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Comments in Response to ACF's Notice for Public Comment on the Child Abuse Prevention and Treatment Act (CAPTA) [FR Doc. 2015-07390]

Submitted by the Children's Advocacy Institute
June 26, 2015

The Children's Advocacy Institute (CAI) of the University of San Diego School of Law is an academic, research, and advocacy organization working at the state and federal levels to improve the health and well-being of children and youth. A significant portion of our research and advocacy is aimed at reforming aspects of the child welfare, child protection, foster care, and dependency court systems in order to improve the experiences and outcomes for the children and youth whose lives are touched — and in many cases, forever changed — by these systems.

We appreciate the opportunity to respond to the Administration for Children and Families' (ACF) request for comments about ACF's policy interpretations as contained in the Child Welfare Policy Manual (CWPM) regarding the public disclosure mandate set forth in the Child Abuse Prevention and Treatment Act (CAPTA).

Background

For the past several years, CAI and First Star have engaged in national and state-based advocacy and public education regarding, among other things, CAPTA's mandate that states have laws or programs that allow for "public disclosure of the findings or information about the case of child abuse or neglect which has resulted in a child fatality or near fatality." As an organization dedicated to making thoughtful and meaningful reform that helps to save and improve the lives of our most vulnerable citizens, we became dedicated to ensuring that reform in this most extreme subset of cases can be driven by reliable and comprehensive data. CAI and First Star regularly survey the laws of all fifty states and the District of Columbia to determine whether each jurisdiction is in compliance with this requirement, and to evaluate the extent to which each state's laws or programs further the purpose and intent of the public disclosure provision. In 2008 and again in 2012, we published our findings in national reports entitled *State Secrecy and Child Deaths: An Evaluation of CAPTA-Mandated Public Disclosure Policies about Child Abuse or Neglect Fatalities or Near Fatalities, with State Rankings* (available at www.caichildlaw.org).

CAPTA's public disclosure provision reflects Congress' understanding that the value of maintaining confidentiality of child abuse and neglect reports and records is greatly diminished in cases of fatalities and near fatalities, and that in such cases it is of overwhelming importance to examine the performance of the system as a whole and to identify and remedy any mistakes, weaknesses or failings. Indeed, the U.S. Senate has reported that the CAPTA provision mandating public disclosure in these cases "ensures improved accountability of protective services and can drive appropriate and effective systemic reform."¹ The U.S. House of Representatives likewise stated it

¹ U.S. Senate, *Sen. Rep. No. 378* (2010).

is the intent of the conferees that in the case of a fatality or near-fatality resulting from child abuse or neglect, that the factual information regarding how the case was handled may be disclosed to the public in an effort to provide public accountability for the actions or inaction of public officials.²

Thus, Congress determined that in order to identify and fix flaws in our child welfare system, the need for public disclosure of what happened in these specific cases must trump the rule of confidentiality that typically applies to child abuse and neglect records and reports. To ensure that this disclosure takes place, Congress amended CAPTA in 1996 to explicitly require that states have policies allowing for the disclosure of this information to the public.

With the first *State Secrecy* report, released in 2008, CAI and First Star put Congress and HHS on notice that many states were not in compliance with CAPTA's public disclosure requirement. Some states had no identifiable public disclosure policy at all, other states had policies that covered only fatalities and not near-fatalities, and many states had restrictions and exceptions that basically rendered their public disclosure policies illusory.

Responding to this notice, in 2010 the Senate Health, Education, Labor and Pension (HELP) Committee called upon HHS to take action to address this situation by adopting the following Report language (emphasis added):

The committee believes that the duty of child protective services, required in CAPTA Sec. 106(b)(2)(x), to provide for the mandatory public disclosure of information about a case of child abuse or neglect which has resulted in a child fatality or near fatality ensures improved accountability of protective services and can drive appropriate and effective systemic reform. However, the committee is aware that not all States are in compliance with these CAPTA requirements. **The committee calls upon the Secretary of Health and Human Services to develop clear guidelines in the form of regulations instructing the States of the responsibilities under CAPTA to release public information in cases of child maltreatment fatalities and near fatalities, and to provide technical assistance to States in developing the appropriate procedures for full disclosure of information and findings in these cases.**

Thus, as stated by the HELP Committee, the expectations of Congress are that

- (1) HHS adopt regulations that fully inform states of their responsibilities under the public disclosure provision, and
- (2) States provide "full disclosure" of information in cases of child abuse or neglect fatalities or near fatalities.

