

Starting Soon:



# Medicaid Changes: New Home Care Regulations to be Effective Nov. 8, 2021

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## **Our Speakers:**

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# KEY QUESTIONS ON PAYING FOR LTC

1. **Where** would you want to live?
2. **Who** would take care of you?
3. **How** would you pay for it?

Private LTC  
Insurance  
+ Life  
Products

Self-  
Insuring

Medicaid

# MEDICAID BASICS – FINANCIAL ELIGIBILITY



## Medicaid LTC Services are Divided into Two Categories:

### Chronic Care

- Care provided in nursing home
- 5-year lookback
- Transfer penalties= # of mos.
- “Rule of Halves” planning

### Community

- *Home health care*
- Assisted living facility
- Medicaid managed long-term care (MLTC), NHTD, CDPAP
- Adult day care
- No lookback under current rules



**Changes Made 10/1/20 – Effective  
11/8/21 and 4/1/22(?)**

# NEW REGULATIONS EFFECTIVE NOVEMBER 8, 2021



- Personal Care Services (PCS) – 18 NYCRR Sec. 505.14
- Consumer Directed Personal Care Assistance Services (CDPAS) – 18 NYCRR 505.28
- Updated Regulations published September 8, 2021

According to NYSDOH:

“These regulations modernize the PCS and CDPAS regulations, codify current Department policy, and align Medicaid Managed Care Organization (MCO) authorization roles and responsibilities to those of the Local Departments of Social Services (LDSS) by adopting a variety of new rules.”

# IMPLEMENTATION CONT.



“Not all of the new or amended provisions will be implemented at the same time. For example, the Department will transition to the Independent Assessor, IPP (Independent Practitioner Panel) and IRP (Independent Review Panel) *before* implementing the change in minimum need requirements for PCS/CDPAS service and MLTC plan enrollment.”

- Clarification still needed from the Centers for Medicare and Medicaid Services.
- Until the minimum need requirements are implemented, plan enrollment requirements for Managed Long Term Care Plans are unchanged.



# NEW INDEPENDENT ASSESSOR



- DOH will replace the functions now performed by local districts, MLTC plans and mainstream Medicaid managed care plans with a **new “Independent Assessor,” Maximus**, charged with determining how much Personal Care and CDPAP may be authorized.
- Maximus will conduct one Community Health Assessment (CHA) which will be used to develop a plan of care for each Medicaid enrollee.
- This new independent assessor will apply more rigid standards using a new assessment tool that the State will develop.



# INDEPENDENT PRACTITIONER PANEL



- The regulations replace the requirement for a physician's order to authorize PCS/CDPAS (Personal Care Services/Consumer Directed Personal Assistance Services)
- **NEW REQUIREMENT:**  
Services to be ordered by a qualified, independent practitioner (Medical Doctors, Doctors of Osteopathy, Nurse Practitioners and Physician's Assistants) selected by the state.
- Panel will determine if the individual is self-directing or has an appropriate self-directing other, and if the individual can **safely receive PCS/CDPAS at home** based on their medical stability.

# SCHEDULING CONCERNS



- Maximus will also replace the current nurse for all Medicaid CASA/DSS assessments, including immediate needs assessments, those seeking homecare but are exempt from enrolling with MLTC plans, or those seeking OPWDD/TBI/NHTD waived services

**Does NY Medicaid Choice (MAXIMUS) have the capacity to schedule all of these assessments?**

# 3 ADL REQUIREMENT AFTER APRIL 1, 2022



## To qualify for PCS / CDPAS services and to enroll with an MLTC plan:

- Will require “Limited assistance with physical maneuvering with **“more than two” ADL’s (3+ ADLs)** or
- Persons with dementia or Alzheimer’s diagnosis must need **“at least supervision with more than one ADL” (2+ADLs)**
- People already receiving personal care, housekeeping or CDPAP services as of the implementation date of the new regulations are **“grandfathered in”** under the previous rules

Citation: HLT-28-20-00019-P

# INDEPENDENT REVIEW PANEL



- An additional *medical review* will be required the first time an authorization for PCS/CDPAS services exceeds 12 hours per day, on average.
- The medical review will be conducted by an “Independent Review Panel” (IRP) established by the Independent Assessor (Maximus). The Panel will review the individual’s community health assessment, their Practitioner’s Order and their Plan of Care.
- IRP will determine if the plan of care is reasonable and appropriate to maintain the person’s health and safety at home.
- IRP can recommend changes in scope, type, amount or duration of services but **cannot** specify a recommended number of hours.

