



U.S. Department of Education
Office of Postsecondary Education
400 Maryland Avenue SW, 2nd Floor
Washington, DC 20202

Re: Docket ID ED-2022-OPE-0062

August 26, 2022

Youth Law Center, Bay Area Legal Aid, and the Legal Aid Foundation of Los Angeles are together writing to express serious concerns about the newly promulgated Prison Education Programs proposed regulations; specifically the removal of Pell eligibility for youth in juvenile justice facilities, the applicability of these rules to juvenile justice facilities, and the applicability of these rules to jails.

Youth Law Center is a national public interest law firm that advocates on behalf of children in the foster care and juvenile justice systems to ensure they have the supports and services they need to become healthy and productive adults. Since 2015, the Youth Law Center has been engaged in legislative and policy work to increase access to higher education programs for youth in the juvenile justice system. Since YLC began advocating in California, the number of higher education programs serving youth impacted by the juvenile justice system has increased exponentially, and the state has just allocated \$15 million in ongoing funding in its budget to further expand community college programs serving youth in the juvenile justice system. California has passed legislation mandating that juvenile facilities provide access to online, credit-bearing, and transferable postsecondary education courses for all high school graduates in juvenile facilities. YLC has also partnered with the California Student Aid Commission to publish a financial aid guide focused on ensuring that youth with juvenile justice experience are able to access the funds they need to attend and graduate from college.

Bay Area Legal Aid (BayLegal) is an anti-poverty civil law firm serving low-income residents in seven San Francisco Bay Area counties since the 1960's. BayLegal's mission is to provide meaningful access to the civil justice system through quality free legal assistance. BayLegal's Reentry Legal Services Program and Youth Justice Program serves youth and adults impacted by the juvenile and criminal justice systems. The majority of our clients have multiple civil legal issues stemming from contact with the justice system which impacts their access to employment, education, credit, housing, and other essential services. We help hundreds of youth and adults each year remove legal barriers to employment and education, which often includes criminal record remedies, credit repair, discharging student loan debt, court fines and fees, and school enrollment.

The Legal Aid Foundation of Los Angeles (LAFLA) is a nonprofit law firm that protects and advances the rights of the most underserved – seeking to level the playing field and working to ensure that everyone has access to the justice system. LAFLA works directly with individuals who are formerly incarcerated, including those with juvenile justice involvement, and is interested in ensuring that higher education remain accessible to all justice involved populations.

Our respective organizations have significant experience in higher education access for juvenile justice-impacted youth, and the re-entry of justice involved youth and adults into the community; given this experience, we are deeply concerned about the proposal to remove Pell eligibility from students in juvenile justice facilities and jails. **We ask that the Department of Education exclude juvenile justice facilities from these rules and clarify that students in jails who are *not* serving criminal sentences can continue to receive Pell Grants.**¹

Our comments will cover the following points:

- 1) Youth in juvenile justice facilities are not serving “criminal sentences,” and therefore it is inappropriate for the Department of Education (hereinafter “the Department”) to restrict Pell eligibility for this population.
- 2) People in pre-trial detention are not serving “criminal sentences,” and therefore it is inappropriate for the Department to restrict Pell eligibility for this population.
- 3) Even if the Department had the authority to restrict Pell eligibility for these populations, the proposed regulatory framework is not designed with the specific needs of students in juvenile justice and jail facilities in mind.
- 4) In their current form, these regulations will add to widespread confusion across the country about whether youth and adults who have had contact with the juvenile justice or criminal legal system can access federal financial aid at all.

I. Youth in juvenile justice facilities are not serving “criminal sentences,” and therefore it is inappropriate for the Department of Education to restrict Pell eligibility for this population.

It is well established law that juvenile proceedings are civil, and not criminal in nature.² Juvenile adjudications are not criminal convictions,³ and have not been treated as such under prior Department policy—for instance, the prior bar on Pell for drug convictions did not apply to juvenile adjudications for drug offenses.