Where do we stand five years later?

- (1) HHS has taken no action to adopt regulations that instruct states about their responsibilities *vis-à-vis* CAPTA's public disclosure requirement, and
- (2) HHS made changes to the CWPM in 2012 that allow states to provide less transparency and limited information and — most disturbingly — purports to give states the discretion to provide no disclosure whatsoever.

² U.S. House of Representatives, *H.R. Rep. No. 104-430* (1995).

Comments About ACF's Policy Interpretations on CAPTA's Public Disclosure Mandate

We appreciate the fact that ACF has solicited comments about the revised policy interpretations contained in the CWPM relating to CAPTA's public disclosure mandate, and we provide the following comments and concerns for your consideration.

1. ACF's Adoption of Policy Interpretations Instead of Regulations

As an overarching matter, we find it unacceptable that ACF has chosen to publish “policy interpretations” regarding the CAPTA public disclosure mandate, as opposed to engaging in the more transparent, binding, and enforceable process of rulemaking.³ We respectfully note that the HELP Committee explicitly called upon HHS to adopt “regulations instructing the States of the responsibilities under CAPTA to release public information in cases of child maltreatment fatalities and near fatalities” (emphasis added).

Our research informs us that states are struggling to understand exactly what their responsibilities are with regard to the public disclosure mandate. On the one hand, they must maintain the strict cloak of confidentiality that generally governs the child welfare system. On the other hand, they are required to release information about certain cases. Faced with these two very different mandates, and without any formal, binding regulatory instructions provided by ACF, many states err on the side of confidentiality and have adopted disclosure policies and/or practices that thwart the congressional intent behind the public disclosure mandate.

In order to ensure that states provide “full disclosure” that furthers congressional intent, ACF must adopt regulations that expressly specify what states must do in order to comply with the public disclosure mandate. The cause of ensuring faithful compliance with CAPTA requires rules that have the dignity and binding impact of regulations — regulations that represent the best effort to ensure a national floor of CAPTA compliance among states.

2. ACF's Creation of Extremely Broad Exceptions to Disclosure

Another overarching concern stemming from the 2012 revisions is language that ACF added to CWPM section 2.1A.4, Q/A #8, providing that “States may allow exceptions to the release of information in order to ensure the safety and well-being of the child, parents and family or when releasing the information would jeopardize a criminal investigation, interfere with the protection of those who report child abuse or neglect or harm the child or the child's family.”

We do not object to allowing states to temporarily withhold specific information if release of that specific information would jeopardize a criminal investigation. Nor do we object to allowing states to withhold identifying information concerning the individual who reported child abuse or neglect.

However, we have grave concerns with the new CWPM language that purports to give states an unfettered blanket allowance to make exceptions to the release of information in order to ensure the safety and well-being of the child, parents and family, or when releasing the information would harm the child or the child's family. This new language completely contradicts language that was previously contained in CWPM Section 2.1A.4, Question 4. The prior language, which was repealed by ACF as part of its 2012 revisions, explained that states have no option or discretion in releasing this information even if “full disclosure may be contrary to the best interests of the child, the child's siblings, or other children in the household.” ACF's previous policy interpretation of the CAPTA public disclosure mandate fairly reflected Congressional intent that — in just the most tragic cases of child abuse or

³ We note that with the ACF's recent repeal of the few CAPTA regulations that had ever been formally adopted in the 41 years since CAPTA was first enacted, we are left without a single duly-adopted regulation implementing *any part* of CAPTA — not just its public disclosure mandate.

neglect fatalities and near fatalities — the interest in preventing further tragedies through the flow of information trumps the privacy interests involved. In fact, in enacting the CAPTA public disclosure provision, Congress already conducted the balancing test and determined that the benefits of disclosure outweigh any potential impact that disclosure might have on those involved. By allowing states to engage in their own balancing test, and to withhold information about child abuse and neglect deaths and near deaths, ACF has now disregarded Congress' decision in this regard and replaced it with its own.

