The Course of True Identity: Pennsylvania Legislation for Transgender Youth

By Mária Zulick Nucci

In the first scene of Shakespeare’s *A Midsummer Night’s Dream*, the character Lysander notes that “the course of true love never did run smooth.” The play features several characters who pretend to be the other gender for serious and comic purposes. For transgender persons, reaching their true gender identity can be an especially long and psychologically, emotionally, physically, medically and financially challenging course, without pretense or comedy. This is yet more so for transgender youth in primary and secondary school, who confront it in addition to the general challenges of adolescence. Federal law and some states’ laws address this challenge; in Pennsylvania, pending and proposed legislation also seek to ease their way.

At the federal level, the United States Department of Education, Office for Civil Rights, published *Questions and Answers on Title IX and Sexual Violence*, applicable to federally funded school programs and activities. It specifically includes transgender students as having stated rights regarding freedom from discrimination and violence, using the same standards as for other students. However, although the publication is a “significant guidance document,” it is not federal law as such.

Some states, and municipalities and school districts therein, address transgender youth. Perhaps most notably, California Governor Jerry Brown in 2013 signed AB1266, *The School Success and Opportunity Act*, which amended the Education Code to allow students to use school facilities and participate in sports based on their gender identity (85 Cal.Stats. § 221.5). Opponents, who termed the Act “the co-ed bathroom bill,” sought to place it on the Nov. 2014 ballot for voter referendum to overturn it. However, they did not get the required number of valid petition signatures and, after two lawsuits, the Act was not placed for referendum.

Research indicates that 13 states and the District of Columbia expressly guard the interests of transgender youth. Perhaps most notably,

Employment Discrimination: Transgendered Employees are Protected at Work

By Sharon R. López

Federal and state laws prohibit employment discrimination when the discrimination is based on sex. The plain language of the statute does not mention sexual orientation. However, many gays, lesbians, bisexual and transgender (GLBT) employees experience harassment and disparate treatment at work. Sexual orientation is not a protected class in the statute or the case law, but sexual identity (transgendered identity) does have some protections in the case law but not the plain language of the statute. Bibby v. Philadelphia Coca Cola Bottling Co., 260 F.3d 257 (3d Cir. 2001) (“Title VII does not prohibit discrimination based on sexual orientation.”); Prowel v. Wise Business Forms, Inc., 579 F.3d 285 (3d Cir. 2009) (finding Prowel adduced evidence of harassment based on gender stereotypes based on his effeminate manner). As the Third Circuit Court of Appeals pointed out in the *Prowel* decision, sex stereotyping has long been proscribed by Title VII. Id. 579 F.3d at 290 (“In *Price Waterhouse*, Ann Hopkins had been denied partnership in an accounting firm because she used profanity, was not charming, and did not walk, talk or dress in a feminine manner.”), citing *Continued on page 4*
Developing the Legal Landscape of Transgender Healthcare

By R. Barrett Marshall

Transgender people and their communities have recently enjoyed a considerable surge in visibility. In the past year we have seen the widespread celebration of openly trans activists like Janet Mock and Laverne Cox, as well as great strides forward in the legal arena providing greater discrimination protections to transgender people at work, at school, and in many other institutions. As our culture begins to re-examine assumptions and demonstrate greater inclusion, it is important that attorneys understand not only the issues faced by trans communities, but also how we can best advocate on behalf of trans clients. One of the greatest hurdles remaining is the availability of appropriate and respectful medical care for trans people. Despite the continual advancement of medical research and information on gender transition, the law does not yet fully meet the needs of trans people for medical care.

Some people who identify as transgender have been or can be diagnosed with Gender Dysphoria (GD). GD is listed in the Diagnostic and Statistical Manual of Mental Disorders (DSM-V) and defined as “a marked difference between the individual’s expressed/experienced gender and the gender others would assign him or her, and [that] must continue for at least six months.” This diagnosis, and even the name by which we call it, has changed recently in response to the medical and mental health communities’ increased knowledge about the condition. You may hear people use the phrase “gender identity disorder,” the previous diagnosis used for trans people requiring access to transition-related medical care. The language was adjusted to better reflect the condition and to reduce the stigma felt by people who had previously been diagnosed with a “disorder” that was, in fact, their identity. The most current and appropriate language to use for the medical condition associated with transgender identities is that currently listed in the DSM-V and reflected under the GD diagnosis.