## OTHER CHANGES...



- The new regulations do not require Local Department of Social Service offices or other Medicaid Managed Care Organizations to inform Medicaid recipients of other home care services being available, including CDPAS.
- The regulations also require that consumer's designated representative "be available to ensure that the consumer responsibilities are carried out without delay."
  - No current guidance on what this means!

# NEW NOTIFICATION REQUIREMENTS



- The regulations codify longstanding department policies on documenting the bases and rationales for LDSS and Medicaid Managed Care Organizations to deny, discontinue or reduce services and clarify in regulation additional appropriate basis for such actions.
  - What does this mean?
  - Is the basis for such actions going to be expanded?
- If an appeal is filed ask for Aid Continuing

# IF YOU HAVE QUESTIONS...



- Questions about the new regulations can be sent to: [Independent.assessor@health.ny.gov](mailto:Independent.assessor@health.ny.gov).
- Also refer to NYLAG ([nylag.org](http://nylag.org)) for updates.



# OTHER CONCERNS



- New requirement requires consideration of “whether an individual is capable of safely remaining in the community”
- “Safety” is raised to potentially limit high hour users – More than 12 hrs/day – Potentially requiring institutionalization

# OTHER CONCERNS CONT.



## Good Cause Exceptions:

- Plan closed
- Enrollee is moving outside of service area
- Plan failed to furnish accessible and appropriate medical care, services and/or supplies
- Current provider doesn't have a contract with enrollee's plan
- Plan and enrollee agree transfer is appropriate
- NYS determines the plan has failed to meet its contractual obligation with the State and that such failure directly impacts plan enrollees.



After completion of lock-in period, can freely transfer, but then subject to new grace period and lock-in.

## OTHER CONCERNS CONT.



MLTC plans can involuntarily disenroll recipients for reasons specified in their contract, including:

- Failure to pay spend-down
- Hospitalization for greater than 45 days
- Enrollee was absent from the service area for more than 30 consecutive days

# WHEN DO THE LOOKBACK / PENALTY CHANGES TAKE EFFECT?



- The law imposes a “Medicaid lookback” for transfers after October 1, 2020 for Community Medicaid.
- However, the Director of the Budget may, in consultation with the Commissioner of Health, delay the effective date of the enforcement of the penalty period for a period of time not to exceed ninety days.
- According to DOH – Full implementation of the new law may commence 4/1/22

October 2020						
S	M	T	W	T	F	S
				1	2	3
4	5	6	7	8	9	10
11	12	13	14	15	16	17
18	19	20	21	22	23	24
25	26	27	28	29	30	31

**Thursday, Oct 1st 2020**

# ISSUE: WILL THE LOOKBACK BE RETROACTIVE?



- **NO, Transfers made on or after October 1, 2020 are subject to the new lookback period, but penalties from the new lookback period will not be enforced until 4/1/22.**
  - Example of Phase In
    - 18-month lookback for applications in April 2022
    - 19-month lookback for applications in May 2022
- *Question – Will existing Medicaid Beneficiaries be Grandfathered, or re-examined on Recertification?*

# NEW 2021 MEDICAID ELIGIBILITY NUMBERS



## Monthly Income

Individual (at home)	\$884 (+\$20) <sup>1</sup>
Couple (both at home)	\$1,300 (+\$20) <sup>1</sup>
Minimum Monthly Maintenance Needs Allowance (MMMNA) <sup>2</sup>	\$3,259.50

## Resources

Individual	\$15,900
Couple (both at home)	\$23,400
Comm. Spouse Resource Allowance	\$74,820 (or the spousal share of 1/2 combined resources up to a maximum of \$130,380)

