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Law Office of Caroline A. Zuk

Caroline A. Zuk is an accomplished special education attorney with over 25 years of experience in the fields of special education and the law. Her practice is dedicated to legal issues regarding the education of disabled students in California's public schools.



Ms. Zuk is uniquely qualified to help clients navigate the complex set of laws that govern a pupil's special education. She has conducted academic and psychoeducational assessments, written IEPs, designed intervention programs, analyzed hundreds of assessment reports and IEPs, trained parents and educators, and administrative law judges. She has evaluated hundreds of cases regarding compliance with special education law. She developed and copyrighted a template entitled School Psychologists' Assessment Report, which incorporates legal and psychoeducational components for special education assessments.

Ms. Zuk started her educational career in British Columbia as a special education teacher. While continuing her teaching career in the United States, she earned a school psychology credential and was selected as the Outstanding Graduate, College of Education, California State University Long Beach. After earning her school psychology credential, she worked as a Diagnostic Educational Specialist at the California Department of Education's Diagnostic Center, Southern California, and attended Loyola Law School's evening program in Los Angeles. While there, she served as an Extern for the Western Law Center for Disability Rights. In 1998, Ms. Zuk graduated from law school in the top 5% of her class. Following law school, she worked as an associate at Paul, Hastings and at educational law firms before starting her own practice in 2003.

Her first-hand experience working within and on behalf of public schools provides her clients with a deep understanding of the inner workings of the IEP process. Ms. Zuk believes that no case is too big or small to receive caring, competent, intelligent, and thoughtful representation.

Areas of Practice

- Special Education Law
- Civil Rights
- Student Discipline

Year in Review: Legal Update on FAPE and Behavior

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Year in Review: Legal Update on FAPE and Behavior

UNITED STATES SUPREME COURT

J.D.B. v. North Carolina, 131 S. Ct. 2394 (2011).

Issue: *Miranda* warnings for juveniles in custody, including custody on school grounds.

Facts: A 7th grade student, age 13, was seen in possession of a stolen camera at school. Five days prior, a police officer had observed the student near a home of a break-in. The student was asked to leave his classroom and taken to a closed door conference room where he was questioned for 30 to 45 minutes by two police officers, including a school “resource officer,” an assistant principal (AP) and an administrative intern. The student’s contact information, including the name of his legal guardian, was confirmed prior to any questioning. However, before questioning the adults did not (1) give him an opportunity to call his legal guardian (grandmother); (2) give him *Miranda* warnings; or (3) tell him that he was free to leave the room. The student initially denied any wrongdoing, but eventually admitted to the theft after being urged to tell the truth (e.g., the AP warned the student to “do the right thing,” and warned that “the truth always comes out at the end”). A police officer also warned the student that he may be facing juvenile detention. After the student admitted to the crime, then the police officer told him for the first time that he could refuse to answer any more questions and was free to leave the room. The student provided additional information, including the location of the stolen item and wrote a statement. The student remained at school for the rest of the day. He was subsequently charged with breaking and entering and larceny in juvenile court. In the trial court, the student’s public defender moved to suppress the student’s statements on the grounds that he had been interrogated in a custodial setting and his statements were involuntary. The trial court denied the student’s motion, reasoning that he was not in custody at school. The student was adjudged to be a delinquent, which was affirmed by the North Carolina Court of Appeals and the North Carolina Supreme Court.

Holding: “It is beyond dispute that children will often feel bound to submit to police questioning when an adult in the same case would feel free to leave. Seeing no reason for police officers or courts to blind themselves to that commonsense

reality, we hold that a child’s age properly informs the *Miranda* custody analysis.”

The United States Supreme Court remanded the case to determine if the student was in “custody” within the meaning of the law and, therefore, entitled to the procedural safeguards of *Miranda* warnings.

CIRCUIT COURT OF APPEALS

Sumter County School District v. Heffernan, 642 F.3d 478 (4th Cir. 2011)(South Carolina).

Issues: Autism; staff training in applied behavior analysis strategies.