Medical treatment for GD has been examined and researched by the World Professional Association for Transgender Health (WPATH). WPATH is composed of psychiatrists, surgeons and other kinds of healthcare professionals who specialize in gender transition and develops the most appropriate standards of care for treatment. WPATH released the first set of standards of care in 1979 based on the work of Dr. Harry Benjamin. Since then, seven iterations have been released, the most recent of them in 2011. This field of medicine has grown considerably in the past 35 years and is now recognized by a number of entities, including the American Medical Association and the U.S. Department of Health and Human Services (HHS).

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GLBT Rights Committee Member Profile: John Schaffranek

Each newsletter contains a profile of a GLBT Rights Committee member providing some information on their areas of practice, backgrounds, interests and why they decided to enter the field of law. Profiles are written by the member with help from the editor. This edition’s profile is of John Schaffranek, current Open Court editor.

John Schaffranek practices in the area of domestic relations, criminal defense, estate planning, First Amendment issues and general civil litigation.

John first joined the GLBT Rights Committee in 2013 and quickly agreed to serve as co-editor of Open Court. After serving a few months as co-editor, John took over as editor. He also serves as the Vice Chair of the PBA Law Related Education Committee. John is a member of the Allegheny County Bar Association.

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The Other Closet: Transgender Service Members in the US Military

By Jane A. Allen

Despite the repeal of “Don’t Ask, Don’t Tell” (DADT) on Sept. 20, 2011, little has changed for the estimated 15,500 transgender men and women who are currently serving in the U.S. military. Although gay and lesbian service members are now permitted to serve openly, transgender adults are still arbitrarily banned from military service by outdated physical and mental medical regulations.

A May 2014 study conducted by the Williams Institute of the University of California School of Law found that despite the ban a surprisingly large percentage of transgender adults serve in the armed forces. In fact, the study suggests that transgender men and women are twice as likely to serve in the military as their non-transgender counterparts. The study also estimates that there are 134,300 transgender men and women who are veterans or retired from the National Guard or Reserves.

Efforts to remove the transgender ban gained momentum in May 2014 when the Secretary of Defense Chuck Hagel indicated in an interview with ABC News that he is open to a review of the transgender military service regulations. Secretary Hagel cautioned that, unlike the repeal of DADT, eliminating the transgender ban would be “a bit more complicated,” as “these issues require medical attention” and “austere locations where we put our men and women in many cases don’t always provide that kind of opportunity.”

Secretary Hagel’s announcement came on the heels of the March 2014 Report of the Transgender Military Service Commission, which concluded “there is no compelling medical rationale for banning transgender military service and that eliminating the ban would advance a number of military interests, including enabling commanders to better care for their service members.”

The Transgender Military Service Commission was comprised of five distinguished medical and psychological experts who were tasked with reviewing DOD transgender medical policies to determine if they were based on sound medical reasoning. The Commission was sponsored by the Palm Center, a non-profit public policy research center based in San Francisco, California and was co-chaired by RADM Alan Steinman, M.D. and former U.S. Surgeon General Joycelyn Elders.

“The ban on transgender service has long been a policy in search of a rationale,” stated Dr. Elders in the press release that accompanied the announcement of the Commission’s findings, “We looked hard for any type of sound rationale and found none. Reforming the policy is really a simple matter of updating references to outdated medical science and removing unnecessary barriers to enlistment and retention.”

A follow-up study by the Planning Commission on Transgender Military Service published in August 2014 outlined the “ideal administrative practices” for inclusion of openly serving transgender personnel while “preserving and promoting military readiness.” The nine member Commission concluded that “formulating and implementing inclusive policy is administratively feasible and neither excessively complex nor burdensome”.

Department of Defense Instruction (DODI) 6130.03 establishes medical standards for entry into military service and includes specific physical and mental conditions, including transgender-related issues that are automatically disqualifying and not subject to waiver.