¹ We note that the proposed rule itself does not actually state that students who are *not* serving criminal sentences must enroll in a Prison Education Program to access Pell, however it seems that discussions of the inclusion of jails in these regulations may have assumed that all students in jails were serving criminal sentences (see, Subcommittee Day 1 Session 1, “Right now, students are accessing Pell at local jails and juvenile justice facilities to enroll in any eligible program. And as a product of the changes to the ACA, these students would have to enroll in a prison education program as defined by our proposal”), and that this has resulted in confusion on the part of other policy actors in the space. The Center for American Progress’s brief on this issue, for instance, states that “Under the new regulations, however, all incarcerated people—including those in local and county jails—will have to enroll in a PEP to access Pell Grants.” <https://www.americanprogress.org/article/how-colleges-and-universities-can-bring-pell-grant-funded-programs-back-to-prisons/>.

² Application of Gault 387 U.S. 1 (1967); In re Winship 397 U.S. 358 (1970)

³ United States v. Doe, 53 F.3d 1081, 1083 (9th Cir. 1995) (“The Juvenile Act [18 USC sections 5031 - 5042] created a statutory enclave for juveniles accused of criminal misconduct. Among other things, the Act shields juveniles from the ordinary criminal justice system and gives them protective treatment not available to adults accused of the same crimes. A successful prosecution under the Act, for example, results in a civil adjudication of status, not a criminal conviction.”)

Under previous law, the Department clarified that students in juvenile justice facilities were eligible for Pell Grants because the bar on Pell applied only to those incarcerated in “Federal or State penal institutions.”⁴ The Department correctly acknowledged that juvenile justice facilities are not penal institutions, even if they are operated by the Federal or State government,⁵ and thus students in juvenile justice facilities were eligible to access Pell Grants.

Under the new law, this language is replaced by language stating that a person who is confined or incarcerated can access Pell only if they are enrolled in a Prison Education Program. The proposed definition of confined or incarcerated individual is “an individual who is serving a criminal sentence in a Federal, State, or local penal institution, prison, jail, reformatory, work farm, or other similar correctional institution.”⁶ Under this definition, students in juvenile justice facilities are still eligible to access Pell Grants, and the Department lacks the statutory authority to restrict access.

Youth in juvenile justice facilities awaiting adjudication are not “serving a criminal sentence,” as they have not yet been tried or otherwise resolved their pending case or cases. Once youth have been adjudicated and have received a disposition, which could include commitment to a facility, they are still not “serving a criminal sentence” because a juvenile adjudication is not a criminal conviction. The statutory language does not authorize the Department to restrict Pell grants for individuals who are *not* “serving a criminal sentence;” thus youth in juvenile facilities should be exempted from this proposed rule.⁷

Including youth in juvenile justice facilities as individuals serving “criminal sentences” is in opposition to well-established principles of statutory interpretation. In United States v. Gauld, the court, discussing the distinction between convictions and adjudications, writes “To read prior conviction as embracing juvenile-delinquency adjudications would require [d]rawing meaning from silence, which is particularly inappropriate where Congress has shown that it knows how to direct sentencing practices in express terms.”⁸

By analogy, the interpretation of the language “criminal sentence” to include youth committed to juvenile justice facilities pursuant to a juvenile adjudication requires drawing meaning from silence. If Congress had meant to include youth adjudicated delinquent and committed to juvenile justice facilities in the definition of “confined or incarcerated individuals”, it could have, but there is no reference in the statute to juvenile adjudications or to juvenile justice facilities. Thus, the application of these proposed rules to youth adjudicated delinquent in juvenile justice facilities is inappropriate.

⁴ 20 U.S.C. 1070a(b)(6)

⁵ <https://fsapartners.ed.gov/sites/default/files/attachments/dpclatters/GEN1421FAQAttachment.pdf>

⁶ 20 U.S.C.A. 1091(t)(1)(A) (not yet in effect).

⁷ We acknowledge that there may be limited circumstances in which a youth transferred to the adult justice system and convicted of a crime might continue to be housed in a juvenile justice facility for some period of time, and thus could be considered to be “serving a criminal sentence” in a juvenile justice facility. We note, however, that the language of the statute does not *require* people serving criminal sentences in juvenile justice facilities to enroll in a Prison Education Program, and that imposing a regulatory scheme only affecting this very small population of youth in facilities is likely, at minimum, to cause confusion.

⁸ United States v. Gauld, 865 F.3d 1030, 1034 (8th Cir. 2017).

