

Legislation and Litigation in the Development of Special Education in Kenya and the United States. An Overview

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Abstract

The vital role of special education the world over can not be overstated. Special education is a vital tool to enable individuals with disabilities to realize their goals of equal opportunity in life, full participation in community life, independent living, and economic self-sufficiency. The field of special education has grown at different rates in the various countries of the world. However, since its beginnings in the early to late 1900s, Special Education has grown fast in the United States in terms of the number of students served and the types and quality of services provided. Right from its early beginnings to the present, litigation and legislation continue to play a central role in the development of special education in the country. Kenya has also done its part to advance education of its children and youth with disabilities. Using these two countries as case studies, this article examines legislation and litigation that has contributed to the development of the special education field.

Introduction

The earliest recorded legislative act on behalf of individuals with disabilities in Kenya dates back to 1953 when the colonial government (the British), through the Legislative Council, established the Association for the Physically Disabled of Kenya (APD), the Kenya Society for the Blind (KSB), and the Kenya Society for Deaf Children (KSDC), to provide various services to individuals with disabilities (Republic of Kenya, 1964; 2003; & 2009). This action may have encouraged the activities of various organizations concerned with the status of individuals with disabilities in the country because the earliest facilities of organized care and rehabilitation for individuals with disabilities in Kenya appeared around the same time. These facilities were initiated by religious, secular and other non-governmental institutions and later taken over by the government. Credit for the earliest organized care facility for individuals with disabilities in Kenya goes to the Salvation Army which established a program to rehabilitate injured veterans of the second world, a program that later became the first school in the country for children with blindness. The Salvation Army also, around the same time, established a rehabilitation center for children with physical disabilities which later became the first school for individuals with physical disabilities in the country. Other

churches and religious organizations, such as, the Christen Blinden Mission (C.B.M) established various schools and institutions for individuals with disabilities at their mission sites. These early efforts in various ways in the interest of individuals with disabilities were joined by those of such secular organizations as the Lions Club, the Round Tables, the Rotary International, the Handicap International, Sight Savers, Leonard Cheshire Foundation, and Sense International (Cherono, 2003 & Ndurumo, 1993).

Post-colonial legislative action in Kenya in the benefit of students with disabilities takes the form of articulations of government's goals for the field and formulation of objectives and policy guidelines for the education and training of individuals with disabilities. Literature on the development of special education in Kenya shows that a number of activities were undertaken by the government of Kenya in the interest of people with disabilities in the country after independence which contributed to bringing the issues of education for children with disabilities to the limelight among the policy makers and to the articulation of objectives for the education of this population in the country (Republic of Kenya 1964, 1976, 1988, 1999, & MoEST, 2003). One such action was the creation of the Ominde Commission in 1964 (Republic of Kenya 1964) to examine the national educational policies of the time and to advise the government on directions for further development (Sifuna, 1990). As noted elsewhere (e.g., Kiarie, 2005, Sifuna, 1990, & Republic of Kenya, 2003), along with reporting on the state and the necessary future directions on education, the Ominde Commission (1964-1965), partly as a result of urging by people with disabilities in Kenya to look into their affairs, also reported its findings with regard to the education of children with disabilities in the country. The recommendations of the Commission included the need for awareness of the problems that result from disability and for special education and training for all children with disabilities in the country. It also noted the need for teachers in training to be familiarized with the effects of disability at all levels of children's interactions, development and education (Republic of Kenya, 1964). Other recommendations of the Ominde Commission in the area of disability concerned the need for the government to coordinate and to improve both the quality of service and the methods of delivery of those services to individuals with disabilities. These recommendations, contained in Sessional Paper Number 5 of 1968 of the Kenya Parliament, brought the government to the forefront with regard to provision of services for individuals with disabilities in the country. As a result of the Sessional Paper, the Vocational Rehabilitation Division was established and the Industrial Rehabilitation Center along with ten other centers in the country were established in 1971. The Special Education Section was set up four years later to oversee the education of students with disabilities and with time this section was staffed with specialized staff overseeing educational issues of the various disability categories in the country (DRPI, 2003). Through the outcomes of the Commission, the government planned to empower these children through provision of specialized education and other services in order to facilitate their inclusion in and ability to be self-sufficient in their society and finally contribute to national development. The government articulated its intent to create awareness of disability and necessary services for this population, to practice, facilitate, and support integration in mainstream classes, and to establish residential schools for these students when necessary.