*1 - The first \$20 of monthly income per household will not be counted when determining the eligibility of those Medicaid applicants who are aged, blind, or disabled. Income includes monies coming in each month such as Social Security, pension, rent payments, and disability payments*

*2 - If Community Spouse makes less than \$3,259.50 of their own income, they will receive a portion of their spouse's to reach \$3,259.50*

# THE MEDICAID PENALTY



The Penalty is a Number of Months of Ineligibility

9/23/21



- **Example: Transfer \$140,268**  
$$\$140,268 / \$11,689 = 12 \text{ months}$$
**without Medicaid**
- **Application before 4/1/2022**
  - **NO PENALTY FOR HOME CARE**
- **Application on or after 4/1/2022**
  - **12-month penalty**
- **Penalty begins to run when the applicant is “otherwise eligible” to receive services were it not for the penalty period, and actually applies.**

# 2021 NYS MEDICAID REGIONAL RATES



Region	Counties	2021	2020	2019
New York City	Bronx, Kings (Brooklyn), NY (Manhattan), Queens, Richmond (Staten Island)	<b>\$13,037</b>	\$12,844	\$12,419
Long Island	Nassau, Suffolk	<b>\$13,834</b>	\$13,407	\$13,407
Northern Metropolitan	Dutchess, Orange, Putnam, Rockland, Sullivan, Ulster, Westchester	<b>\$13,206</b>	\$12,805	\$12,636
Western (Buffalo)	Alleghany, Cattaraugus, Chautauqua, Erie, Genesee, Niagara, Orleans, Wyoming	<b>\$11,054</b>	\$10,720	\$10,556
Northeastern (Albany)	Albany, Clinton, Columbia, Delaware, Essex, Franklin, Fulton, Greene, Hamilton, Montgomery, Otsego, Rensselaer, Saratoga, Schenectady, Schoharie, Warren, Washington	<b>\$11,689</b>	\$11,295	\$11,280
Rochester	Chemung, Livingston, Monroe, Ontario, Schuyler, Seneca, Steuben, Wayne, Yates	<b>\$13,020</b>	\$12,460	\$12,342
Central (Syracuse/Utica)	Broome, Cayuga, Chenango, Cortland, Herkimer, Jefferson, Lewis, Madison, Oneida, Onondaga, Oswego, St. Lawrence, Tioga, Tompkins	<b>\$10,857</b>	\$10,451	\$10,068



# WHICH MEDICAID TRANSFER EXEMPTIONS STILL APPLY?



## Transfers to the following individuals/trusts are **EXEMPT**:

1. Spouse
2. Disabled or blind child, or a trust for the benefit of such child
3. A trust established solely for the benefit of an individual under sixty-five years of age who is disabled

# REMEDIES THAT WILL BE AVAILABLE AS TO THE ASSET TRANSFER PENALTY



Transfer penalties may not apply if a satisfactory showing is made that...

- the individual or the individual's spouse intended to dispose of the assets either at fair market value, or for other valuable consideration; or
- the assets were transferred exclusively for a purpose other than to qualify for medical assistance; or
- all assets transferred for less than fair market value have been returned to the individual ...if the burden of proof is met, then the transfer is exempt.

# ISSUE: ARE TRANSFERS TO A POOLED TRUST EXEMPT?



## Income

- DOH “Informal” Position
  - Transfers by an individual age 65 or older who is disabled to a Pooled Income Trust will be subject to a penalty **UNLESS**
  - There is a satisfactory showing that the funds will be utilized for the benefit of the Beneficiary (for full fair market value)
- Ongoing Advocacy
  - NYSBA Elder Law and Special Needs Section
  - NAELA NY Chapter
  - Pooled Trust Coalition

## Assets

- Historically, per the NYS Medicaid Reference Guide (pg. 360), there is no exception to the transfer rules for transfers of assets to pooled trusts created for the benefit of persons 65 years of age or older

# INCOME OVER \$904/MO.



- Under current law, a Medicaid recipient's excess income can be contributed to a Pooled Trust to avoid the Medicaid Spend-down
- INCOME ALLOWANCE – 2021 - \$904 for Single, \$1,300 for couple
- Pooled trust can pay any expense incurred by Medicaid recipient— rent, mortgage, food, technology, etc.



