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# AACS: Title IX Overview

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October 27, 2020

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## Title IX Prohibits Sex Discrimination

No person in the United States shall on the basis of **sex**, be excluded from participation in, be denied benefits of, or be subjected to discrimination under any educational program or activity receiving federal financial assistance

## 2020 Final Rule

- First comprehensive regulations issued under Title IX since 1975 (amends 34 CFR Part 106)
  - Rule includes Sexual Harassment as a form of Sex Discrimination
- Effective August 14, 2020
- All litigation attempts to overturn it have been defeated
- Important Note:
  - This is all still very new and likely to change over time.

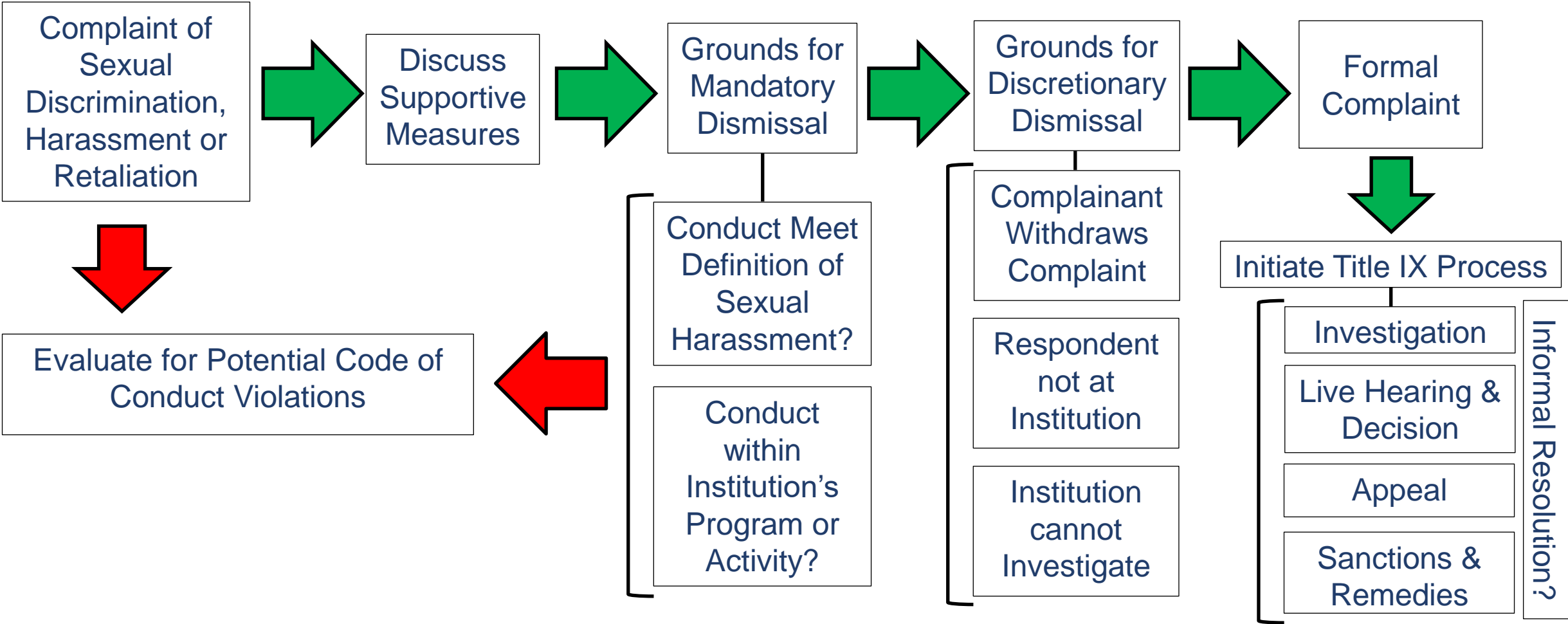
# Major Changes in New Regulations

(at least some of them)

- Separate roles for Title IX Coordinator, investigator, advisors, decision maker, and appellate authority
- Formal Complaint requirement
- “Actual knowledge or deliberate indifference” standard for institutional awareness
- Training requirements for key personnel
- Publication of training and policy on website
- Fair process and equal treatment of both parties