Facts: A non-verbal middle school student with moderate to severe autism exhibited several maladaptive behaviors, including: (1) biting himself or others; (2) frequently wiping his nose and face causing chafing and bleeding; (3) getting out of his seat and running around the classroom 50% of the time; (4) sitting for only 1 to 2 seconds with physical prompts; and (4) wetting his pants several times per day. While the student made progress when the school district assigned an ABA-trained teacher to the child’s special day class for students with autism, the student regressed when a new teacher was assigned to the student. His IEP offered 15 hours per week of applied behavior analysis (ABA) services during the 2005-2006 school year, but the district failed to provide all of the hours. The IEP for the 2006-2007 school year offered 27.5 hours per week of ABA services. The parents removed the child from the school during the 2006-2007 school year, because of behavioral regression and implemented a home-based, ABA program, consisting of 30 hours per week of services. The parents sought compensatory education.

The district argued that at the time of the student’s removal from school, it was “capable” of implementing an appropriate program because it had hired private autism experts to provide training and technical assistance. The district further argued that the home placement was not the least restrictive environment (LRE).

Holding: The district denied the student a FAPE, because of the failure of the lead SDC teacher and classroom aides to understand and use proper ABA techniques. While the court acknowledged that improvements to an educational program may, in fact, be relevant to deciding an appropriate remedy, in this case the “evidence of the District’s improved capabilities was far from concrete.” As to the LRE issue, the court referred to its previous holding that we have “never held that

parental placements must meet the least restrictive environment requirement.” Rather, LRE is one factor to be considered; as previously explained by this court, “. . . the Act’s [IDEA] preference for mainstreaming was aimed at preventing schools from segregating handicapped students from the general student body; the school district has presented no evidence that the policy was meant to restrict parental options when the public schools fail to comply with the requirements of the Act.”

***Kowalski v. Berkeley County Schools*, 652 F.3d 565 (4th Cir. 2011)(West Virginia).**

Issue: Student Discipline; Free Speech

Facts: Kowalski, a high school student without a disability, was suspended from school for five days for creating and posting to a MySpace.com webpage called “S.A.S.H.,” which stood for “Students Against Sluts Herpes.” The webpage was largely dedicated to ridiculing a fellow student. The student initiated an action under 42 U.S.C. § 1983 against the district and five school officials, alleging that the defendants had violated her free speech and due process rights under the First and Fourteenth Amendments by disciplining her. She alleged that the school district was not justified in regulating her speech, because it did not occur during a school-related activity. The district court concluded that the district and its officials were authorized to suspend the student, because her webpage was “created for the purpose of inviting others to indulge in disruptive and hateful conduct,” which caused an “in-school disruption.”

Holding: The 4th Circuit concluded that the discipline was permissible, reasoning that “Kowalski used the Internet to orchestrate a targeted attack on a classmate, and did so in a manner that was sufficiently connected to the school environment as to implicate the School District’s recognized authority to discipline speech which ‘materially and substantially interfere[s] with the requirements of appropriate discipline in the operation of the school and collid[es] with the rights of others.’”

The student filed a petition for a writ of certiorari, which the United States Supreme court denied on January 17, 2012.

***Lathrop R-II School District v. Gray*, 611 F.3d 419 (8th Cir. 2011), *cert. denied*, 131 S. Ct. 1017 (2011).**

Issue: Autism; Maladaptive Behaviors

Facts: In 2000, the 4th grade student enrolled in the district where he was among the first students with autism. The student demonstrated maladaptive behaviors that adversely affected his ability to learn, including echolalia, biting his fingers, flapping his hands, engaging in loud outbursts, and touching his penis. The district took multiple steps to address the behavior, including: (1) immediately

assigning a full-time aide; (2) providing staff training on autism and interventions; (3) providing daily, individual speech therapy; (3) hiring an autism and behavior specialist who conducted a functional behavioral assessment, including collecting eight weeks of data; (4) developing a behavior plan; and (5) implementing sensory strategies to decrease the maladaptive behaviors. The IEPs were detailed, such as including 12 pages of present levels of performance and recommending 27 goals. Following an 18-day administrative hearing, the panel concluded that the district had denied the student a FAPE, because it had not sufficiently addressed his behavioral and social skill deficits.