The National Education Commission (Gachathi report) of 1976 (Republic of Kenya, 1976) recommended that early intervention and assessment of children with special needs be emphasized. This commission also recommended that awareness of causes of disabilities be created in the society to strengthen preventative measures, that research be conducted to determine the nature and extent of disabilities to inform service delivery, and that early childhood development education centers be established as part of special schools. The Gachathi report also recommended that policy be developed for the integration of learners with special needs.

In 1984, centers for the assessment, identification, and placement of students with disabilities, called Educational Assessment and Resource Centers (E.A.R.C) were introduced by the Kenya Ministry of

Education and established in many districts (Republic of Kenya, 2009). Children with disabilities were, and still are, assessed, identified, and provided with some services before being placed either in the general education classroom in a neighboring school or in a residential school or being referred to the hospital for treatment for medical conditions. Although these centers were established initially in a few districts, there are currently over 52 E.A.R.C in the country with at least one in every district, along with 345 sub centers carrying out the same duties (Muga, 2003; & Republic of Kenya 2009).

Legal Notice Number 17 of 1986 of the Kenya law created the Kenya Institute of Special Education (K.I.S.E), an educational institute charged with the responsibility of overseeing and directing many aspects of special education in the country (Republic of Kenya, 2003). Although training of teachers of students with disabilities is conducted in other institutions in the country, K.I.S.E provides courses in various ways for in-service teachers and other personnel in the field of disability, runs centers where model assessments of students for purposes of evaluation is demonstrated, conducts research in special education and serves as a documentation and resource center for the field. Also housed at KISE are a model integration and inclusion center, a preschool, and a center for various aids for students with disabilities (Kenya Institute of Special Education, N.D) all for training of teachers for students with various forms disabilities.

The recommendations of both the Presidential Working Committee on Education and Training for this Decade and Beyond, Kamunge report of 1988 (Republic of Kenya, 1988) and the Totally Integrated Quality Education and Training Taskforce, the Koech report of 1999, made recommendations in the area of education of learners with disabilities. While the Kamunge report recommended deployment of Special Needs Education Inspectors in the districts, the Koech report noted the absence of a comprehensive policy on special needs education and recommended that a national special education advisory board be established.

In 2003, the Kenya government enacted the Persons with Disabilities Act (Republic of Kenya, 2003), another step in the progress of education for students with disabilities. Although this Act was criticized by the Kenya Society for the Mentally Handicapped (KSMH) for failing to provide direct policy on early identification of children with disabilities, it is a law that benefits individuals with disabilities because it prohibits all forms of discriminative treatment of persons with disabilities such as in access to education and training and “provides for adaptation of infrastructural , socioeconomic and environmental facilities to ensure a conducive environment for persons with special needs and disabilities” (Republic of Kenya, 2009 pg. 21). Another taskforce, the Dr. Kochung Taskforce of 2003, (Republic of Kenya, 2003) set up for the purpose of appraising the status of special needs education in the country, recommended in service and training of teachers for children with special needs, increased budgetary allocation and equipping to strengthen EARCs, inventory of assistive devices and equipment available in schools, and surveys to establish the number of children and youth with disabilities in and out of school settings.

Due to these policy guidelines, special education continues to grow in Kenya as is clear from the number of special education institutions in the country, the number of schools with special education units and the number of students with disabilities receiving services in the country. The number of those receiving special education services in the country stood at 221,995 in 2008 while the number of special education institutions in the country increased from 926 in 2002 to 1579 in 2008. Three thousand four hundred and sixty four special needs institutions exist in the country, 54.1 % of which are in primary education, 38.2 % in Early Childhood Development Education (ECDE), 3.4 % in Non-formal Education Institutions, and 4.3 % in secondary education. Of the 3464 special education institutions in the country, 2,713 are integrated while 751 are special schools (MOE, 2008& MOEST, 2012).