# Grievance Process Overview

# Overview of Grievance Process



## Overview of Roles

Title	Responsibilities	Training	Status
Title IX Coordinator	Intake reports and Formal Complaints, provide supportive measures	Sexual harassment definition, scope of education program, how to conduct an investigation, grievance procedure (hearing, appeals, informal resolution), impartiality	Must be school employee Cannot serve as decision-maker
Investigator	Conduct a fair, objective and impartial investigation	Impartiality, how to conduct an investigation, issues of relevance, rape shield, report writing	Employee or 3 <sup>rd</sup> party Cannot serve as decision-maker
Decision-Maker	Evaluate evidence, determine relevancy during hearing, make and issue determination	Sexual harassment definition, hearing process, technology to be used in hearing, issues of relevance, evidence, rape shield	Employee or 3 <sup>rd</sup> party Cannot serve in any other capacity
Advisor(s)	Question opposing party and witnesses during hearing	None required	Party provided Employee or 3 <sup>rd</sup> party
Informal Resolution Facilitator	Conduct informal resolution process	Informal resolution process	Employee or 3 <sup>rd</sup> party

# Policy & Definitions



## Sexual Harassment

- Sexual Harassment is conduct on the basis of sex that falls into one or more of the following 3 categories:
  - Quid Pro Quo
  - Hostile Environment
  - Sexual Violence (sexual assault, domestic violence, dating violence, or stalking as defined in federal law)

## Sexual Violence and Clery/VAWA

- Violence Against Women Reauthorization Act of 2013 (“VAWA”) requires inclusion of state definitions for Sexual Assault, Dating Violence, Domestic Violence, Stalking and Consent are contained in the Annual Safety and Security Report (“ASR”)
- Clery (Jeanne Clery Disclosure of Campus Security Policy and Crime Statistics Act) Crime Statistics are reported based on federal definitions

## Elimination of Conflicts and Bias

- All persons involved in grievance process
  - Free from conflicts of interest or bias
  - Receive training on:
    - Definition of sexual harassment
    - How to conduct an investigation and the grievance process
    - How to serve impartially
    - How to make relevancy determinations

## Publication

- Title IX Coordinator information and nondiscrimination policy
  - Post on website & publish in handbook/catalog provided to prospective/current students and employees
- Grievance procedures and process
  - Including how to make a complaint of sex discrimination or harassment and how the school will respond
  - Distribute to all prospective/current students and employees
- Training materials posted on website
  - For Title IX Coordinators, investigators, decision- makers, and informal resolution facilitators

## Response

- School responds when:
  - Actual knowledge of sexual harassment
  - That occurred within the school's education program or activity
  - Against a person in the United States

## Actual Knowledge

- Title IX response obligation is based on school's "actual knowledge"
  - notice of sexual harassment or allegations to the Title IX Coordinator or an official of the school who has authority to institute corrective measures
  - constructive notice "should have known" standard eliminated
- School is liable for sexual harassment only when:
  - it knows of sexual harassment allegations; and,
  - responds in a way that is "deliberately indifferent"

## Three Kinds of Reporters (because one just isn't enough)

- School designates who (1) must, (2) may and (3) must with Complainant's consent report to the Title IX Coordinator
- What is the difference?
  - Must report: school official with authority to institute corrective measures
  - May report: as designated by the school – not required to report to Title IX Coordinator
  - Must report with consent: as designated by the school – must report to Title IX Coordinator so long as Complainant consents

# Formal Complaint



## Formal Complaint

- “Formal Complaint” is now a term of art.
  - A complaint signed by a Complainant or Title IX Coordinator alleging sexual harassment and requesting an investigation
- Complainant
  - Current or prospective student
  - Current or prospective employee
- To pursue or not pursue a complaint?
  - Generally defer to Complainant’s wishes
  - Title IX Coordinator can initiate investigation if he/she determines not pursuing would be deliberately indifferent or harmful to the campus community