II. People in pre-trial detention are not serving "criminal sentences"

The Department should clarify that people who have not been sentenced (both in juvenile and adult proceedings) are not covered by the statutory definition of confined or incarcerated individual. Representations made by the Department in the negotiated rulemaking hearings, as well as materials released by third parties summarizing the rule, indicate that there is confusion as to whether the definition would apply to all persons in jails; by plain language, it does not.

As noted in the previous section, the new statutory definition of confined or incarcerated individual is “an individual who is serving a criminal sentence in a Federal, State, or local penal institution, prison, jail, reformatory, work farm, or other similar correctional institution.” Black’s Law Dictionary defines a sentence as “The judgment that a court formally pronounces after finding a criminal defendant guilty.”⁹ People in jail awaiting trial¹⁰ have not yet been or may never be found guilty of a crime; they are thus not serving a criminal sentence and are excluded from the statutory definition of confined or incarcerated individual.

Conditioning the loss of a Pell Grant upon an arrest leading to detention in a jail, rather than a conviction, raises due process concerns. As a general matter, the Fifth Amendment of the U.S. Constitution states that no person shall be “deprived of life, liberty, or property without due process of law,” and numerous cases have been litigated regarding the federal government’s responsibility to provide due process when restricting or curtailing access to public benefits. The choice to include “criminal sentence” in the definition of a confined or incarcerated individual recognizes the Constitutional issues that might arise otherwise. This choice is consistent with the prior statutory restriction on Pell, which was limited to individuals in state and federal penal institutions, institutions they could not have been placed in without having been convicted of a crime and sentenced accordingly.

There are circumstances in which people serve criminal sentences in jails, and under the new statutory language, those people fall into the definition of a confined or incarcerated individual, and thus are covered by the Prison Education Program regulatory regime. These individuals, who are a minority of people in jails, should undoubtedly be allowed to access higher education; this will require programs that serve them to be approved as Prison Education Programs. However, for reasons outlined in the next section, we urge the Department to consider whether it is possible to create an alternative regulatory regime for jail programs, particularly those serving small numbers of students, so that these students are able to access higher education without programs having to engage in a significantly complicated regulatory process in order to make that access possible.

⁹ SENTENCE, Black’s Law Dictionary (11th ed. 2019)

¹⁰ The Prison Policy Institute’s report, Mass Incarceration: The Whole Pie 2022, states that on a given day, there are about 547,000 people in jails; 445,000 of those people are held in pre-trial detention. Note that the actual number of people who enter a jail for pre-trial detention in a year is much higher; there are 10.6 million jail admissions per year. <https://www.prisonpolicy.org/reports/pie2022.html#datasection>.

III. Even if the Department had the authority to restrict Pell eligibility for this population, the proposed regulatory framework is not designed with the specific needs of students in juvenile justice and jail facilities in mind.

A. Juvenile Facilities

The juvenile justice system, writ large, is fundamentally different from the adult prison system. The adult prison system is relatively centralized—facilities are operated by or contracted with the Federal Bureau of Prisons or a state department of corrections. Adult prison facilities are typically large, housing between a few hundred and few thousand people, with the majority of people serving sentences longer than five years.¹¹

While juvenile justice systems differ significantly from state to state, very few, if any, operate in a manner similar to federal or state prison systems. In some states, such as California, juvenile justice facilities are run by county probation departments, which operate both for short-term detention and long-term commitment. By July of 2023, there will be no more state-run juvenile justice facilities in California. In other states, such as Texas, local juvenile detention facilities are run by counties, and the state-run Department of Juvenile Justice operates state detention facilities. Vermont currently has no state-run juvenile detention facility at all, and youth adjudicated delinquent are placed in the custody of the Department of Children and Families, which oversees both the state’s child welfare and juvenile justice systems. While, again, there is significant variation between states, the overall trend is towards reducing use of the detention and length of stay for juveniles, and when necessary to detain youth, detaining youth close to home rather than in state facilities.¹²

As a general matter, juvenile justice facilities are small. In California, the 2021 average daily population in county juvenile facilities was 2032 total across all 58 counties, with multiple counties reporting average daily population numbers under 10 children.¹³ In Texas, the 2021 average daily population in pre-adjudication secure detention facilities was 1,089 in 45 facilities, and the average daily population in post-adjudication secure facilities was 631 over 32 facilities.¹⁴ Of the youth in those facilities, only a small number hold a high school diploma or equivalency. The age limit for youth in juvenile facilities ranges from state to state—on the upper end, California can, in limited circumstances, hold youth until age 25. More typically, Texas post-disposition juvenile facilities can detain youth until the age of 19. Youth in juvenile justice facilities are also typically there for relatively short periods of time - a few weeks to a few months - before being released to less restrictive settings, which in most cases is simply returning home.

