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"Mommy, What's an Exculpatory Contract?": Parental Liability Releases in New Hampshire

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Until the late twentieth century, New Hampshire law did not recognize the viability of liability releases which purported to prospectively waive liability for negligence (also known as "exculpatory contracts").[1] Even after many other states began enforcing liability releases, New Hampshire continued to follow what it termed the "minority rule."[2] Over the past half century, however, the New Hampshire Supreme Court has slowly retreated from its traditional stance on liability releases. Increasingly, it enforces them.

A. **State of Liability Release Law in NH**

While ostensibly "generally prohibited" in New Hampshire,[3] prospective waivers of negligence *will* be enforced if: "(1) they do not violate public policy; (2) the plaintiff understood the import of the agreement or a reasonable person in his position would have understood the import of the agreement; and (3) the plaintiff's claims were within the contemplation of the parties when they executed the contract."[4] This three-part test was first outlined in the *Barnes v. New Hampshire Karting Association* case in 1986.[5] The burden of proof is on the defendant to demonstrate that a liability release is enforceable.[6]

Prongs two and three of the *Barnes* test concern the release language itself and whether it clearly and unambiguously (a) waives liability for negligence, and (b) encompasses the factual circumstances of the injury.[7] A discussion of those two factors is beyond the scope of this article.[8]

Returning to the first prong of the *Barnes* test, enforcement of a liability release is contrary to public policy if it is "injurious to the interests of the public . . . or tends to interfere with the public welfare or safety."[9] For example, enforcement of a release may contravene public policy if there is a special relationship or disparity of bargaining power between the parties.[10] Public policy "review is limited to the confines of positive law, rather than general considerations of supposed public interests."[11]

As the Court first announced in *Barnes*, "recreational" activities (such as go-karting) do not implicate public policy concerns because they are not "of great importance to the public."[12] Most liability releases arise in the context of recreational activities. Thus, while the Court continues to say that exculpatory contracts are "generally prohibit[ed],"[13] it has effectively endorsed their use excepting a few specific circumstances.

B. **Parental Liability Releases**

One question the New Hampshire Supreme Court has not considered is the effectiveness of pre-injury liability releases against minor children. As a preliminary matter, it is clear that an exculpatory contract actually signed by the minor himself could not be enforced.[14] For that reason, it is now common practice for businesses to have a child's *parent* sign a liability release ("parental release"), which purports to release their child's potential claims.[15]

1. **The Majority View**

Around the country, "a clear majority of courts treating the issue have held that a parent may not release a minor's prospective claim for negligence."[16] By the author's count, courts in at least sixteen states have found parental releases unenforceable. Three other states do not allow pre-injury liability releases under any circumstances.

The majority-view courts invalidating parental releases note the "well-established public policy that children must be accorded a measure of protection against improvident decisions of their parents."[17] It would be unfair, courts conclude, to allow a parent to waive their child's claims for negligence, when some of those same parents might "be unwilling or unable to provide for" that child if seriously injured.[18] If a parental waiver is enforced and the parents have no medical insurance, an injured child might not receive necessary medical treatment and could become permanently impaired.[19]

In that vein, the majority jurisdictions sometimes invoke the doctrine of *parens patriae*, referring to the "state in its capacity as provider of protection to those unable to care for themselves."[20] This doctrine gives courts broad common law authority to act in the best interests of children within the state.[21]

In addition to *parens patriae*, majority-view courts

have almost uniformly pointed to statutory or common law rules which hold that *post*-injury settlement releases are not effective sans court approval. Surely, say those courts, the same protective public policy should apply for *pre*-injury releases.[22] As one court explained:

> Since a parent generally may not release a child's cause of action after injury, it makes little, if any, sense to conclude a parent has the authority to release a child's cause of action prior to an injury.[23]

Indeed, courts have noted that "if anything, the policies relating to restrictions on a parent's right to compromise an existing [i.e., post-injury] claim apply with even greater force in the pre-injury, exculpatory clause scenario."[24] This is because post-injury settlements involve "actual negotiations concerning ascertained rights and liabilities," whereas exculpatory contracts are "routinely imposed in a unilateral manner with any genuine bargaining."[25]

