 U.S. 539, 559 (1976)

5) Prior Related Legislation:

- a) AB 847 (Salas), of the 2009-10 Legislative Session, would have imposed a 20% tax on retailers that operate adult entertainment venues which would be transferred to the Adult Entertainment Venue Impact Fund, which would have been created by this bill. AB 847 was returned to the Chief Clerk pursuant to Joint Rule 62(a).
- b) AB 2914 (Charles Calderon), of the 2007-08 Legislative Session, would have imposed an 8.3 % tax on the sale of, or the storage, use, or other consumption of, tangible personal property that is adult material which would be transferred to the Adult Entertainment Impact Fund, which would have been created by this bill. AB

2914 was held on the Assembly Appropriations Suspense File.

- c) AB 1551 (Charles Calderon), of the 2007-08 Legislative Session, would have imposed an 8% tax on the gross receipts of an adult entertainment venue which would be transferred to the Adult Entertainment Venue Impact Fund, which would have been created by this bill. AB 1551 was returned to the Chief Clerk pursuant to Joint Rule 56.
- d) AB 2798 (Leslie), of the 2003-04 Legislative Session, would have required that performers be tested for the presence of sexually transmitted diseases before production begins on a film containing sexual content. AB 2798 was held in the Assembly Rules Committee and returned to the Chief Clerk without further action.
- e) AB 1013 (Charles Calderon) of the 1997-98 Legislative Session, would have imposed a 5% tax on adult entertainment products and services and a comparable excise tax on the storage, use or other consumption of adult entertainment products and services into the Victims of Violent Crime Support Fund, which the bill would have created. SB 1013 was returned to the Secretary of the Senate pursuant to Joint Rule 56.

REGISTERED SUPPORT / OPPOSITION:

Support

AIDS Healthcare Foundation (Sponsor)
American Congress of Obstetricians and Gynecologists
Beyond AIDS
California Communities United Institute
California Medical Association
Numerous private citizens

Opposition

Free Speech Coalition
Valley Industry and Commerce Association

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