As of Aug. 5, 2014, the DOD modified its longstanding regulation on medical retention. The new DODI 1332.18 no longer lists transgender-related conditions as automatic grounds for administrative separation. It allows each branch of the service to generate its own list of disqualifying medical conditions but only if “the conditions in fact interfere with assignment to or performance of duty.” To date, all branches of the service include transgender-related conditions on their lists.

So although the new DOD medical regulation theoretically improves the chances of an openly transgender service member continuing to serve

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Price Waterhouse v. Hopkins, 490 U.S. 228, 235 (1989). Therefore, a sex stereotyping theory will not protect gay and lesbian workers who conform to gender stereotypes but may protect gay and lesbian workers who do not conform with gender stereotypes.

The sex stereotyping non-discrimination theory does protect transgender employees from discrimination in the workplace. In 2012, the Equal Employment Opportunity Commission (EEOC) held there are legal protections for transgendered employees under Title VII. See Macy v. Department of Justice, EEOC Appeal No. 0120120821 (Apr. 20, 2012). Mia Macy was a veteran who applied for a job with the federal Bureau of Alcohol, Tobacco, Firearms and Explosives. She presented as a man when she began the job application process. As she progressed through the job application process, she began presenting herself as Mia, her true female sexual identity. Three days after she informed her prospective employer of her new presentation, the position was withdrawn, allegedly because of budget reductions. Mia suspected the position was withdrawn because of the change in her presentation from a man to a woman, or “gender identity stereotyping.” Id. The EEOC’s analysis in Macy confirmed Title VII includes the term “gender,” which includes biological sex and “the cultural and social aspects associated with masculinity and femininity.” Id. The Macy decision found discrimination based on transgender identity is per se gender discrimination.

When an employer discriminates against someone because the person is transgender, the employer has engaged in disparate treatment related to the sex of the victim. This is true regardless of whether an employer discriminates against an employee because the individual has expressed his or her gender in a non-stereotypical fashion, because the employer is uncomfortable with the fact that the person has transitioned or is in the process of transitioning from one gender to another, or because the employer simply does not like that the person is identifying as a transgender person. In each of these circumstances, the employer is making a gender-based evaluation, thus violating the Supreme Court’s admonition that “an employer may not take gender into account in making an employment decision.” Id. (internal quotes omitted).

The EEOC reviewed other decisions involving transgender discrimination and found that the above conclusion supported the finding of per se discrimination, including the Schroer v. Billington finding of per se discrimination, including the Schroer v. Billington opinion. Schroer v. Billington, 577 F. Supp. 2d 293 (D.D.C. 2008). In Schroer, the prospective employer, the Library of Congress, rescinded an offer of employment to a transgender job applicant after she informed the employer of her intent to undergo sex reassignment surgery. See 577 F. Supp. 2d 293 (D.D.C. 2008). The U.S. District Court for the District of Columbia entered judgment in favor of Schroer on the sex stereotyping claim.

Recently, President Obama signed amendments to an executive order providing workplace protections to transgender federal employees. (Exec. Order No. 11,478, 3 C.F.R. 803 (1966-1970); Exec. Order No. 11,246, 3 C.F.R. 339 (1964-1965)). This was an extension of the 2009 workplace protections that were ordered for federal gay, lesbian and bisexuality workers. (Id.).

The need for employment laws to protect sexual orientation and identity is still great. Without the clarity of the law, the executive orders and sex and gender stereotyping theories are not clearly available for all workers and their advocates. The Employment Non-Discrimination Act provides federal clarity. Pennsylvania also needs to amend the Pennsylvania Human Relations Act to provide clear protections for sexual orientation and gender identity. The Pennsylvania Bar Association House of Delegates passed a resolution supporting these measures. (Adopted by the Pennsylvania House of Delegates June 22, 2007, http://www.pabar.org/public/committees/CIV01/resolutions/SB_761.pdf). The political climate seems to be changing, but not soon enough for some workers. If you are practicing in a municipality that has an anti-discrimination ordinance, there may be protections in that ordinance for sexual identity and expression. Equal protection under the law for the GLBT Community is but a promise if we do not protect economic security and autonomy.