2. **The Minority View**

On the other hand, a not-insignificant minority of jurisdictions enforce liability releases of this kind, including Massachusetts, California, and Ohio.[26] Additionally, at least four states have passed legislation allowing parental releases in some situations.[27] The minority of courts enforcing parental releases have pointed to the constitutional right of parents to make decisions concerning the care, custody, and upbringing of their children.[28] That constitutional right allows parents to decide what school the child will attend, what medical care the child will receive, and how to discipline the child.[29] The minority jurisdictions conclude that executing a parental liability release is just another important life decision within the constitutional province of a parent.[30]

Additionally, those courts posit that enforcing parental releases actually supports public policy in various ways. For one, the presence of a release may encourage parents to participate actively in events and oversee them to ensure quality and safety.[31] And the organizations themselves – in particular, not-for-profits like Little League and Boy Scouts – can conduct events without fear of financially crippling lawsuits.[32]

In fact, almost all published decisions enforcing such releases involve non-profit and government defendants.[33] Courts have recognized that "community-run and school-sponsored type activities involve different policy considerations than those associated with commercial activities."[34] Many non-profit organizations cannot afford to carry liability insurance,[35] but provide a great benefit to the public, particularly children.[36] Thus, in the context of non-profit activities, some courts have decided that the scales of public policy tip towards enforcing liability releases.[37]

3. **New Hampshire Law**

Although the New Hampshire Supreme Court has yet to consider pre-injury parental waivers, at least three trial courts have decided the issue while applying New Hampshire law.

The first was the United States District Court for the District of New Hampshire in 1997. A minor, through his parent as next friend, brought an action for negligence (among other things) against a defendant business.[38] Prior to the injury, the mother had signed a document purporting to release the defendant from liability for negligent acts by its agent.[39] The business moved for summary judgment against the minor on the basis of the release.[40]

The District Court (Barbadoro, J.) concluded that the liability waiver could not be enforced against the child. In doing so, Judge Barbadoro relied on the 1932 N.H. Supreme Court case of *Roberts v. Hillsborough Mills*.[41] In *Roberts*, a minor was involved in a workplace injury. Under the workers' compensation statute of that time, an injured worker could elect to receive benefits under the statute, or he could choose to pursue a claim for negligence.[42] The plaintiff's mother, purportedly as mother and best friend of plaintiff, entered into an

agreement with the defendant to receive payments per the statute.[43] The minor plaintiff did in fact receive payments from the defendant for several months.[44] The minor then instituted a personal injury lawsuit through his father as next friend.

The question before the *Roberts* Court was whether the mother's settlement agreement was binding on the child. The Court stated: "Ordinarily there are only two recognized ways in which a minor may take binding action in the enforcement or discharge of his legal rights, namely, through a duly appointed guardian acting within his powers, or through his next friend by proceedings in court."[45] Since the court had not authorized the mother to act, she had no authority to legally bind her son.[46] The Supreme Court found that, by instituting valid litigation, the minor disavowed the prior agreement made by his mother.[47]

In light of the *Roberts* precedent, Judge Barbadoro concluded that, since parents have no common law authority to release a child's cause of action *after* an injury, "it makes little sense to conclude that the parents should have that authority *before* the injury occurs."[48] The federal court also noted that most other jurisdictions had found such pre-injury releases unenforceable.[49]

Seventeen years later, the District Court for the District of Massachusetts considered the issue while sitting in diversity jurisdiction and applying New Hampshire law.[50] In that case, a minor was injured on a motorcross track owned and operated by a for-profit corporation based in Epping, New Hampshire. The defendant moved for summary judgment on the basis of a liability release signed by the minor's parents.[51]

The court began its analysis by recognizing New Hampshire's general policy of prohibiting exculpatory contracts.[52] It also noted that parental releases had been rejected by a majority of courts across the country.[53] The federal court identified *parens patriae* as the doctrine underlying many of the majority-view decisions.[54] The court noted that *parens patriae* was at the core of the many state statutes prohibiting parents from releasing a child's claim post-injury without court approval.[55]

With those principles in mind, the federal judge concluded that parental releases violated New Hampshire public policy and were unenforceable.[56] The New Hampshire Supreme Court has long affirmed the viability of the *parens patriae* doctrine.[57] In fact, as the federal court noted, our Supreme Court has held that parental rights "are not absolute, but are subordinate to the State's *parens patriae* power, and must yield to the welfare of the child."[58] New Hampshire also has a statute requiring court approval for post-injury settlements.[59]