¹¹ Federal Bureau of Prisons statistics note that 78% of people are sentenced for longer than five years. https://www.bop.gov/about/statistics/statistics_inmate_sentences.jsp.

¹² Jurisdictions as diverse as New York City, Texas, Ohio, Illinois, and Michigan have all invested in practices to promote placement closer to home, rather than in isolated facilities. https://www.njcn.org/uploads/digital-library/NCCD_Close-to-home_Place-youth-in-Communities_2014.pdf

¹³ <http://www.bscc.ca.gov/wp-content/uploads/JDPS-1Q2002-4Q2021Trends.pdf>

¹⁴ <https://www.tjjd.texas.gov/index.php/doc-library/send/334-state-of-juvenile-probation-activity/3201-the-state-of-juvenile-probation-activity-in-texas-2021>

It is our understanding that the Department's proposed regulations are meant to protect students from predatory actors who may attempt to profit off of students' Pell funds while providing substandard education and/or degrees that do not lead to employment. This is a goal that, as advocates for young people, we share. But, in the context of juvenile facilities, the number of eligible students and the average length of stay in facilities may point to a different balance of risks and flexibilities than in the adult prison system.

First, in juvenile facilities, the challenge that is often faced is not that there are many providers agitating to profit from incarcerated students, but rather that providers have difficulty justifying the cost of building out college programming for a group as small as half a dozen students. In order to encourage more college providers to enter this space, California has recently created a dedicated funding stream for community colleges seeking to serve students in the juvenile justice system, both in facilities and on their campuses. California also requires that students in juvenile facilities have access to online, transfer-level public college courses, a model that we hope to see expand to other states.

Second, due to the fact that most students in juvenile facilities will return to their homes and communities in a relatively short period of time, and that many are detained close to their home community, program models that make sense in prison (and the attendant risks), such as building out an entire associates' or bachelors' program that can be completed during a person's period of incarceration, do not make sense for the vast majority of students in juvenile facilities. In California, the higher education model that allows providers to reach the most students is *not* to build a full college program that operates in isolation in a facility, but rather to engage students in coursework offered by a local community college, either through dual enrollment or as a first time college student, that can be completed in a shorter period of time and/or be continued on campus upon a student's release to the community.

We cannot state with confidence what the effect of these regulations would be on colleges seeking to work with small groups of students in person or online, or on local colleges wishing to collaborate with local juvenile justice facilities to create supported re-entry pathways, but we do have some questions and concerns about the potential downstream effects. The Department has had ample opportunity to learn about how higher education programs operate in prisons due to the Second Chance Pell pilot program, but has not, to our knowledge, engaged in similar research or relationship building with higher education programs working in juvenile justice facilities. We ask that the Department wait to regulate juvenile justice facilities until it has had a chance to examine the concerns we raise below:

1. Whether the regulatory burden upon colleges wishing to start prison education programs in juvenile facilities might deter colleges from serving students, given the small number of students in such facilities.
2. Whether the regulatory burden might result in favoring higher education institutions dedicated specifically to providing Prison Education Programs in many locations over local institutions that wish to serve only their local juvenile facility.
3. Whether local probation departments, courts, or other county agencies that oversee juvenile detention facilities would have the capacity to operate as an oversight entity, again, given the small number of students in juvenile justice facilities.

4. Whether the regulation might result in higher education programming only being available in a small number of large, more-prison-like juvenile facilities, thus incentivizing placement in such settings over smaller, therapeutic facilities, and/or disincentivizing the development of innovative higher education models, such as supported access to online classes at a local college or step-down programs in which youth reside in a detention facility but are able to attend college classes on a campus.