Sharon R. López is the managing partner at Triqueta Law, a boutique Lancaster law firm dedicated to appellate, civil rights and employment law advocacy for workers. She also serves the Pennsylvania Human Relations Commission as special counsel.
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students. Even in conservative, “red state” Nebraska, the Lincoln Public Schools District responded to conservative media mischaracterization of its transgender-student policies. The District provides teacher training on gender inclusiveness and sensitivity to these young people and distributes informational materials as part of that training. The District noted it has a student body diverse in income levels and national origins and wants to increase its (already admirable) 87% graduation rate to 90%. (http://mediamatters.org/blog/2014/10/10/school-district-responds-to-fox-news-misinforma/201115; see also Danielle Weatherly, From Jack to Jill: Gender Expression as Protected Speech in the Modern Schoolhouse, Draft, University of Arkansas School of Law, Research Paper No. 14-24, http://ssrn.com/abstract=2481084, to be published in New York University Review of Law and Social Change.)

At present, the law in this commonwealth does not uniformly address transgender youth. Thirty-four Pennsylvania municipalities have laws protecting rights regarding sexual orientation; in May 2013, Philadelphia Mayor Michael Nutter signed laws including transgender status in antidiscrimination protections. However, while these various ordinances might include gender identity, they might not specifically address the needs of grade and high school students (http://www.padiversity.org/townlaws.html; see also Pennsylvania Student Equality Coalition, pennsec.org). School districts for Abington, Allentown, Pittsburgh and the State College area have policies regarding gender identity. In addition, the Pennsylvania School Boards Association (psba.org) model policies include sexual orientation but not gender identity. However, statewide legislation to include protections based on gender identity is in progress.

Senate Bill 300, introduced Aug. 12, 2013, by 26 sponsors, would amend the Pennsylvania Human Relations Act (43 P.S. §§951-963) to include “sexual orientation, [and] gender identity or expression” as protected from discrimination in employment, housing, and public accommodations. Under §2(cc) of SB300, “[t]he term ‘gender identity or expression’ means actual or perceived gender identity, appearance, behavior, expression or physical characteristics whether or not associated with an individual’s assigned sex at birth.” Students would benefit, as the Human Relations Commission would include gender identity and expression in educational programs “for the schools in this commonwealth,” “to further good will among all persons, without regard to…gender identity or expression…” SB300 was referred to the Senate State Government Committee on Aug. 12, 2013. Commenting on it during a Senate session, Senator Lawrence Farnese stated its intent to extend respect and dignity to all as basic human rights, so that it was not “a special law” for LGBT persons (http://www.legis.state.pa.us/WU01/LI/SJ/2013/0/Sj20130507.pdf?page=15). More recently, Senator Farnese noted that representatives of faith communities, small business and LGBT called for action on the bill (http://www.legis.state.pa.us/WU01/LI/SJ/2014/0/Sj20140617.pdf).

The Pennsylvania House is considering House Bill 300, which mirrors SB300. HB300 was introduced Aug. 8, 2013, by 90 sponsors, and has been referred to the House State Government Committee.

Transgender students in Pennsylvania will benefit from legislation contemplated by Representative Mark Cohen. In April 2014, he announced a planned four-bills package to address issues for LGBT persons; the fourth bill would amend the Public School Code to remove gender restrictions and prerequisites, and would be based on the California law discussed above (http://www.buzzfeed.com/tonymerveick/pennsylvania-lawmaker-to-introduce-package-of-sweeping-trans#2qo9pgk).

SB300 and HB300, and Representative Cohen’s proposal, would clarify the human issues and the legal framework for Pennsylvania’s school board members, administrators, teachers and other staff who are currently in legal uncertainty despite personal sympathy and good faith toward these students, as shown by recently publicized situations: the Johnstown student not allowed to run for homecoming king when his peers voted him to the homecoming court because his driver’s license listed him as female; and the Red Lion student who wanted to graduate in his male name, but the school stated his diploma was a legal document and so had to use his female birth name. SB300, HB300, and Representative Cohen’s efforts would thus ease the course not only for transgender students, but also for the education professionals whose vocation is their proper guidance and nurturing at this critical time in life.