Based on those considerations, the district court determined that New Hampshire had a strong public policy favoring the welfare of children. When that public policy was combined with the state's mistrust of

liability releases in general, the federal court declined to enforce the parental liability release.[60]

The most recent case, *Perry v. SNH Development, Inc.*, is a 2017 decision from the Hillsborough County Superior Court – South (Temple, J.).[61] The case involved a young girl who fell from a ski lift at Crotched Mountain, allegedly due to the negligence (and statutory violations) of ski area employees.[62] Prior to the injury, the girl's mother had signed a liability release purporting to release the mountain from liability for any negligence.[63]

Judge Temple noted the majority view that parental releases violated public policy.[64] However, he did not reach a decision on the basis of public policy. Citing the *Roberts v. Hillsborough Mills* case discussed above, the court found that absent court proceedings, a parent lacks legal authority to waive a child's rights.[65] That includes a prospective waiver of a cause of action.[66] The Superior Court in *Perry* thus decided the issue purely as a matter of agency law: under New Hampshire common law parents simply "lack the authority to waive [a minor's] prospective negligence claims."[67] Interestingly, however, the court did note that, if pressed to decide the issue on public policy grounds, it would be inclined to join the majority rule jurisdictions.[68]

C. **Future Outlook**

The above cases demonstrate a relative consensus among trial courts considering parental releases under New Hampshire law. However, the reasoning employed by the three courts was not uniform. As discussed above, the Superior Court in *Perry* relied exclusively on principles of agency espoused in the *Roberts* decision of the early twentieth century. The Massachusetts court in *Harrigan*, on the other hand, invalidated the release on public policy grounds and the *parens patriae* doctrine. The *McKenna* decision was somewhere in between: the federal court pointed to both public policy considerations and to the *Roberts* decision as support for its conclusion that parental releases were unenforceable.

The agency theory relied on by the Superior Court in *Perry* is in some ways the "cleaner" solution. It is a black and white rule based on common law principles; it is simple to apply. And *Roberts* is indeed definitive: as a rule, parents are unable to make binding legal actions on their child's behalf.[69] But, it is fair to wonder whether the New Hampshire Supreme Court would feel bound by the *Roberts* decision today. At the time *Roberts* was decided, New Hampshire still prohibited exculpatory contracts altogether.[70] Obviously, our Supreme Court has strayed far from that position.[71]

The Court might worry about the real-life ramifications from a blanket "no parental agency" rule. Such a rule would not allow the Court to distinguish between parental releases for non-profits versus commercial businesses. Either all parental releases would be enforceable, or all would be *un*enforceable. Absent legislative intervention, the same rule would apply to ski resorts as would apply to middle school field trips (though that's not to say that a court *should* enforce exculpatory contracts when the defendant is a non-profit or governmental entity: several courts have rejected that notion also).[72]

More problematically, adherence to the agency rule could create complications in other contexts. For example, would a parental consent to a medical procedure be unenforceable?[73] What about when a parent grants subrogation rights to a health insurer for a child's future tort claims? A blanket rule of unenforceability might be considered impractical by some courts.[74] A court would have more flexibility if it applied a public policy analysis.[75]

Invalidating parental releases based on public policy would also be consistent with existing New Hampshire exculpatory contract law. As noted above, a liability release contravenes public policy when there is a "disparity in bargaining power" between the contracting parties.[76] As other courts have pointed out, when an adult signs a liability waiver, that person is putting their own rights at risk.[77] They are presumably aware of the potential dangers in an activity and make an informed decision to sign the release anyway. If an adult feels like the activity is dangerous or being run negligently, they can choose to withdraw from the endeavor. A child typically does not have that option: the child may be incapable of appreciating a risk or may have no choice but to participate. The child may not even be able to read the release which purports to waive her rights.[78]

In the end, the determinative factor may be New Hampshire's overall disfavor for liability releases of any kind.[79] New Hampshire has long recognized the general principle that entities should be responsible for their negligent conduct.[80] Based on freedom of contract principles, courts have begrudgingly allowed adults to sign away their own rights in liability releases.[81] But allowing a third party – even a parent – to sign away the rights of an innocent child is a bridge too far. New Hampshire public policy discourages it, and the state's common law does not allow it.