Holding: The circuit court ultimately determined that the district had appropriately addressed the student's behavior needs, and the United States Supreme Court denied the student's petition to hear the case. In deciding in the district's favor, the 8th Circuit relied, in part, on the following evidence:

D.G.'s 2002 and 2003 IEPs both described his disruptive behaviors and included a host of strategies to address them. They elaborated on D.G.'s difficulties with social interactions, his adaptive behaviors, and self stimulating behaviors such as finger biting and hand flapping. Both contained a behavior plan with four columns: (1) "When [D.G.] does this ..."; (2) "and we think it means ..."; (3) "we should ..."; (4) "PREVENTATIVE ACTIONS." One preventative strategy involved rewarding and penalizing D.G. with potato chips. Both IEPs contained a sensory diet with strategies for keeping D.G. on task and preventing disruptions. For example, D.G. was to be given a "fidget box" and was permitted to jump on a trampoline between activities. Other accommodations included special lighting, a private bathroom, weighted lap and shoulder pads, and frequent breaks. The District sent behavior charts home daily from November 2002 through May 2003 and from August 2003 through November 2003. Both the behavior plan and sensory diet were revised in the 2003 IEP.

Hansen v. Republic R-III School District, 632 F.3d 1024 (8th Cir. 2011)(Missouri).

Issue: Eligibility (OHI and ED); ADHD; Conduct Disorder; Bipolar Disorder

Facts: The student had been diagnosed with ADHD, conduct disorder and bipolar disorder. He entered the school district in the fifth grade and was suspended several times for threatening teachers and peers. He also made suicidal comments and performed poorly academically. The district conducted an initial evaluation and determined that the student was not IDEA-eligible, reasoning that the student was socially maladjusted but not emotionally disturbed, and that a medical diagnosis of ADHD was not sufficient to determine eligibility.

Holding: The 8th Circuit upheld the district court’s determination that the student satisfied IDEA’s criteria for emotional disturbance and other health impairment. Both courts relied on facts that demonstrated the adverse effects of social skills deficits, inattention, and impulsivity on the educational performance. The court noted that the student had “received numerous disciplinary referrals over a four-year period for threatening students and teachers, fighting with other students, and treating his peers and teachers with disrespect. After working with J.H., Republic’s school-based mental health clinician, Peggy Defazio, described him as socially unsuccessful due to his limited social skills and terminated their relationship because he threatened her.” The court further noted that the student had “consistently struggled to pass his classes, failed the standardized test he was required to pass for advancement to the seventh grade, and suffered academically because of his diagnosed bipolar disorder.” However, a dissenting judge disagreed with the ED eligibility determination, because evidence in the record indicated that student performed well academically and socially with certain teachers.

K.E. v. Independent School District No. 15, 647 F.3d 795 (8th Cir. 2011)(Minnesota).

Issues: Multiple Disabilities; Behavior Intervention Plan.

Facts: This case involved an elementary school student who had received several diagnoses, including ADHD, fetal alcohol syndrome, disruptive behavior disorder, cognitive disorder and mood disorder. Student’s intellectual functioning was in the low average range with IQ scores of 78 and 82. The school district determined that the student was IDEA-eligible under the category of “Other Health Disabilities.” Student has difficulty staying on task, keeping organized, following directions, remaining quiet, working independently, and completing assignments. She often acted impulsively and lacked self-control.

The district conducted a functional behavior assessment, which concluded that she needed a behavior intervention plan (BIP) to address blurting out and negative interactions with peers. The student’s IEP incorporated the BIP, as well as offered other supports, including sensory breaks, additional sensory input throughout the day, and aide support during lunch and recess. A psychologist from the Mayo Clinic diagnosed the student with bipolar disorder with psychotic traits and recommended a different placement, including home instruction and a day-treatment setting. The parents challenged the district’s IEPs, alleging that they did not adequately address her behavioral disabilities.

Holding: The court decided in the district’s favor, finding that it had created and implemented a cohesive behavioral management plan. While the student’s experts testified that the assessment and BIP contained deficiencies, the court relied on her passing grades and growth on standardized tests as evidence that she had received a FAPE. The court also factored in the parents’ lack of cooperation in the IEP process, including cancelling meetings and refusing to allow the district to implement the IEPs.

***Park Hill School District v. Dass*, 655 F.3d 762 (8th Cir. 2011)(Missouri).**

Issues: Autism; Behavior Intervention Plan.

Facts: This case involved twin brothers with autism. The parents filed a due process complaint on the twins’ first day of school, and withdrew both boys from the public school system one (1) month later. Among other issues, the parents alleged that the IEPs did not include a behavior intervention plan or otherwise adequately address behavior issues.