B. Jails

Jails range greatly in size, purpose, and population depending on the jurisdiction in which they are located; some counties may operate jail facilities specifically for long-term incarceration as well as court holding and/or temporary holding facilities. While many people who are booked into jails are there for relatively short periods, some may remain incarcerated pre-trial or pre-sentencing for months or even years. As stated previously, there are also instances in which people serve criminal sentences in jails—usually these sentences are a year or less.¹⁵ However, the majority of people in jails are awaiting trial, have not been convicted of any crime, and are not serving a criminal sentence.¹⁶ Typically, jails are operated by a local authority such as the sheriff, police chief, or county administrator.

Given the vast diversity in jail environments, it is difficult for us to state with confidence what the impact of these regulations on students in jails and the colleges that wish to serve them; some programs, particularly those working in jails that are large and have students who are incarcerated for longer periods, may find the Prison Education Program regulations to be appropriately calculated to their circumstances. Other programs could find the regulations to be a barrier to operation. Individual students could find themselves subjected to additional bureaucratic barriers to reintegrating into their communities, particularly if the Department were to apply these regulations to students in pre-trial detention.

We share the Department's goal of ensuring that students are not preyed upon by institutions offering substandard programming, but are unsure whether these regulations appropriately balance protection against that risk with the promotion of wide access to college programming across different settings. We ask that the Department engage with more higher education programs serving jails prior to issuing comprehensive regulations on jail programs, with attention to the concerns raised below:

1. Whether the regulatory burden upon colleges wishing to start prison education programs in jail facilities might deter colleges from serving students, particularly those in smaller settings, or in facilities with a very small number of students who are incarcerated for longer periods of time who might otherwise choose to participate in online or distance education courses. Students who are incarcerated for lengthy periods pre-trial or pre-sentencing would be most negatively affected

¹⁵ <https://bjs.ojp.gov/topics/corrections/correctional-institutions#v0csqe>

¹⁶ The American Bar Association notes that the interaction of the bail system and pretrial detention results in wealth-based incarceration and the criminalization of poverty. https://www.americanbar.org/groups/crsj/publications/human_rights_magazine_home/economic-justice/criminal-justice-debt-problems/.

by a lack of programming, particularly as completion of programming pre-sentencing can serve as a mitigating factor in reducing a person's overall sentence.

2. Whether the regulatory burden might result in favoring higher education institutions dedicated specifically to providing Prison Education Programs in many locations over local institutions that wish to serve only their local jail.
3. Whether local sheriffs, police chiefs, or other county agencies that oversee and administer jail facilities would have the capacity to operate as an oversight entity in the manner described in the regulation, particularly in small jurisdictions.
4. Whether these regulations would promote or disincentivize higher education models focused on promoting greater connection to community, which may be more feasible to create in local detention settings, rather than models focused on building colleges inside an isolated carceral setting.
5. If the Department were to apply these regulations to students in pre-trial detention, we have the following questions and concerns related to students already attending a college program and receiving a Pell grant at the time of their detention (some of which also apply, though to a lesser degree, to students serving criminal sentences in jails). Note that incarceration in jail, even for relatively short periods, is already a disruptive experience that can lead to job loss, and loss of health insurance and other benefits.
 - a. At what point would a student arrested and held in a jail lose their Pell Grant unless they transferred to a Prison Education Program?
 - b. What responsibility would a student have to notify their existing institution of attendance of an arrest, given privacy concerns and also lack of access to normal modes of communication, such as phones and email?
 - c. What process would students who lost their Pell Grant while in pre-trial detention have to go through in order to get reinstated? Would a student have to pay back the portion of their Pell Grant disbursement covering the time that they were in detention, even if they were able to make satisfactory academic progress in their program despite the disruption? Even if they never ultimately served a criminal sentence related to their detention?¹⁷
 - d. How would this impact the ability of students to fill out the FAFSA during the re-entry process?

IV. These regulations will add to widespread confusion about whether youth and adults who have had contact with the juvenile justice or criminal legal system can access financial aid at all.

There is currently widespread confusion about whether students who have had contact with the juvenile justice or criminal legal system can access financial aid among state policymakers, judges, attorneys, probation departments, financial aid administrators and other stakeholders. The myth that contact with these systems prevents students from accessing higher education support is persistent, reinforced by simple Google searches populated by misleading quotes or dubious sources of information, as well as reputable entities that are simply mistaken about the law. This misinformation harms students who want

¹⁷The prospect of creating new financial consequences for incarceration is concerning, given the already significant financial barriers people face when reentering society after a period of incarceration.
<https://www.brennancenter.org/sites/default/files/legacy/Fees%20and%20Fines%20FINAL.pdf>

the benefit of postsecondary education and training and the institutions that are committed to serving them.