No intervening statutory or judicial action took place compelling, necessitating, permitting, or even explaining this complete change in ACF's "policy interpretations." In fact, the one piece of congressional directive that was handed to ACF prior to its 2012 revisions (the 2010 HELP Committee report language) instructed the agency to ensure that states were engaging in "full disclosure of information and findings in these cases" — not to give states the discretion to withhold information as they see fit.

Interestingly, ACF describes the reason for its 2012 revisions as follows: "The Administration recognized that some States want to provide the public with a full picture of the agency's involvement when child abuse or neglect is the cause of a child fatality or near fatality."⁴ We are baffled as to why the Administration did not consider at all times since the 1996 enactment of the public disclosure mandate that this was the precise intent and purpose of the public disclosure mandate — that all states provide the public with a full picture of the agency's involvement when child abuse or neglect is the cause of a child fatality or near fatality. That said, the ACF explanation goes on to say that: "Prior Federal policy did not precisely describe what information may be disclosed and allowed for State discretion in releasing the facts, findings, and information." We presume the latter part of this statement refers to discretion in what to release, not in whether to release findings or information since, as noted above, the pre-2012 "policy interpretations" clearly provided that states had no option or discretion with regard to releasing this information if requested to do so. So while commendably giving states a specific set of minimum information that must be released, ACF chose to also give them *cart blanche* discretion to withhold any and all information by adding the broad new exceptions noted above. After explicit inquiries, no explanation or justification was provided by ACF for giving states these new exceptions to public disclosure.

A further concern about this change is that it allows states to withhold information to purportedly ensure the safety and well-being of not only the child victim and other children in the household — *but also the parents and family*. In so doing, ACF has decided that protecting the interests of adults (even those perhaps responsible for the child's fatality or near fatality) is more important than the public's right to information that could help save other children's lives. Such an interpretation is not consistent with Congressional intent.

3. ACF's Failure to Define the New Term "Pertinent to"

ACF's 2012 changes to CWPM section 2.1A.4, Q/A #8 added language indicating that states must release information including, but not limited to, "the cause of and circumstances regarding the fatality or near fatality; the age and gender of the child; information describing any previous reports or child abuse or neglect investigations that are pertinent to the child abuse or neglect that led to the fatality or near fatality; the result of any such investigations; and the services provided by and actions of the State on behalf of the child that are pertinent to the child abuse or neglect that led to the fatality or near fatality." While the specificity provided by this listing was at first welcomed by child advocates, we quickly feared that the CWPM's failure to define what information is to be deemed "pertinent to" the abuse or neglect that led to the fatality or near fatality would lead to under-disclosure or non-disclosure by states that adopt a very limited interpretation of the term. Since a primary purpose of the public disclosure mandate is to review what led up to a tragic incident of child abuse or neglect fatality and near fatality, and whether anything could have been done to potentially prevent such an incident, clearly some

⁴ See Children's Bureau Policy Division, *Children's Bureau Policy Division Update* (April 23, 2013).

of the most vital and useful information is what happened before in that family's life. Did we have prior signs or indications that this child might be in harm? Did we respond appropriately to those signs? As child advocates, we believe that everything contained in a case file about prior events is potentially "pertinent to" an eventual death or near-death, and all information must be disclosed to the public in order for it to make that determination.

Unfortunately, when a child dies due to abuse or neglect in a home that had previous contacts with the child welfare agency, the agency might have deem the previous reports of abuse or neglect insufficient to act upon, or perhaps not pertinent to previous reports of abuse or neglect. We question the wisdom of allowing the child welfare agency to have unilateral and unfettered discretion to determine what prior information was "pertinent to" a case that eventually resulted in a child's fatality or near fatality. This is particularly true when another purpose of providing public disclosure is to determine if the agency inappropriately handled or responded to prior reports or information indicating that a child was in a potentially harmful situation.

We call upon ACF to adopt into regulation language that expressly states that any and all findings or information about previous reports, referrals, investigations, services provided, and/or actions taken with regard to the child, the child's family, and/or members of the child's household are deemed "pertinent to" the child abuse or neglect that led to the fatality or near fatality.