Mária Zulick Nucci graduated from Temple University School of Law. She focuses on appellate litigation, aviation and animal law, and civil rights. She may be reached at MJNucci5@gmail.com; her LinkedIn profile is at http://www.linkedin.com/pub/maria-nucci/62/1b4/731/.
Developing the Legal Landscape of Transgender Healthcare

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In medical contexts, discrimination against trans people primarily occurs in two ways. First, trans individuals often face mistreatment and rejection at the hands of medical providers. Our clients at Mazzoni Center Legal Services frequently report having been refused medical care because they have disclosed their trans status. Second, many trans people face discrimination in form of lack of access to transition-related care. Very few insurance plans provide coverage for gender transition procedures, particularly sex reassignment surgery (SRS), despite the procedures’ medical necessity. While there have been advances in legal protections against both forms of discrimination recently, it will require continued work by advocates to ensure that necessary medical services are available to all members of the trans community.

The Patient Protection and Affordable Care Act (ACA) includes a non-discrimination provision that advocates see as a possible tool for equalizing access to healthcare. Section 1557 of the ACA prohibits discrimination on the basis of race, color, national origin, sex, age, or disability under “any health program or activity, any part of which is receiving Federal financial assistance … or under any program or activity that is administered by an Executive agency or any entity established under [Title I of ACA]…." HHS has issued guidance explaining that because this section includes “sex” as a protected characteristic, it provides protection against discrimination on the basis of gender identity, including transgender status. Therefore, the ACA protects trans people against being refused services or having medical issues unrelated to their gender treated differently because they are trans. The National Transgender Discrimination Survey Report on Health and Healthcare, released by the National Center for Transgender Equality and the National LGBTQ Task Force, found that 19% of trans respondents reported that they had been refused medical services because of their gender, and 28% had experienced harassment in medical settings. Under the ACA, this kind of patient rejection is now illegal. The natural extension of that anti-discrimination provision would be to ensure that medically necessary care would not be denied to trans people, including medically necessary gender transition care which for some people includes SRS. Neither HHS nor court decisions have formally addressed whether Section 1557 of the ACA does so, but there has been progress toward ensuring coverage under other laws.

The most significant of these changes had been the reconsideration of National Coverage Determination (NCD) 140.3, released May 20, 2014. National coverage determinations are the mechanism for deciding what diagnoses and procedures are covered by the federal Medicare program. NCD 140.3 explicitly addresses SRS. The previous determination on SRS was developed in 1981. At that time, HHS stated that transition-related SRS was still in an “unproven” and “experimental” stage. Putting aside the questionable veracity of that conclusion back in 1981, the research and treatment of countless individuals since then has provided information about the effects of SRS. The leading authorities across the medical community now agree that sex reassignment surgery is a safe and effective treatment for GD. In the recent updated determination, the Appellate Division of HHS concluded that SRS is now medically recognized as a legitimate and appropriate treatment for some people with GD. This determination makes it possible, on a case-by-case basis, for individuals to receive coverage for SRS under their Medicare health plans. As mentioned above, this is a vitally important shift in the availability of medical care for many members of the trans community. While previously there were virtually no insurance plans that covered SRS, now the single largest payer of healthcare costs in the country – Medicare – covers these procedures.

But even after such a sweeping victory, there is still work to be done, because there are still considerable hurdles to appropriate and available health care for trans people. Most states, including Pennsylvania, still have statutes or regulations that exclude transition care from all state-subsidized healthcare coverage. While several state insurance commissioners have released bulletins clarifying the need to provide trans-inclusive medical services to assure this change goes into effect promptly, but this has only occurred in states that have civil rights laws that are otherwise trans inclusive. In many places, like Pennsylvania, there are no explicit statutory protections in place and this may be the first step toward changing the availability of healthcare for trans people. The ACA and the Medicare determination provide a foundation for healthcare advocacy on behalf of trans people, but there is more work to be done. Advocates must now set about assuring that state and local laws are written and enforced that are consistent with the developing medical science and with federal law.

R. Barrett Marshall is a staff attorney at Mazzoni Center in Philadelphia, PA and provides direct legal services to lesbian, gay, bisexual and transgender (LGBT) community members. Barrett has developed specialties in issues related to transgender people, family law and health insurance matters.
Profile: John Schaffranek  
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Executive summary: John is a member of the PBA YLD and graduate of the PBA Bar Leadership Institute. He is an Ohio native and a graduate of Denison University (undergraduate) and University of Pittsburgh (law school). John is currently exploring starting his own law practice.