## Who are the Parties?

- Complainant:
  - Alleged victim unless parent/legal guardian has a legal right to act
  - Anyone can complain about sex discrimination
    - Person reporting does not have to be the victim of conduct that could constitute sex discrimination or sexual harassment
    - Eg. A person who observed sexual harassment but is not the target may complain
  - Only a Complainant or Title IX Coordinator may file a Formal Complaint
- Respondent: person who engaged in the alleged misconduct

## Who Can Be a Respondent?

- A person alleged to have engaged in conduct that could constitute sexual harassment

# Supportive Measures

## Supportive Measures

- Steps taken by the institution that are designed to preserve or restore equal access to education
  - Individualized, appropriate and reasonably available
  - Provided without charge
  - Non-disciplinary and non-punitive
  - Available to Complainant and Respondent, as applicable
  - Confidential
- Required in all cases (formal complaint not needed)

## Supportive Measures

- When offered?
  - Title IX Coordinator should promptly and confidentially contact Complainant to offer
  - Offered even if Complainant has not filed a Formal Complaint
- What should be offered?
  - Consider Complainant's wishes in deciding appropriate measures
  - Explain the process of filing a formal complaint as part of
- Who implements?
  - Title IX Coordinator

# Dismissal of Complaints

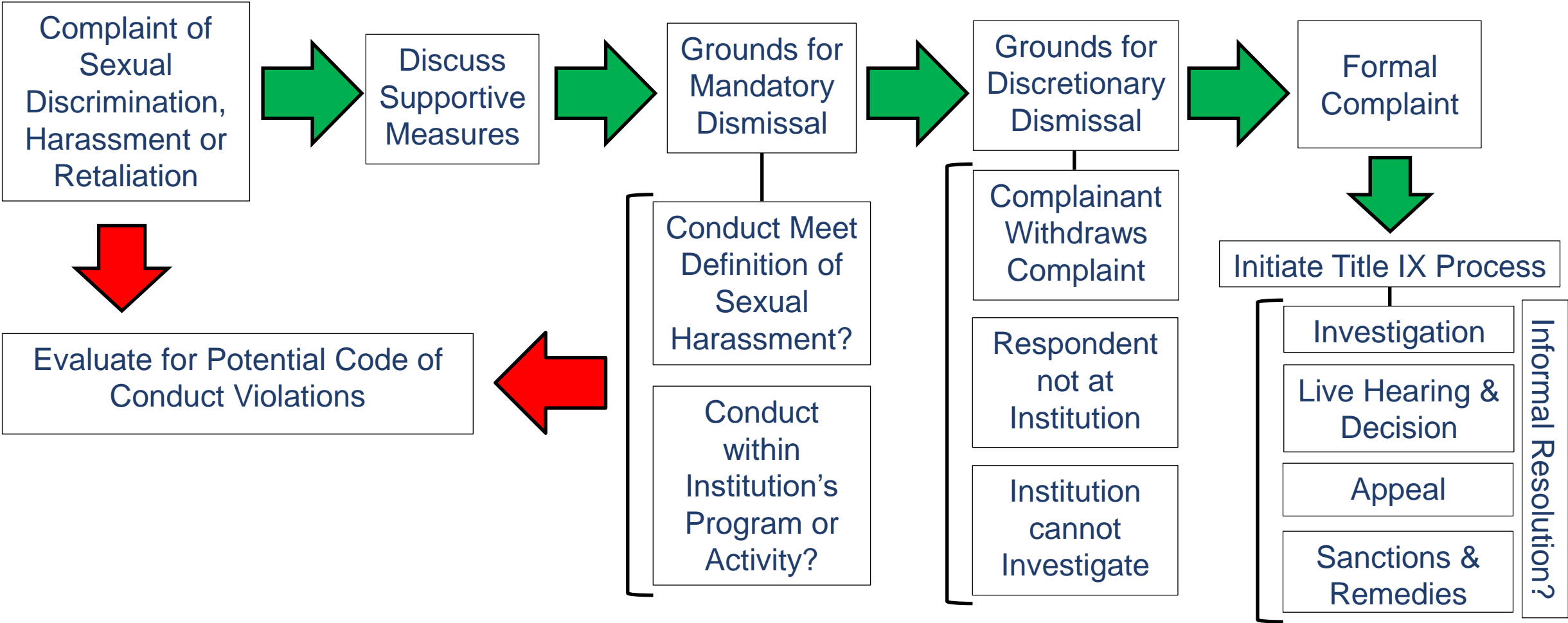
## Dismissal

- School must dismiss any complaint that:
  - Does not constitute sexual harassment;
  - Did not occur in the program or activity; or,
  - Did not occur against a person in the United States.
- School may dismiss a complaint if:
  - Complainant withdraws the complaint
  - Respondent is no longer enrolled or employed
  - Circumstances prevent institution from investigating
- Dismissal does not prevent action under code of conduct



# Formal Title IX Grievance Process

# Overview of Grievance Process



## Grievance Process Overview

- Formal Complaint
- Optional Informal Resolution (can be done at any time)
- Investigation
- Live Hearing
- Appeal
- Implementation of Remedies

## Notice of Allegations

- After receiving a formal complaint
- School provides notice to the parties of:
  - The Grievance Process
  - The allegations, including specific information
  - Parties may select an advisor (yes, it can be a lawyer)
  - If additional allegations are investigated, new notice must be given

## Investigation- Important Considerations

- Burden of proof remains with the school
- Equal opportunity to the parties to present evidence
- No gag orders- parties can discuss allegations
- Parties can have an advisor present
- Provide equal notice of hearings, interviews, and meetings
- Provide equal and meaningful access to evidence
- Create an investigative report that fairly summarizes the evidence 10 days prior to any hearing

## Informal Resolution

- Informal resolution allowed, but cannot be required
- May only be offered if a formal complaint is filed