4. Examples of States Using ACF's Revisions to Limit or Deny Public Disclosure

Unfortunately, soon after the 2012 CWPM revisions, the amorphous "pertinent to" language was used by the State of Tennessee to avoid substantive disclosure entirely with regard to certain child abuse or neglect fatalities and near fatalities. Responding to a request for the CAPTA-mandated public disclosure, Tennessee indicated that during the timeframe in question there were five such fatalities or near fatalities – and in four of those cases, the family had prior involvement with child protective services. However, Tennessee deemed that not one of those four cases included prior involvement that was "pertinent to" the fatality or near fatality.⁵ CAI's own studies of fatalities due to child abuse and neglect in California show that in more than half of the fatalities due to child abuse and neglect in California show that in more than half of the fatalities due to abuse and neglect, the families had a prior relationship with child protective services that was not just "pertinent to" but was in fact substantially related to the ultimate cause of death. It strains logic to believe that in Tennessee, zero out of four cases of deaths or near deaths due to child abuse and neglect involved prior involvement with child protective services that was "pertinent to" the abuse or neglect that led to the death or near death.

The State of Minnesota revised its law in 2015 to limit the disclosure of information regarding previous reports of child abuse or neglect, previous investigations, and actions of and services provided by the local social services agency on behalf of a child that are "pertinent to" the child abuse or neglect that led to the child fatality or near fatality. Mirroring the CWPM, Minnesota's revised law fails to define the term "pertinent to" and allows the agency to make that call unilaterally.

The State of Ohio revised its public disclosure law after ACF's 2012 revisions to the CWPM. New regulatory language requires the Public Children's Services Agency (PCSA) to prohibit disclosure of information if PCSA determines that harm to the child or the child's family would occur, and limits the disclosure of information about previous reports, services and actions taken to those deemed "pertinent to" the child abuse or neglect that led to the child fatality or near fatality. Mirroring the CWPM, Ohio's revised law fails to define the term "pertinent to" and allows the agency to make that call unilaterally.

The State of Vermont amended its Family Services Policy Manual, effective August 2013, to provide that information describing previous reports, previous investigations, or services provided and actions taken

⁵ See Anita Wadhvani and Tony Gonzalez, *DCS Withholds Files on Child Deaths*, THE TENNESSEAN (Dec. 2, 2012).

by the state shall be disclosed to the public only if it is deemed “pertinent to” the child abuse or neglect that led to the child fatality or near fatality. Mirroring the CWPM, Vermont’s revised policy fails to define the term “pertinent to” and allows the agency to make that call unilaterally.

Vermont’s revised policy also accepts ACF’s offer to make exceptions to disclosure “in order to ensure the safety and well-being of the child, parents and family” or when releasing the information would “harm the child or the child’s family.” The Commissioner of the Department of Children and Families is authorized to make the final determination in this regard.

The State of Rhode Island amended its public disclosure policy in January 2013 to provide that information describing previous reports, previous investigations, or services provided and actions taken by the state shall be disclosed to the public only if it is deemed “pertinent to” the child abuse or neglect that led to the child fatality or near fatality. Mirroring the CWPM, Rhode Island’s revised policy fails to define the term “pertinent to” and allows the agency to make that call unilaterally.

Rhode Island’s revised public disclosure policy also accepts ACF’s offer to make exceptions to disclosure “in order to ensure the safety and well-being of the child, parents and family” or when releasing the information would “harm the child or the child’s family.” The Commissioner of the Department of Children and Families is authorized to make the final determination in this regard.

The State of New Jersey revised its public disclosure policy in 2015 to limit the release of information regarding the Division’s involvement with a child victim and his or her family prior to a fatality or near fatality “to the extent [that information] is pertinent to the child abuse or neglect that led to the fatality or near fatality[.]” To its credit, New Jersey at least discussed the need to define the term “pertinent to” — apparently at the prompting of the Office of the Law Guardian, Advocates for Children of New Jersey (ACNJ), and Court Appointed Special Advocates (CASA), each of which opined that the standard of pertinence proposed by the Department was too vague. Preliminary language suggested that the Department would stipulate that the term “pertinent to” refers to information that pertains directly to the abuse or neglect that resulted in a fatality or near fatality, pertains to prior acts of abuse or neglect that have a commonality of involved persons, pertains to a pattern of abuse that led to a fatality or near fatality, or would otherwise assist the public or media in understanding the Division’s response to the acts of abuse that led to a fatality or near fatality. However, no such defining terms were codified into the state’s regulatory language.