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ENDNOTES

1. Richard J. Lehmann, *Welcome, Come on In. But Don't Expect Me to Act Reasonably*: *Exculpatory Contracts Provisions After McGrath v. SNH Development*, 32 N.H. Trial Bar News 35, 35 (Winter 2010).
2. *Id.*
3. *Barnes v. New Hampshire Karting Ass'n*, 128 N.H. 102, 106 (1986).
4. *McGrath v. SNH Dev., Inc.*, 158 N.H. 540, 542 (2009).
5. *Barnes*, 128 N.H. at 106-08.
6. *Jenks v. N.H. Motor Speedway, Inc.*, 2010 U.S. Dist. LEXIS 19668, at *12 (D.N.H. Mar. 3, 2010). It is important to remember that exculpatory contracts are just that: *contracts*. So, although the New Hampshire Supreme Court has articulated the specific three-part test described above, that test really just restates general principles of contract law -- with an added gloss of skepticism and disfavor. *See McGrath*, 158 N.H. at 543 (citing general contract rule regarding public policy found in *Harper v. Healthsource New Hampshire*, 140 N.H. 770, 775 (1996)). Like any contract, liability releases require offer, acceptance, and consideration. *Hall v. Perry*, 211 P.3d 489, 493 (Wyo. 2009). Likewise, typical contract defenses such as fraud, duress, and mistake are defenses to the enforcement of liability releases, even though the *Barnes*/*McGrath* test does not specifically address those situations. *See Lizzol v. Bros. Prop. Mgmt. Corp.*, 2016 U.S. Dist. LEXIS 150427, at *24 (D. N.H. Oct. 31, 2016).