- School must:
  - Provide written notice to the parties of the allegations, requirements of the resolution process, and any limitations
  - Obtain written consent from both parties
- Informal resolution not permitted if complainant is a student and respondent is an employee

## Advisors

- Parties have the right to select an advisor during an investigation and hearing
- Can be but does not have to be an attorney
- If the Complaint goes to a live hearing, the parties must have an advisor
- If the party does not have an advisor, the school must provide
- Only advisors may cross-examine witnesses

## Decision Maker

- Someone other than the Title IX Coordinator
- May be more than one person
- Will issue a written determination of responsibility
- Must be trained on the Title IX policy and elimination of bias and conflicts of interest



## Live Hearing

- Requirements for a live hearing include:
  - Opportunity for parties' advisors to examine and cross-examine witnesses, including challenging the credibility of witnesses
  - Examinations must be direct, oral, and in real time
  - Parties may be required to stay in separate rooms with a live video + audio connection
  - Only relevant questions may be asked; prior sexual conduct is not relevant

## Live Hearing

- More live hearing requirements:
  - School must provide an advisor at no charge if a party does not have one
  - Decision-maker may not rely on a statement by a party or witness if they do not submit to cross-examination
  - Decision-maker may not draw an inference based solely on a refusal to testify
  - School must create a record of the hearing—video, audio, or transcript

## Written Determination

- Written determination of responsibility:
  - Use published standard of evidence
  - Conclusions about whether alleged sexual harassment occurred
  - Rationale for result
  - Describe procedure from formal complaint through hearings
  - Make findings of fact and conclusions
  - Disciplinary sanctions and whether remedies will be provided
  - State the procedures and allowable bases for any appeal
  - Provide simultaneously to both parties

## Appeals

- Policy must provide for appeals for both parties
- The bases for an appeal must include:
  - procedural irregularity affected the outcome of the matter
  - newly discovered evidence that could affect the outcome of the matter
  - Title IX personnel had a conflict of interest or bias, that affected the outcome of the matter

# Prevention of Retaliation

## Retaliation Prohibited

- Prohibits
  - intimidation,
  - threats,
  - coercion, or
  - discrimination for making a complaint or participating in process
- Retaliation need not be on the basis of sex
- Use the same Title IX grievance process

# Record Keeping

## Record Keeping

- Seven years
- Records of any actions
- Include:
  - basis for conclusion;
  - why response was not deliberately indifferent;
  - supportive measures; and,
  - if supportive measures are not provided, why not





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