For instance, while a Google search for “juvenile detention financial aid” does pull up information from studentaid.gov, the top quote for the question “Can you apply for fafsa while incarcerated?” (sic) says “While you're confined in an adult correctional facility or juvenile justice facility, your eligibility for federal student aid is very limited: Federal Student Loans—**You're not eligible to receive federal student loans while confined in an adult correctional facility or a juvenile justice facility.**” (formatting in context).

The next recommended question by Google, “What disqualifies you from getting Fafsa?” (sic) cites CollegeRaptor.com, which says (incorrectly) “**Incarceration, misdemeanors, arrests, and more serious crimes** can all affect a student's aid. Smaller offenses won't necessarily cut off a student from all aid, but it will limit the programs they qualify for as well as the amount of aid they could receive. Larger offenses can disqualify a student entirely.” (formatting in context).¹⁸

Other top Google results for questions related to incarceration, convictions, and financial aid eligibility turn up answers like “If you’re a student with criminal convictions, the government will most likely limit your FAFSA eligibility, but don’t panic. Instead, study up on your status and work with a lawyer or a financial aid office to see what financial aid options you have”¹⁹ or “If your child is sent to a state institution, they will not receive federal student loans or Pell Grants.”²⁰

While these results largely originate from small law firm websites, more knowledgeable actors in the juvenile justice and criminal legal sphere are not immune from misinformation. For instance, the School Justice Partnership National Resource Center, a project of the National Council of Juvenile and Family Court Judges, states on their website that difficulty getting financial aid is a collateral consequence of juvenile adjudication.²¹

While we do not claim that there are *no* instances in specific states or at specific schools where juvenile justice or criminal legal involvement may impact eligibility for financial aid, we note that the overall messaging is vague and overbroad, leading readers to believe that financial aid for anyone who has an adjudication or conviction is inaccessible outside of limited exceptions, when the opposite is actually true.

In the juvenile justice context, YLC has finally been able to start combating that message – Youth Law Center’s juvenile justice financial aid guide, released in partnership with the California Student Aid Commission, clearly and repeatedly states that youth who have had contact with the juvenile justice system are generally eligible to receive state and federal financial aid.²² This has led to students newly accessing the benefits of postsecondary education and training and the opportunities for their futures that

¹⁸ See image at end of document.

¹⁹ <https://www.davidtarrlaw.com/fafsa-with-felony/>

²⁰ <https://www.lukiclaw.com/blog/2022/01/will-my-child-get-financial-aid-after-a-juvenile-conviction/>

²¹ <https://schooljusticepartnership.org/cc#:~:text=Additional%20collateral%20consequences%20of%20juvenile,aid%20for%20higher%20education%2C%20financial.>

²² The guide was released in 2020 and is available here: <https://ylcorg.stage.site/resource/financial-aid-for-jj-youth/>



flow from these programs. It has also led to an increased commitment from higher education institutions to outreach and support these students as valued members of their student body. And in the adult context, the incredible excitement about the reinstatement of Pell for people incarcerated in prisons and the removal of the confusing drug conviction bar is beginning to break down myths about financial aid for formerly incarcerated people.

Instituting a rule barring youth in juvenile facilities from Pell eligibility unless they are in a Prison Education Program will stymie that progress, as would instituting a rule stripping Pell eligibility from people (children and adults) detained following an arrest. People already believe that juvenile and criminal legal system contact make it impossible to go to college; the Department should not add fuel to that fire, particularly when it is not statutorily mandated to place restrictions on access to financial aid for this population.

Thank you for the opportunity to provide comment. If you have questions about our comments, please reach out to Jasmine Miller at jmiller@ylc.org or Linnea Forsythe LForsythe@baylegal.org

Sincerely,

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juvenile detention financial aid



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Federal Pell Grant Eligibility for Students in Juvenile Justice ...

While these Q&As were drafted to provide general guidance on the eligibility of incarcerated students to receive Federal student aid, they are not intended to.

6 pages

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