Ingstad and Grut (2007) reference a health and demographic survey completed by the country’s ministry of Planning and National Development which estimates that about 10% of Kenya’s population has a

form of disability, a number that is collaborated by the World Health Organization (W.H.O) 2006. Kenya's population is estimated at 32.2 million (Economic Survey, 2003) putting the number of individuals with disabilities at about 3 million. About one quarter (750 000) of all persons with disabilities are young people of school-going age. In view of this statistic, it is clear that many children and youth in the country are not receiving education at all. This makes sense in the face of the fact that most of the individuals with disabilities live in the rural areas and most educational services for children with disabilities are found in the urban areas (Mukobe, 2013).

The recommendations of the Kochung Taskforce, along with the emphasize on the importance of Special Needs education by sessional paper number 1 of 2005 led to the development of the National Special Needs education policy in 2009, a big step forward in the development of the Special Needs education field in the country. The Kenya National Special Needs education policy contains fifteen areas and fifteen objectives that the Ministry of Education and other involved stakeholders plan to meet with regard to educating students with special needs in the country. Each of the fifteen objectives is followed by a policy statement, a statement of what the government intends to do to meet each objective, and the strategies the Ministry of Education and the government will engage in to accomplish the policy objectives. The ministry articulates objectives in the areas of assessment and early intervention, access to quality and relevant education, adaptation of facilities, specialized technology, inclusive education, and curriculum development. Policy objectives are also articulated in the areas of capacity building and human resource development, participation and involvement in decision making, advocacy and creation of awareness of disability issues, partnerships and collaboration in the interest of students with disabilities, gender issues, research and documentation, disaster preparedness, and resource mobilization (Republic of Kenya, 2009). The Ministry of Education plans to put effort into each area addressed by these objectives.

It is worth noting that the passage of this National Special Needs Policy Framework is a major step in the right direction and Kenya is likely to bring about a lot of improvement in the field of Special Needs Education. In a country where material resources are scarce, the government has, once again, committed itself to financing the education of its citizens with Special Needs. This step is to be applauded along with the commitment to reexamine the policy every five years to determine progress, the success of the strategies, appropriateness of objectives stated, and to add any other priorities that come up. One can expect improvement in the various areas targeted in the policy objectives that are stated. A lot can be expected in the area of Special Needs Education in Kenya given the work that continues in the country. Along with the activities of other stakeholders in this area, such parent organizations as the Kenya Association for the Intellectually Handicapped (K.A.I.H), the Autism Society of Kenya (ASK), the Kenya National Association for the Deaf (K.N.A.D), the Kenya Society for the Physically Handicapped (K.S.P.H), and the Kenya Union of the Blind (KUB), continue to engage in activities to create awareness of children, youth and adults with disabilities in the country, press for services and advocate for the rights of individuals with disabilities. With the government advocating the right of children with disabilities to an education in various ways, such as making calls to parents on the country's national television programs for parents to enroll their children with disabilities in schools, more children with disabilities can be expected to get an education.

In various articles of the recently passed Kenya Constitution of 2010 (Republic of Kenya, 2010), the government articulates its commitment to upholding the rights of persons with disability to access education and to be integrated into the society. The Constitution upholds compulsory basic education as a right for every child, safeguards the right to an education for minorities and marginalized groups, and mandates the government to take measures to ensure the youth's ability to access relevant education and training. These activities are intended to boost enrolment for students with disabilities and other marginalized populations. The stipulations of the Children Act in 2001 and the Persons with Disabilities Act in 2003, among other

pieces of legislation have gone a long way in championing the course of education for students with disabilities in the country.

Litigation and Legislation in the United States

An examination of the history of services for individuals with disabilities reveals that this population has been subjected to such practices as death, infanticide, slavery, physical abuse, neglect and abandonment (e.g., Nielsen, 2013; Kitchin, 1998; & Bogdan & Biklen, 1977; Kiarie, 2005). Admittedly, society's response to children with disabilities has come a long way and a review of the field in the United States underscores the role of both legislation and litigation in its development. A review of the status of education for students with disabilities in the years prior to 1970 indicates that this area provided fertile ground for litigation and legislation in the field. During this period, schools educated no more than one out of every five students with disabilities(?), over one million students with disabilities were completely excluded from any publicly funded formal education and about three and one half million students did not receive appropriate services (Hallahan & Kauffman, 2006; Hardman, Drew, & Egan, 2005; Heward, 2009). Many state laws excluded students with disabilities from receiving public education at all and many students with severe disabilities were institutionalized (Ryndak & Alper, 2003).