Holding: The Eighth Circuit decided in favor of the school district, stating that:

For similar reasons, we reject the [administrative] Panels’ assumption that the lack of a behavior intervention plan in the 2005 IEPs was a procedural inadequacy that ‘compromised the pupil’s right to an appropriate education.’ The 2005 IEPs noted D.D.’s and K.D.’s individual behavioral issues, as well as other limitations and concerns, reflecting that the IEP team had considered strategies to “address that behavior.” § 1414(d)(3), 34 C.F.R. § 300.324(a)(2). District personnel testified that they had intended to use teaching methods and strategies that had worked with other autistic students at Graden [Elementary School] and, if that proved unsuccessful with D.D. or K.D., conduct a functional behavioral assessment and develop an individualized behavior intervention plan. The Parents frustrated this strategy when they refused to enroll D.D. and K.D. at Graden. After the boys had attended the [private school] for most of the 2005-2006 school year, the [private school] developed a written Behavior Plan. The District’s staff, having observed the boys for many hours at the [private school], included that Plan in the 2006 IEPs, which the [administrative] Panels concluded adequately addressed behavior issues. The

Panels had no reason not to assume the same process would have occurred had the Parents enrolled D.D. and K.D. at Graden.

The court further noted that “The IDEA was not intended to fund private school tuition for the children of parents who have not first given the public school a good faith opportunity to meet its obligations.”

Payne v. Peninsula School District, 653 F.3d 863 (9th Cir. 2011)(en banc).

Issue: Exhaustion of administrative remedies.

Facts: This case involves sharply contested facts regarding the use of a “time-out” room for a student with autism. The parents alleged, among other things, that the special day class teacher used the room to punish the child without supervision, resulting in the child urinating and defecating on himself. Parents sought monetary damages for deprivation of the child’s constitutional rights, alleging among other things the knowing and intentional infliction of excessive force. The district court dismissed the case on the ground that the parents had failed to exhaust their administrative remedies under the IDEA by filing a due process complaint.

Holding: The Ninth Circuit held that the IDEA’s exhaustion of administrative remedies requirement is not jurisdictional and, instead, is an affirmative defense that must be raised by a school district or is waived. The appellate court also ruled that IDEA’s exhaustion requirement only applies when the relief sought by a plaintiff is available under IDEA, and that non-IDEA claims are not subject to the exhaustion requirement. Accordingly, the court held, “although the district court properly dismissed Payne’s IDEA-based § 1983 claim, it should not have dismissed her non-IDEA claims on exhaustion grounds.”

Note: In October 2011, the school district filed a petition for a writ of certiorari. The U.S. Supreme Court has not yet granted or denied the petition. School districts are concerned that the Ninth Circuit’s holding nullifies the exhaustion requirement, and that parents of children with disabilities will attempt to litigate cases prematurely in court thereby causing delays and driving up costs, among other concerns. This is a case to watch closely. [Update: The U.S. Supreme Court declined to hear the school district’s petition.]

UNITED STATES DISTRICT COURTS

E.Z.-L. v. New York City Dept. of Educ., 763 F.Supp.2d 584 (S.D.N.Y. 2011).

Issue: Autism; Functional Behavior Assessment; Behavior Intervention Plan.

Facts: This case involved an elementary school student with autism, who since preschool age had attended a private day school in Manhattan that specialized in the treatment of autism. The district offered an IEP with placement in a special day class with a 6:1:1 ratio (six children for every teacher and teacher's aide); multiple related services, including 2 hours per week of individual occupational therapy; 2 hours per week of speech and language therapy (individual and small group); and 1 hour per week of counseling (individual and small group). Student's behavioral challenges included sensory dysregulation, a need for immediate gratification, biting her hands, and hitting herself. The IEP included behavior goals and a sensory diet. The specialized school also had a "sensory room." At the administrative level, the hearing officer concluded that the student did not need a functional behavior assessment or a behavior intervention plan, reasoning that the combination of the special education teacher's expertise, the behavior goals, the related services, and the sensory diet were sufficient to address the student's behavior.

Holding: The court agreed that the lack of a functional behavior assessment and a BIP did not rise to the level of a denial of FAPE, reasoning that the lack of a FBA does not render an IEP procedurally inadequate where the IEP provides strategies to address the student's behavior.