Profile: John was admitted to the Pennsylvania Supreme Court in 2012. He knew he wanted to be a lawyer since he was 14 years old. However, after finishing high school he took some time to assess his interest in the law and worked as a paralegal. His paralegal experience confirmed his career choice. He completed his undergraduate degree at Denison University and afterwards started law school at University of Pittsburgh.

He discovered his interest in domestic relations law early on. His experience in a family law clinic made him realize the impact a good lawyer can have on a client going through domestic struggles.

“One realized that when something goes well in their case it changes the client’s life for the better,” John explained.

This realization gives John a real sense of satisfaction about his work and career choice. Key to successful family law work is problem solving. Tony Lisska, Ph.D., a college philosophy professor at Denison University, served as a problem solving mentor. Dr. Lisska taught John that in order to solve problems you must be willing to entertain the possibility of the impossible.

John worked for a mid-sized law firm in western Pennsylvania during law school and immediately following graduation. John also litigated Open Record’s Appeals for the Pittsburgh Post-Gazette before the Pennsylvania Office of Open records and the Commonwealth Court. He had a unique opportunity to represent a newspaper as a client in First Amendment litigation involving the Pennsylvania Voter ID Act. One of the matters involved an appeal to the Third Circuit Court of Appeals and a petition for a writ of certiorari to the Supreme Court of the United States. “Not many attorneys have an opportunity to represent a client at the United States Supreme Court!” explained John.

As an openly gay lawyer, John has not made big pronouncements about his sexual orientation, rather he just engages with others as he normally would otherwise. For instance, when he worked for a firm he brought his partner to firm events that included partners. There was no fanfare or opposition.

John recognizes we lawyers are the medium for laypersons to understand the legal system. He also believes lawyers have a role to play in advocating equal rights for all including the GLBT community.

“The law is only words on a page unless and until you have a lawyer to advocate for you. Lawyers are responsible for achieving the policies set forth in the law,” John explained.

As a gay and out lawyer, John works to improve conditions for members of the GLBT community. “Being open and helping my GLBT community makes for better client relations.” Helping his community and career is one of the reasons why John joined the GLBT Rights Committee.

“I believe it is important to make wider contacts in the legal community and being part of group that encourages it, like the GLBT Rights Committee is a good way to do that,” says John. John looks forward to continuing his work at the PBA and putting his PBA Bar Leadership Institute experience to good use.

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on active duty, in reality very little has changed. Transgender men and women are still absolutely barred from joining all branches of the armed services. Additionally, until each branch of the military amends its own medical regulations, active duty transgender service members are stuck in a very precarious position.

As retired Army Maj. Gen. Gale S. Pollock, co-author of the Report of the Planning Commission on Transgender Military Service, points out, “The transgender ban is not a top priority for the military right now, as a conflict with the Islamic State rages in Iraq and budget cuts loom”. She suggests that, for now, she would advise transgender service members to “remain in the closet.”

Jane A. Allen is a sole practitioner in Tunkhannock, PA. Her practice is limited to Social Security Disability claims. Allen also served as Regional Director of the Northeast Regional Office of the Department of Community and Economic Development as well as Regional Director of the Governor’s Northeast Regional Office under former Governor Tom Ridge. She began her legal career as a Lieutenant in the United States Navy JAGC where she served as Federal Torts Claims Attorney and Department Head of Defense Counsel. Allen is currently the Vice Chair of the GLBT committee.
GLBT Rights Committee

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Committee History:
The Committee was formed in 2005. The Committee’s mission is to study matters pertaining to the recognition and protection of the legal rights of the gay, lesbian, bisexual and transgender (GLBT) community. The Committee monitors and makes recommendations on issues and developments in the law impacting GLBT people in the public and the legal profession.

Committee Membership:
The Committee is open to GLBT lawyers & allies. The Committee welcomes all members who are interested in promoting equal rights for the GLBT lawyers and the GLBT community at large.

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