Literature also reveals that special education in the United States was introduced in the 1900s and continued to grow slowly so that by the 1920s through the 1960s, educational services in the public schools for most children with disabilities were not available. During this period, the history of education of students with disabilities is characterized by exclusion, inadequate, inappropriate and meager special education and related services. As noted earlier, laws for mandatory school attendance did not include students with disabilities. Whereas children with more severe disabilities were routinely excluded from public education in almost all states, children with even the mildest levels of disabilities were not always allowed to attend school either. Research into the growth of special education in the United States indicates that only 12 percent of all children with disabilities received special education (Jaeger & Bowman, 2002) and that as late as 1962, only 16 states had laws that included students with even mild mental retardation under mandatory school attendance regulations (Reynolds & Fletcher-Janzen, 2007). Education for students with disabilities was not mandated.

Early Litigation and Legislation

It is mainly because of litigation and legislation that special education is where it is today in the United States. Fueled by parents groups and organizations for students with disabilities, early litigation focused on the right to an education for students with disabilities. Parent groups such as the United Cerebral Palsy (UCP), the National Association for Retarded Children, the National Association for the Deaf, the American Association on Mental Deficiency, the Council for Exceptional Children, the American Federation for the Blind, the National Society for Autistic Children, and the Association for Children with Learning Disabilities all worked to get accurate information to families with disabilities, professionals and policy makers, regarding the right to an education for students with even the most severe forms of disability. These efforts contributed to increased awareness of the plight of children with disabilities along with advocacy for enforcing their right to an education. Another boost to the case for the educational rights and equal access to education for students with disabilities came from the civil rights and social justice climate of the 1960s. Of importance is the landmark case of *Brown versus the Board of Education of Topeka, Kansas* (1954) which affirmed education as a right and not a privilege for every child, with or without a disability. Using the ruling in this case, the parents and advocates for students with disabilities questioned the lack of application of the same principles of equal right and access to the education of children with disabilities. They took

issue with the existing educational system which denied equal access to children with disabilities and rendered itself vulnerable to numerous court cases in the 1960's and 1970s. In addition to the ruling of the *Brown versus Board of Education*, important pieces of state and federal legislation were passed in this period that recognized the educational needs of students with disabilities. For example, two laws passed in 1958 and 1959, respectively, PL 85-926 and PL 86-158 funded training for teachers and other professionals who worked with students with intellectual disability (Heward, 2009; Jaeger & Bowman, 2005;). Another legislation, the *Teachers of the Deaf Act*, PL 87-276 enacted in 1961 (Daniels, 1997) provided funding for the training of teachers and other professionals for the deaf, hard of hearing, and those with speech impairments. Both the *Elementary and Secondary Education Act*, (PL 89-10), of 1965 and the *State Schools Act*, (PL 89-313), funded states' education for children with disabilities while another Act, the *Handicapped Children's Early Education Assistance Act* of 1968 (PL 90-538) provided funds for early childhood intervention for children with disabilities (Albretch, Seelman & Bury, 2001; Turnbull, Stowe, & Huerta, 2007). These legislations went a long way both in creating awareness among policy makers, of the needs of students with various types of disabilities and in affirming a right to an education for this population (Martin, Martin, & Terman, 1996).