   Lower courts in New Hampshire sometimes interpret the *Barnes* factors as the *only* three prerequisites to an enforceable exculpatory contract. *See, e.g.*, *Miller v. Sunapee Difference, LLC*, 308 F.Supp. 3d 581, 594 (D. N.H. 2018) (stating that "a 'meeting of the minds' is not an explicit requirement of [liability release] enforceability under New Hampshire law."). But this misguided position has the effect of *lessening* scrutiny of liability releases compared to standard contracts, when in fact the opposite should be true.
7. *See McGrath*, 158 N.H. at 542.
8. New Hampshire jurisprudence on these latter prongs has been somewhat inconsistent. *Compare Wright v. Loon Mountain Recreation Corp.*, 140 N.H. 166, 169-70 (1999) (interpreting "catch-all" release language strictly), *with McGrath*, 158 N.H. at 545-46 (broadly). Although described as two separate factors, courts have tended to combine the two prongs into a single analysis. *See, e.g.*, *McGrath*, 158 N.H. at 545-46; *Camire v. Gunstock Area Comm'n*, 2013 N.H. Super. LEXIS 30, at *5 (N.H. Super. Mar. 22, 2013), *aff'd on other grounds,* 166 N.H. 374 (2014).
9. *McGrath*, 158 N.H. at 543 (citing *Harper v. Healthsource New Hampshire*, 140 N.H. 770, 775 (1996)).
10. *Id.* (citing *Barnes*, 128 N.H. at 106). The New Hampshire Supreme Court has specifically named common carriers, innkeepers, landlords, and public utilities as entities which cannot form enforceable exculpatory contracts. *Barnes*, 128 N.H. at 106; *Tanguay v. Marston*, 127 N.H. 572, 577 (1986) (landlord-tenant).
11. *Appeal of Town of Pelham*, 154 N.H. 125, 130 (2006). The public policy "may be statutory or nonstatutory in origin." *Harper*, 140 N.H. at 775.
12. *Barnes*, 128 N.H. at 106.
13. *McGrath*, 158 N.H. at 542; Lehmann, *supra* note 1.
14. *Porter v. Wilson*, 106 N.H. 270, 271 (1965) ("The right of a minor to disaffirm his contract . . . is well recognized in this jurisdiction."); *Hamblett v. Hamblett*, 6 N.H. 333, 349 (1833) ("The contract of a minor may not bind him . . . .").
15. Allison M. Foley, *We, the Parents and Participant, Promise Not to Sue … Until There is an Accident. The Ability of High School Students and their Parents to Waive Liability for Participation in School-Sponsored Athletics*, 37 Suffolk U. L. Rev. 439, 440 (2004).
16. *Penunuri v. Sundance Partners, LTD*, 301 P.3d 984, 992 (Utah 2013); *see Blackwell ex rel. Blackwell v. Sky High Sports Nashville Operations, LLC*, 523 S.W.3d 624, 644-45 (Tenn. Ct. App. 2017) (surveying cases).
17. *Galloway v. State*, 790 N.W.2d 252, 257 (Iowa 2010).
18. *Meyer by Meyer v. Naperville Manner*, 634 N.E.2d 411, 414 (Ill. App. Ct. 1994).
19. Megan Bittakis, *Walking Away From Omelas: Why Parental Preinjury Releases for Children Engaging in Commercial Recreational Activities Should Be Unenforceable*, 21 Kan. J.L. & Pub. Pol'y 254, 275 (Spring 2012).
20. *Hojnowski v. Vans Skate Park*, 901 A.2d 381, 387(N.J. 2006); Black's Law Dictionary 1221 (9th ed. 2009).
21. *See Finlay v. Finlay*, 148 N.E. 624, 626 (N.Y. 1925).
22. *Wethington v. Swainson*, 155 F. Supp. 3d 1173, 1179 (W.D. Okla. 2015). Most states have statutes or court rules requiring court approval of settlements involving minors. *See, e.g.*, RSA 464-A:42.
23. *Scott v. Pac. W. Mt. Resort*, 834 P.2d 6, 11-12 (Wash. 1992); *see also Applegate v. Cable Water Ski, LLC,* 974 So. 2d 1112, 1114 (Fla. Dist. Ct. App. 2008) ("By requiring judicial approval of settlements over $15,000, the legislature has manifested a policy of protecting children from parental imprudence in the compromise of their claims for injury.").
24. *Hawkins v. Peart*, 37 P.3d 1062, 1065 (Utah 2001).
25. *Id.*
26. Stephanie Ross, *Interscholastic Sports: Why Exculpatory Agreements Signed by Parents Should Be Upheld*, Comment, 76 Temp. L. Rev. 619, 626-29 (2003).
27. The fact that legislatures, not courts, have acted to allow parental releases "suggests that changing this default rule should be a legislative choice," not achieved by judicial decision. *J.T. ex rel. Thode v. Monster Mountain, LLC*, 754 F. Supp. 2d 1323, 1327 n.2 (M.D. Ala. 2010).
28. *See, e.g.*, *Sharon v. City of Newton*, 769 N.E.2d 738, 746 (Mass. 2002); *see also Troxel v. Granville*, 530 U.S. 57, 66 (2000).
29. *Zivich v. Mentor Soccer Club*, 696 N.E.2d 201, 206 (Ohio 1998).
30. *Id.* at 206.
31. *Id.* at 205.
32. *Hohe v. San Diego Unified Sch. Dist.*, 274 Cal. Rptr. 647, 649 (Cal. Ct. App. 1990).