5. Concerns with the Definition of Near Fatality

Although ACF asked stakeholders to identify any concerns with the definition of near fatalities in a state, we would first like to note that the CAPTA definition of the term is itself extremely troubling in what it omits. The CAPTA definition (“an act that, as certified by a physician, places the child in serious or critical condition”) excludes a number of acts that would have, absent intervening factors, either killed the child or caused him/her significant physical injury. From the child’s perspective, how are any of the following acts less of a “near fatality” than those that cause a child to be in serious or critical medical condition?

- A parent aims a loaded gun at a child and pulls the trigger, but the gun jams.
- A caretaker throws a child out of a fourth-story window, but the child lands on an awning below and suffers only minor injuries.
- A parent blacks out from alcohol or drug use, and his/her small child goes outside and falls in the pool; a neighbor hears this and rushes over in time to save the child from drowning.

We believe that the CAPTA definition must be expanded to also include situations where a social services or law enforcement agency determines that a child was at imminent risk of death or serious

bodily harm by the actions of a parent or caretaker, and we will be calling on Congress to make that amendment.

As far as individual state definitions that are of concern, we note the following:

- In Iowa, the term near fatality “means an injury to a child that, as certified by a physician, placed the child in serious or critical condition” (Iowa Code § 235A.13). We believe that the term “injury” is narrower and more restrictive than the term “act” contained in the CAPTA definition.
- West Virginia defines the term near fatality as “any medical condition of the child which is certified by the attending physician to be life threatening” (W. Va. Code § 49-7-1). We believe that this standard is a bit more restrictive, and perhaps less specific, than the standards contained in the CAPTA definition.

6. State Confusion Regarding Confidentiality Protections

Related to concern #1, above, we note that many states are understandably confused by the conflicting federal mandates that they (1) maintain confidentiality with regard to child welfare records and (2) disclose findings and information regarding child abuse or neglect fatalities and near fatalities. Instead of providing states with clear and express regulatory guidance regarding what they are to disclose, the public disclosure section of ACF’s CWPM adds more fuel to the confusion fire. The public disclosure section of the CWPM has eight Q/A sections, and no less than five of the eight sections include vague warnings to states that, while engaging in the mandated public disclosure, they must also ensure that they are complying with “any other relevant Federal confidentiality laws.” Even Q/A #8, which lists specific information that states must disclose, follows that list up by noting that “State policies must ensure compliance with any other relevant federal confidentiality laws, including the confidentiality requirements applicable to titles IV-B and IV-E of the Social Security Act.”

In order to alleviate the confusion for both states and the public, ACF must determine exactly what — if any — of the other relevant federal confidentiality law provisions take precedence over the specific public disclosure mandate. We note that to some extent, ACF has done this in the confidentiality section of ACF’s CWPM (2.1A.1, Q/A #6, emphasis added), which states as follows:

There may be instances where CPS information is subject both to disclosure requirements under CAPTA and to the confidentiality requirements under title IV-E and 45 CFR 205.50. **To the extent that the CAPTA provisions require disclosure** (such as in section 106(b)(2)(B)(ix) to other governmental entities and **in section 106(b)(2)(B)(x) in the case of a child fatality or near fatality**), **the CAPTA disclosure provision would prevail in the event of a conflict since the CAPTA confidentiality provisions were most recently enacted.**

Thus, the confidentiality section of the CWPM indicates that the CAPTA public disclosure provision would prevail over other confidentiality requirements, but the public disclosure section of the CWPM does not so provide, and instead constantly reminds states to ensure that they are complying with any other relevant federal confidentiality laws.

ACF must provide more complete and uniform guidance to states regarding this determination that the CAPTA disclosure requirement trumps other confidentiality provisions, and it must do so in regulatory form. Doing so will alleviate states of the concern that complying with one federal mandate might put them at risk of violating another.

7. Child Fatality Review Panels/Commissions

Before addressing the work of child fatality review panels/commissions, we would like to comment briefly on the impact of the CAPTA-mandated Citizen Review Panels. In addition to mandating “public disclosure” of findings and information regarding child abuse or neglect fatalities and near fatalities, CAPTA also requires every state that receives CAPTA funding to maintain a Citizen Review Panel to, among many other things, engage in a “review of child fatalities and near fatalities.”