T.K. v. New York City Department of Education, 779 F.Supp.2d 289 (E.D.N.Y. 2011).

Issue: Bullying and FAPE under the IDEA.

Facts: L.K., a 12-year-old girl with a learning disability, was repeatedly bullied by her peers. Testimony by aides described the bullying as "being ridiculed as well as other children [...] intentionally stay[ing] away from L.K. and [...] physically push[ing] her away for fun." Students also tried to trip L.K. and "then if she fell, well, then the teachers would get upset with her for making a scene." Students in the child's class also would refuse to touch pencils after L.K. had touched them, and laughed at her when she attempted to speak in class. While the parents informed the principal of the problem in person and in writing, the principal did not take any investigative action and refused to discuss the bullying at a special education meeting, believing that it was not relevant to the child's special

education. The parents enrolled their daughter in a private school and sought tuition reimbursement at a due process hearing. The hearing officers concluded that the bullying did not prevent the student from receiving a FAPE. The parents appealed to federal court, alleging that the failure to address the bullying was a denial of FAPE under the IDEA.

Holding: The court disagreed with the hearing officers, finding that the failure to address bullying can rise to the level of a denial of FAPE. The court cited four elements of an actionable claim, relying heavily on the standards set forth in the Office for Civil Rights' "Dear Colleague Letter," dated October 2010: (1) whether the student was bullied, and if so, did it occur because the student had a disability; (2) the school's awareness of the bullying; (3) whether the school failed to take steps to stop the bullying; and (4) whether the school's failure to intervene prohibited the student from receiving a FAPE. The court stated:

“[w]hen responding to bullying incidents, which may affect the opportunities of a special education student to obtain an appropriate education, a school must take prompt and appropriate action. It must investigate if the harassment ... occurred. If harassment occurred, the school must take appropriate steps to prevent it in the future. These duties exist... regardless of whether the student has complained, asked the school to take action, or identified the harassment as a form of discrimination.”

The court further noted:

The “[c]onduct need not be outrageous to fit within the category of harassment that rises to a level of deprivation of rights of a disabled student. The conduct must, however, be sufficiently severe, persistent, or pervasive that it creates a hostile environment.”

In analyzing the denial of FAPE, the court found that the bullying had inhibited the student's academic growth and the student had experienced social withdrawal and isolation. The court further found that “[i]t is not necessary to show that the bullying prevented all opportunity for an appropriate education, but only that it is likely to affect the opportunity of the student for an appropriate education.” The court further reasoned that “[a]cademic growth is not an all-or-nothing proposition. There are levels of progress. A child may achieve substantial

educational gains despite harassment, and yet she still may have been seriously hindered.”¹

B.H. v. West Clermont Bd. of Educ., 788 F. Supp. 2d 682 (S.D. Ohio 2011).

Issue: Multiple Disabilities; Behavior/Point System; Physical Restraint.

Facts: This case involved a student with the diagnoses of intellectual disability (high 50’s/low 60’s), poorly controlled epilepsy, selective mutism, ADHD, explosive behavior disorder, Cushing’s Disease, pervasive developmental disorder and post-traumatic stress disorder. Student’s behavior problems included aggression (hitting, kicking, spitting), non-compliance, and elopement. The district completed a behavior assessment, but relied on an untrained aide to complete it. Student’s behavior plan was a classroom-wide point system, which allowed the student to earn points to move up “levels.” Student’s parent informed the teacher that student did not understand the point system. Student never moved beyond level 1, the lowest level. At times, she was docked points for sleeping in class, which was likely related to the medication to treat epilepsy. Student was physically restrained for maladaptive behavior, sometimes several times per day. On one occasion, the student came home bruised and hysterical, and was subsequently hospitalized. The parent refused to return the student to school, because the school could not promise that staff would not continue to restrain her. The parent placed the child in a private school where her behavior was managed without using physical restraints. The child also started to verbalize responses there.

A hearing officer concluded that the student did not benefit from her behavior goals, and that she had regressed due to the use of physical restraints and the inconsistent application of a behavioral intervention plan. The hearing officer ordered two (2) years of compensatory education, including placement at a non-public school and a functional behavior assessment.