33. *See Hojnowski*, 901 A.2d at 389 (collecting cases); *but see BJ's Wholesale Club, Inc. v. Rosen*, 80 A.3d 345 (Md. 2013). However, the decision in *BJ's Wholesale Club* emphasized the fact that Maryland law explicitly allows parents to settle their child's claim without court approval. *Id.* at 356.
34. *Kirton v. Fields*, 997 So.2d 349, 357 (Fla. 2008).
35. *Id.*
36. Bittakis, *supra* note 19, at 266 (citing *Zivich*, 696 N.E.2d at 205).
37. *Id.* at 266-68.
38. *McKenna, et al. v. American Institute for Foreign Study Scholarship Foundation*, slip op. CV-94-671-B (D.N.H. Sept. 12, 1997). This order is not indexed on the major legal databases, but it is available on the federal court's website at http://www.nhd.uscourts.gov/sites/default/files/Opinions/97/97PB039.pdf.
39. *Id.* at *6.
40. *Id.*
41. 85 N.H. 517 (1932).
42. *Id.* at 518.
43. *Id.* at 517.
44. *Id.*
45. *Id.* at 519
46. *Id.*
47. *Id.*
48. *McKenna*, at *8 (emphasis added) (citing *Scott*, 834 P.2d at 11-12).
49. *Id.* at *9.
50. *Harrigan v. New England Dragway, Inc.*, 2014 U.S. LEXIS 194576 (D. Mass. 2014).
51. *Id.* at *10. Interestingly, the minor plaintiff himself had signed a separate liability release (in addition to the parental release signed his father). The federal court quickly disposed of that issue, ruling that by filing suit the minor had disaffirmed any purported exculpatory contract signed personally. *Id.* (citing *Stack v. Cavanaugh*, 67 N.H. 149 (1891)).
52. *Id.*
53. *Id.* at *10-11.
54. *Id.* at *13.
55. *Id.*
56. *Id.* at *14.
57. *See State v. Richardson*, 40 N.H. 272, 273 (1860) (describing power of "Parens Patrioe"); *Dow v. Jewell*, 21 N.H. 470, 487 (1850); *see also See In re Baby K.*, 143 N.H. 201, 206 (1998).
58. *Harrigan*, 2014 U.S. LEXIS 194576 at *14 (citing *In the Matter of Nelson & Nelson*, 149 N.H. 545, 548 (2003)).
59. *Id.* (citing RSA 464-A:42).
60. *Id.*at *15.
61. 2017 N.H. Super. LEXIS 32 (2017). The *Perry* case was litigated by the author and his colleague Jack White, Esq..
62. *Id.* at *3-4.
63. *Id.* at *2.
64. *Id.* at *13 n.5.
65. *Id.* at *14 (citing *Roberts v. Hillsborough Mills*, 85 N.H. 517 (1932)).
66. *Id.*
67. *See id.* at *14-15. *See also Woodman v. Kera LLC,* 785 N.W.2d 1, 9 (Mich. 2010) ("The application of the common law in this case is simple and straightforward. The waiver at issue is a contractual release. [The father] signed the waiver on behalf of his son, thereby intending to bind [his son] to that contract. Under the common law, [the father] was without authority to do so."); *Apicella v. Valley Forge Military Academy & Junior College*, 630 F. Supp. 20, 24 (E.D. Pa. 1985).
68. *Id.* at *13 n.5. The Superior Court also considered an indemnification clause in the season's pass agreement, which purported to force the mother to indemnify the daughter. *Id.* at *15-16. If enforceable, this would of course circumvent any agency issues. The court found, however, that the indemnification clause violated public policy. *Id.* at *16. As Judge Temple noted, "every other jurisdiction to address this issue has held such indemnifications unenforceable on similar grounds." *Id.* at *7.
69. *Roberts*, 85 N.H. at 519.
70. *Papakalos v. Shaka*, 91 N.H. 265, 268 (1941).
71. *See McGrath*, 158 N.H. at 544-46; Lehmann, *supra* note 1.
72. *Spears v. Ass'n of Ill. Elec. Coops.*, 986 N.E.2d 216, 223-24 (Ill. Ct. App. 2013) (collecting cases); *Childress v. Madison County*, 777 S.W.2d 1, 7-8 (Tenn. Ct. App. 1989).
73. Joseph H. King, Jr., *Exculpatory Agreements for Volunteers in Youth Activities: The Alternative to Nerf Tiddlywinks*, 53 Ohio St. L.J. 683, 717 (1992).
74. That said, if a court wished to apply the agency rule, it could fashion exceptions based on public policy considerations, similar to the "necessaries" exception to the rule against infant contracts. *Id.* Ultimately, the distinction between an agency analysis and a public policy analysis may be one of semantics.
75. Florida is an example of a state that follows different rules for parental releases involving non-profits and for-profits. *See Applegate*, 974 So.2d at 1116; *Krathen v. School Board of Monroe County*, 972 So.2d 887 (Fla. Dist. Ct. App. 2008).
76. *McGrath*, 158 N.H. at 543.
77. *Galloway*, 790 N.W.2d at 257-58.
78. *Id.*
79. New Hampshire's distrust for releases distinguishes it from other states, like Massachusetts, which actually favor the enforcement of exculpatory contracts. *See Sharon*, 769 N.E.2d at 744.
80. *Barnes*, 128 N.H. at 106.
81. *Id.*

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