During this period, the educational programs available for students with disabilities through the efforts of many dedicated professionals, were separate from the public schools and special education meant segregated education. In the early eighteenth and nineteenth centuries, educational services for these children were largely confined to residential schools for such children as had physical disabilities, hearing impairment, and those who were blind, among others (Daniels, 1997; Jaeger & Bowman, 2005). Professionals and advocates along with researchers on the learning outcomes of students with disabilities in inclusive and segregated settings debated the issue of segregation versus inclusion as educational settings for students with disabilities, an issue that was addressed through litigation, for example, in both the *Pennsylvania Association for Retarded Citizens (PARC) versus the Commonwealth of Pennsylvania* (1971) and the *Mills versus District of Columbia Board of Education* (1972). PARC focused on a state law that denied public school education to students with mental retardation who were deemed unable to profit from a public school attendance. The burden was on the state to prove that the excluded children with intellectual disability were uneducable and to demonstrate a need to exclude these students from a public education. The court decided that the children were entitled to free public education, that the parents needed to be notified before any change was made in their children's educational programs, and that regular public schools were preferable to segregated settings (Blacher Jan & Baker, 2002). As in the *PARC v Commonwealth of Pennsylvania* (1971), *Mills versus District of Columbia Board of Education* 1972, served to reaffirm the right to education and equal access in education for students with disabilities. The effect of *Brown versus Topeka* litigation on the development of special education was replicated in the *PARC versus Commonwealth of Pennsylvania* and the *Mills versus District of Columbia Board of Education*. These litigations and the judicial rulings that resulted served as catalysts for other court cases and legislation in the years that followed. However, a real boost to the development of special education in the United States in this period came from parents, professionals, and advocates for students with disabilities who lobbied congress for a federal law and federal money that would guarantee students' right to an education and help states fund special education. This led to the passage of PL 94-142 in 1975, the *Education for All Handicapped Children Act (EHCA)*, implemented in 1977 and later renamed *Individuals with Disabilities Education Act* (1990). This Act has rightly been referred to as the most ambitious and the most pervasive educational act ever enacted (Cartwright, Cartwright, & Ward, 1989). Through this Act, not only was every child with a disability ages 3 to 21 entitled to a free, appropriate public education in the least restrictive environment but also every school district was required to offer programs for children with intellectual

disabilities regardless of the severity of their disability (Gregory, 2007). It was through this legislation that educational opportunities were made available to thousands of children who had not previously been served and every child with a disability had to have an Individualized Education Program (IEP), a document containing specific educational goals for the child and providing a timeline for meeting those goals. The six principles of the Act, PL 94-142 give a good picture of what was wrong in the education of students with disabilities at the time prior to the passage of the Act. The zero reject principle alerts us to the gross exclusion of students with disabilities from public education. With the passage of the Act, every student with a disability had a right to an education no matter how significantly affected they were by the disability. With the guideline on parent and student participation, parents of students with disabilities who formally were not guaranteed involvement in their child's education were now allowed, almost mandated, to participate in their children's education and, through the principle of procedural due process, these parents were given avenues to air their complaints regarding any aspects of their children's education that they did not agree with. The principle of none discriminatory evaluation ensured that more effort would be expended towards properly diagnosing and classifying children with disabilities by, at the very least, ensuring that students were tested using the language they were most familiar with. The IDEA, an outcome of parent and professional litigations and advocacy on behalf of students with disabilities in the United States, remains the driving force behind efforts to improve the educational services and outcomes for all children with disabilities in the United States (Winzer, 1993). This Act is reauthorized every couple of years most recently 2004 and litigation and legislation continue to be major forces in the development of special education in the United States. Whereas earlier litigation and legislation on behalf of students with disabilities focused on the right to an education and segregated versus inclusive educational environments for this population, more recent legislation have the quality and the outcomes of education for these students as their focus.

Recent Legislation

Inclusion, the participation of students with disabilities alongside their nondisabled peers in academic, extracurricular and other school activities, was once the exception rather than the rule for most students with disabilities in the United States. Recent data indicates that close to 60 % (sixty percent) of all students with disabilities are in the regular class 80-100% of the time (U.S Department of Education, 2011), which is the federal government's standard for inclusion. This fortunate situation is largely due to the federal legislation, IDEA, and court rulings in the many litigations addressing segregated schooling. The importance of inclusion can not be overstated as data on this educational practice is replete with its positive social and academic outcomes for students with and those without disabilities (e.g., Jackson, Ryndak, & Wehmeyer, 2008/2009; Kiarie, 2007; Snell & Brown, 2006; Cole, Waldron & Majd, 2004). Alongside access to and inclusive education for students with disabilities is the outcome-based accountability in IDEA which holds improving educational results for students with disabilities an essential goal and requires states and local education agencies to report data showing that students are making progress toward their individual goals and toward other goals (Turnbull, Turnbull, & Wehmeyer, 2010.). These other goals have to do with progress in learning the general education curriculum and demonstrating progress in it.