# **WHAT STEPS CAN YOU TAKE NOW TO ACCESS COMMUNITY MEDICAID?**

# UNTIL 4/1/22, EXISTING LOOKBACK / PENALTY RULES APPLY



- If a Community Medicaid Application **IS FILED PRIOR** 4/1/22, existing rules apply, meaning there is no lookback for homecare and no penalty or waiting periods.
- Applicant must have assets below \$15,900.00 and income less than \$904.00 per month
  - **Assets**
    - Use Medicaid Asset Protection Trust (MAPT)
    - Spend Down on Legitimate Expenses
      - Home repairs
      - Automobile
      - Prepaid Burial
    - Transfer assets to Community/Non-Applying Spouse
  - **Income**
    - Use Pooled Income Trust for excess monthly income, or shift income to Community Spouse if their income is below MMMNA of \$3,259.50

# EXAMPLE: MEET PATRICIA



- Income \$2,370/ Month
- Assets
  - IRA \$75,000
  - Savings & Checking \$25,000
  - Home \$250,000
  - \$100K in Stock



# MEDICAID HOME CARE EXAMPLE



## QUERY:

When can Patricia be eligible for Medicaid Home Care if we start planning today?



# MEDICAID HOME CARE EXAMPLE



## Answer:

- October 1, 2021
- How is that Possible?

# MEDICAID HOME CARE EXAMPLE



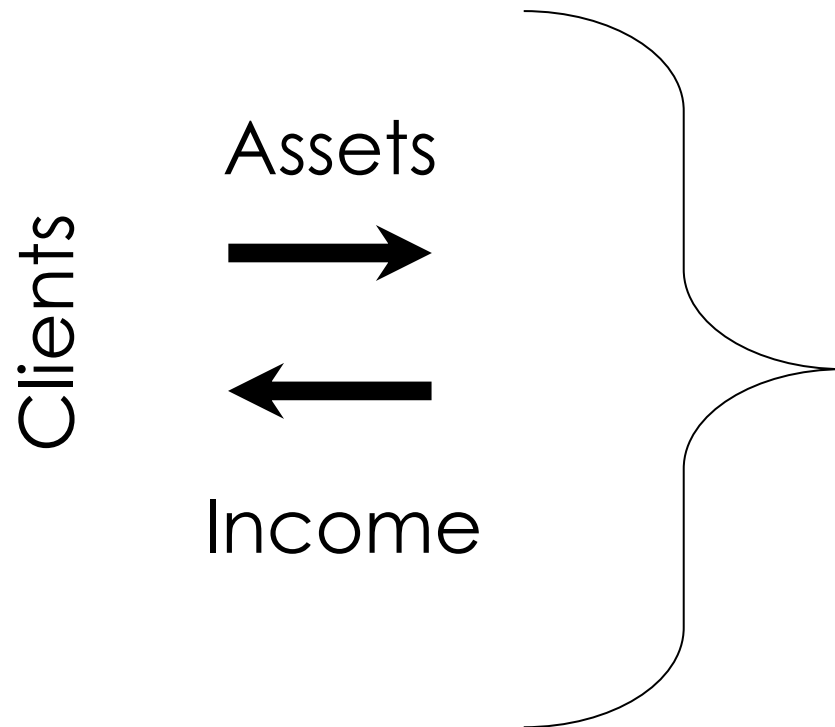
- Step 1 – Patricia creates and funds a Medicaid Asset Protection Trust with her home, stock and \$11,000
- Step 2 – Patricia creates a Pooled Trust and assigns \$1,466 of income per month

# MEDICAID HOME CARE EXAMPLE



- Step 3 – Patricia applies for Medicaid – What counts?
  - Assets = \$15,900
  - Income = \$904
- Medicaid Trust and Pooled Trust funded- income and asset protected
- No Waiting Period!