The California Citizen Review Panel’s latest report available online⁶, which covers the period of Oct. 1, 2010 through Sept. 30, 2011, makes no mention of child fatalities or near fatalities whatsoever. California has not had a statewide Citizen Review Panel since December 2010, and instead maintains three county-based panels in Calaveras, San Mateo, and Ventura counties (counties that, combined, account for approximately 4% of the state’s population).

By including separate and distinct mandates for Citizen Review Panels and public disclosure in CAPTA, Congress clearly expects that in addition to whatever investigation and reporting is done by Citizen Review Panels, there will also be a clear and distinct process to put information about child abuse and neglect fatalities and near fatalities directly into the hands of the public.

Regarding the work of statewide child fatalities review panels/commissions, we note that generally, the purpose of these teams is to collect and review data on the causes of child deaths, and to recommend changes in policies and programs that will help reduce preventable child deaths. These entities represent a critical step forward in recognizing the importance of thorough information gathering and investigation when a child dies. Their work should be applauded.

However, these child fatality review panels tend to operate under strict confidentiality, and in most cases, the information provided to the public by the panels does not satisfy the CAPTA public disclosure requirement. Often, they review only a small sampling of child fatalities. They typically give the public summary information and recommendations, instead of case-specific findings and information on every child abuse or neglect death. Also, most of these panels do not investigate or report on abuse and neglect near fatalities whatsoever.

Currently California maintains no statewide child death review team; the statewide team was disbanded in 2008 when state funds were cut, and the state now maintains only local county teams.⁷ California has not produced an annual state report for several years due to budget cuts; under state law, county teams (where they exist) are required to make available their findings and aggregate data annually.⁸

To its credit, Los Angeles County’s *Child Death Review Team Report 2012*⁹ provides some case-specific information regarding 3 of the 24 child abuse and neglect fatalities that the County had during 2011, but the information is presented in a summary format that does not satisfy the CAPTA public disclosure requirement. For example, in a summary about the death of a two-year-old girl, the County notes that the child welfare agency had received twelve previous referrals, but provides no information about the nature of the referrals, the agency’s response, services provided, etc.

The most recent report of Sacramento County’s Child Death Review team, which covers the three-year period of 2010–2012, reports 22 child maltreatment deaths (including 11 categorized as “abuse and neglect homicides”). The report contains only aggregate data and recommendations — no case-specific information is provided.

⁶ Available at <http://www.childsworld.ca.gov/res/pdf/2011CRP.pdf>.

⁷ See The National Center for the Review & Prevention of Child Deaths, *California Spotlight*, available at www.childdeathreview.org/cdr-programs/u-s-cdr-programs/spotlight-california/.

⁸ *Id.*

⁹ Available at https://www.childdeathreview.org/wp-content/uploads/State-Docs/CA_LACDR_2012.pdf.

Conclusion

While giving states some much needed specificity regarding what they are required to release pursuant to CAPTA's public disclosure mandate, ACF's CWPM revised policy interpretations are contrary to Congressional intent by

- giving states discretion to refuse to provide public disclosure of findings and information about child abuse and neglect fatalities and near fatalities through the use of broad, amorphous exceptions (negating congressional intent that states provide "full disclosure" by allowing states to provide no disclosure whatsoever);
- favoring parental, familial, and other privacy interests over the need to ensure public review and accountability of our child welfare system;
- failing to provide states with clear and complete guidance as to what their responsibilities under CAPTA's public disclosure mandate are, and how they can provide full disclosure in a manner that comports with any other applicable federal laws; and
- taking the form of "policy interpretations" instead of the Congressionally-mandated form of binding and enforceable regulations.

We appreciate the opportunity to voice our concerns and our hope that the regulations, guidance, and assistance that ACF provides to states from this point forward will fully and fairly further the underlying purpose of CAPTA's public disclosure mandate: providing information to the public about the most tragic cases of child abuse or neglect. Only then will the public be able to determine if and what systemic changes to our child welfare systems are necessary in order to prevent future tragedies from occurring.

Sincerely,



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CAI Administrative Director /
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CAI National Policy Director /
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