Holding: The court found that the district had “failed to meet [student’s] behavioral needs where it neglected to implement appropriate positive behavioral interventions, set increasingly low behavioral expectations, and employed physical restraint, even where shown to be ineffective.” The court upheld the compensatory education award.

¹In *M.L. v. Fed. Way. Sch. Dist.*, 394 F.3d 634 (9th Cir. 2005), the Ninth Circuit held that bullying can be a basis for a denial of a FAPE. However, the Ninth Circuit set forth a higher standard for a student to satisfy than the standard set forth in *T.K.*

C.T. v. Croton-Harmon Union Free School Dist., 2011 WL 2946706 (S.D.N.Y. 2011).

Issue: Functional Behavior Assessment; Behavioral Supports; Residential Placement

Facts: During 7th grade, the student (who did not yet have an IEP) began abusing drugs and alcohol. He also had a history of physical aggression and skipping classes but nevertheless earned passing grades and passed five Regents examinations. During 11th grade, the parents enrolled their son in a wilderness program in Utah, and later contacted the district regarding special education eligibility. The district determined that the student was IDEA-eligible under the category of emotional disturbance, and offered placement in general education with small group learning labs, individual counseling, and weekly group consultations with a teacher. The parents rejected the proposed IEP, believing that their son needed a residential placement to prevent regression. The parents further alleged that the district's failure to conduct a functional behavior assessment resulted in a denial of FAPE.

Holding: In deciding in the district's favor, the court found that a FBA was not needed, because the IEP contained behavior goals, counseling, and added academic classes to build in structure during the day. As to the concern regarding regression, the court stated, "[t]o the extent [the] concerns of 'relapse' focused on substance abuse, such issues cannot provide a basis for residential placement under the IDEA." The court added, "while a residential placement may have been the most effective way to treat the student's substance-abuse problem, that treatment was not the District's responsibility."

Estate of Montana Lance v. Lewisville Independent School District, 57 IDELR 168 (E.D. Tex. 2011).

Issue: Bullying of a child with a disability.

Alleged Facts: This case involves a nine-year-old who had an IEP to address his emotional disturbance, learning disability, and speech impairment. The boy committed suicide at school. The parents alleged that their son committed suicide due to repeated bullying at school. For example, the parents alleged that the child was called "gay" due to his speech impairment, and that his classmates were warned to avoid him or they, too, would be ridiculed. The parents alleged that the bullying caused depression and suicidal ideation. The IEP team discussed the bullying and student's behavior, and recommended a full psychological assessment, counseling and a behavior intervention plan.

The district also placed the student in an alternative education setting due to several disciplinary incidents. The parents alleged that the disciplinary incidents were a response to the bullying, and that the behavior intervention plan was not used. The parents further alleged that the district did not notify them of the bullying and failed to investigate the incidents of bullying. While at the alternative school, the student admitted to a counselor that he was suicidal, but allegedly the counselor did not notify anyone or evaluate the student's statements.

The student returned to his regular school. The parents alleged that their son was subject to bullying by the same students, and received an in-school suspension for his response to the bullying. During the suspension, the student used the restroom in the nurse's office, locked the door, and hung himself with a belt. The parents alleged that the nurse knew that the student had locked himself in the restroom before, and had to look for a key to open the door on the day of the student's suicide. The parent filed a complaint in federal court against the school district and school officials, alleging civil rights violations. The district moved to dismiss the complaint.

Holding: The court denied the district's motion in part, finding that the plaintiffs had sufficiently alleged facts to support a Section 1983 claim based on violation of the child's right to substantive due process under the Fourteenth Amendment to the United States Constitution. The court concluded that the district's "acts, although passive, increased the danger to Montana's reasonable safety prior to the affirmative act of removing Montana from the regular classroom and placing him in isolation [in-house suspension]. The Court finds that the young age of Montana, his disabilities, and the affirmative acts taken by the school are sufficient at this stage of the case to indicate that a 'special relationship' existed between Montana and the school." The court further concluded that the allegations in the complaint were sufficient to demonstrate deliberate indifference.

Note: In ruling on a motion to dismiss, the trial court must accept the allegations set forth in the complaint as true. This does not mean, however, that the allegations are, in fact, true. It simply means that the plaintiffs have an opportunity to try to prove their case.