# MEDICAID ASSET PROTECTION TRUST (MAPT)



- Trustee – manages trust assets
- Beneficiaries
  - Client – income for life and right to use real property
  - Heirs = Remaindermen - inherit when trust ends



- ▶ Home
- ▶ Bank Accounts
- ▶ Stocks & Bonds
- ▶ Annuities
- ▶ Life Insurance
- ▶ Business
- ▶ Real Estate

## Medicaid Asset Protection Trust

- Income is yours if you want it
- Principal can NOT be given back to you directly, but
- Principal can be given to children or other beneficiaries



## KEEP OUT

Cash

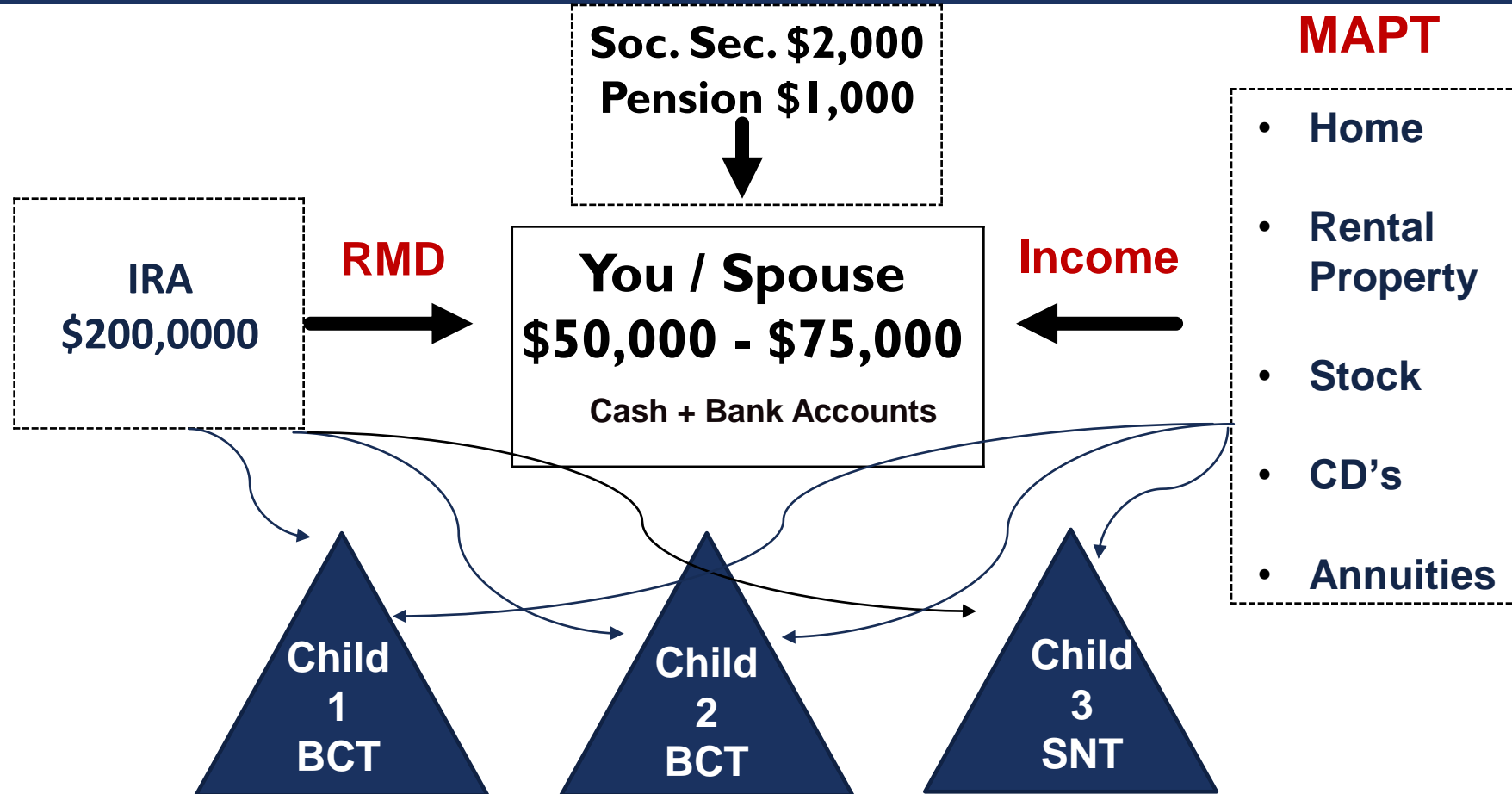
Bank Acct.