Another legislation, the Elementary and Secondary Education Act (ESEA) of 1965, currently the No Child Left Behind Act (2001) places students with disabilities right in the midst of the high stakes and accountability standards. With the goal to improve the academic scores of all students, (Marzano, Yanoski, Hoegh, & Simms, 2013; Meier, Kohn, Darling-Hammond, & Wood, 2004; Popham, 2005; Peterson & Martin, 2003), NCLB raises expectations for the educational outcomes of students with disabilities to an all time high. Students with disabilities are required to take the tests of student achievement, the state and district assessments that are aligned to the general education curriculum to the extent determined by each

child's IEP (Kauffman & Wiley, 2004; Yell & Drasgow, 2005). Although at this point, data shows mixed results in terms of the improvement in test scores for students with disabilities as a result of this requirement and the learning activities that accompany it, one can reasonably expect that as teachers become more skilled in meeting the learning needs of students with disabilities in the general education classroom, student performance is likely to improve. Data on assessments so far indicates a minimal but steady increase in Math scores for students with disabilities since they were first tested through the NCLB (National Center for Educational Statistics, 2011). Data on reading shows a slight and uneven improvement across the years.

Legislation and litigation continue to ensure that students with disabilities are included in every educational reform or initiative. Most recently, the Common Core State Standards (Kendall, 2011; Courtade & Browder, 2011) implemented in education have taken students with disabilities into account as is clear from statements on various state department of education websites. For instance, one statement notes that students with disabilities must be challenged to excel within the general curriculum and be prepared for success in their post-school lives, including college and/or careers. It goes on to say that the Common Core State Standards provide an historic opportunity to improve access to rigorous academic content standards for students with disabilities. The continued development of understanding about research-based instructional practices and a focus on their effective implementation will help improve access to mathematics and English language arts (ELA) standards for all students, including those with disabilities (Connecticut State Department of Education, N.D). In light of the goals envisioned in such statements, one can reasonably expect that local and state education agencies will do their part to incorporate supports and accommodations to enable students with disabilities to meet high academic standards and to fully demonstrate their skills and knowledge in reading, writing, math, speaking and listening among others.

Although the expansion of our concepts of equality, freedom, and justice, the spread of the ideas of democracy, individual freedom, egalitarianism across America and Europe, and the changing perceptions and attitudes about individuals with disabilities (Gargiulo, 2010; Hallahan & Kauffman, 2006, & Heward 2009), contributed to the growth of special education, it is reasonable to argue that the ideas gained from humanitarian understandings with regard to individuals with disabilities found expression in the litigations that were brought before the courts in state after state regarding concerns with education of children and youth with disabilities in the United States. It is this climate that led to the judicial rulings and legislative action in special education that propelled the field forward. Thanks to litigation and legislation, exclusion and isolation for students with disabilities is no longer the norm. These children and their families are included and participate in educational programs in the least restrictive environment and their right to an appropriate education is overseen by such offices as the Office of Special Education Programs and the Office of Special Education and Rehabilitative Services at the national level and special education departments and offices in every state in the country.

CONCLUSION

This paper has examined the vital role of litigation and legislation in advancing special education in the United States and in Kenya with the purpose of making a case for utilizing these two in the developing countries where special education is still in its infant stages. It is clear from the foregoing and from history that the field of special education would not be where it is in the United States today without both legislative enactments and the judicial rulings that resulted from the litigations brought before the courts regarding various issues in the education of students with disabilities. It is also clear from the foregoing that while the role of both litigation and legislation in the development of special education in the United States is clear, it is the role of "legislation" in the form of policy guidelines that is more prominent in the development of special education in Kenya. In spite of the advances made in the field of special needs education in Kenya,

the role of litigation is missing. Perhaps this is telling in the light of the fact that in regard to special education, Kenya is still dealing with issues of access to the learning physical environment for the child with a disability while the United States has gone on to focusing on issues of the quality and appropriateness of the educational services provided along with accountability for the learning outcomes for these students by their teachers and the system. It is likely that litigative action is necessary to enforce the right of access to an appropriate education for all students with disabilities in Kenya. Thankfully, this is one of the major foci of Kenya's National Special Needs Education policy framework recently passed. It is important to echo a report from the President's Commission on Excellence in Special Education in the United States in 2002 which noted that although special education has created a base of civil rights and legal protections, children with disabilities remain those most at risk of being left behind. What this means is that there is still lots of room for improvement in many aspects of education for students with disabilities in the United States. One can anticipate that litigation and legislation will continue to play a major role in the field of special education in this country, in Kenya and, hopefully, in other countries of the world.

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