IRA, 401(k)

## Security Features

- ❖ Choose initial Trustee, and change at any time
- ❖ Choose initial beneficiaries, and change at any time
- ❖ With the consent of all beneficiaries, in some jurisdictions the trust can be “amended or revoked”

# ASSET PROTECTION PLAN – LIMITED TIME ONLY?



# WHAT IF PATRICIA NEEDED CARE EVEN FASTER??



## Fast Track Medicaid Application if Immediate Need for Personal Care or CDPAP (Can't Wait Out 4+ Month MLTC Process)

- 2015 Law requires new procedures to process a Medicaid application in **SEVEN DAYS** for any applicant with an immediate need for personal care (PCS) or consumer-directed personal assistance (CDPAP) services & to approve PCS/CDAP in 12 days.
- Question – How will the new transfer penalties and lookback affect the Immediate Needs application?



# HOW LONG WILL THE LOCAL AGENCY HAVE TO MAKE AN ELIGIBILITY DETERMINATION?



- The new lookback will likely cause long delays in processing by local agencies
- Medicaid agencies must respond with approvals in:
  - (i) 45 days
  - (ii) 90 days if there is a disability determination (Pooled Trust)
- New rules change the process and standards for medical qualification





# **WHAT STEPS CAN YOU TAKE AFTER 4/1/22 TO ACCESS COMMUNITY MEDICAID?**

# PLANNING FOR HOME CARE VARIABLES



What if you or a family member needs care after 4/1/22 and no planning as been done?

**Plan A**      Gift/Promissory Note Strategy with a Side Fund

**Plan B**      Gift of 100% of Excess Resources Outright  
(Gift-Back)

**Plan C**      Self-Pay for 30 months; transfer the balance

**Plan D**      Spousal Refusal

# SPOUSAL REFUSAL



- A spouse who is not applying for Medicaid can **refuse to turn over income or assets to support the spouse** who is, in order to obtain Medicaid eligibility



Proposed elimination in State Budget  
**DID NOT PASS!**

# WHY NOW?



**EVEN IF YOU ARE NOT APPLYING FOR MEDICAID IMMEDIATELY,  
THE TIME TO PLAN IS NOW.**

- Planning to pay privately
- Purchasing insurance to cover long term care
- Planning to access Medicaid in the future.

**GIVEN LOOMING BUDGET DEFICITS, IT WILL ONLY BECOME  
HARDER TO ACCESS BENEFITS.**

## NEXT STEPS?



Every situation is unique and requires an individualized plan

- If you think you can qualify for Medicaid now
  - Get a comprehensive assessment by an independent geriatric care manager (EverHome Care Advisors)
  - Conduct thorough review of your income and resources (LTC questionnaire)
  - Consult with a qualified elder law attorney
  - Asset transfers must be completed by 2/28/2022
  - Medicaid Applications must be filed by 3/30/2022

# NEXT STEPS?



## Every Situation is Unique.



- If you are planning for the future:
  - Begin with a financial and legal analysis (LTC Questionnaire)
  - Consult with a qualified insurance professional
  - Consult with a qualified elder law attorney to explore legal planning to access Medicaid and protect your assets.
  - Purchase insurance and enact trusts as soon as possible

# UPCOMING WEBINARS



## **Special Needs Planning: New Approaches to Protect a Child or Adult with a Disability**



- Thursday, September 30, 2021
- 12:00 – 1:00 PM
- Go to [pierrolaw.com/events](http://pierrolaw.com/events) for more information or to register





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