

# SWEET | STEVENS | KATZ | WILLIAMS

Lawyers for education.



**Karl A. Romberger, Jr.**  
[kromberger@sweetstevens.com](mailto:kromberger@sweetstevens.com)

## FAKE NEWS IS ALL THE (OUT)RAGE, BUT FACT-BASED EVIDENCE IS STILL REQUIRED

In the days of “fake news” consuming so much attention, take a pause and think critically. It is a good exercise at any time, and it is the foundation for what we employ as “evidence.”

What is fake news depends on one’s channel. Opinion-based truth may operate well to oil the levers of culture and politics. “What I tell you three times is true,” makes wonderful poetry (“The Hunting of the Snark,” by Lewis Carroll) and may be the new cultural and political reality. But what is proven true in law still depends on fact-based evidence.

The Supreme Court’s *Endrew F.* decision explains the public school’s defense against special education claims depends on the “cogent explanations” offered by educators. Well-voiced opinion with an air of gravitas borrowed from circular “reasoning” is not evidence, let alone proof. It is just uninformed blather. As educators, and the lawyers defending educators, indeed, for anyone engaged in civic society, we must cut through the nonsense posing as fact, always asking ourselves and always confronting proponents with this simple question: “How do I know that?”

“Plaintiffs cite no non-testimonial evidence in arguing that the hearing officer erred with respect to their expert’s conclusions. The merely cite back to their expert’s opinion.” *W.H., et al. v. Schuylkill Val. Sch. Dist.*, 954 F. Supp. 2d 315, 329 (E.D. Pa. 2013). Plaintiffs lost their case. They lost because circular say-so – “Our expert said it and she’s right because she’s an expert who said it” – is not validated evidence proving their assertion.

“Cogent explanations” are obviously more than just an explanation. “The dog ate my homework” is an explanation. “The dog ate my homework, and here is the video I took as soon as I saw what he was doing so I could prove it,” would seem a validated assertion excusing the need to turn in the assignment. “But I saw him rub hamburger on a piece of paper,” says another student, and zoom-focused, slow-motion inspection shows a blank paper with reddish stains just before disappearing into the maw. This late evidence also supports the asserted explanation. But it does not support the excuse or the ultimate issue about the malefactor’s homework culpability.

Nigel, the man with the “11 amplifier” might be loudest (“This is Spinal Tap”)¹ but not the most melodious. When asked why not just make 10 louder, he could answer only “but these go to 11.” Not answering the question is not a cogent explanation. With all due respect to Plankton (“SpongeBob SquarePants”, Season 2 episode “Band Geeks”)², being loudest, or the most assertive, or the most opinionated, and so on, is simply not an element of validating, cogent proof.

We give our opinions. We reinforce to staff that we are entitled to our own facts – our side of the story – and we are entitled to offer our opinions in support of our case. But that is not enough. It must make sense, and it must be compellingly believable, a standard quite easy to reach by simply stating what you recall and why you decided upon a certain action. What you recall is just non-judgmental fact. Why you decided the way you did is just your reasoning about the fact.

The Bellman’s repetition, Nigel’s circuitry, and Plankton’s decibels are not cogent. Like the expert and the homework malefactor, they offer answers, but unsuitable answers for the law, which if personified, is a critical thinker. For all that we do or say (“Pat made progress” or “The IEP is appropriate”) and for all that is offered to us (“Pat can’t function in a big school” or “The IEP is not appropriate”), just keep asking, “How do I know that?” There is no shame or offense to be taken by asking, “How do I know that?”

And now, we have told you three times, so you know it is true.

Clients who have questions regarding issues discussed in this article, or any education law matter, should feel free to call us at 215-345-9111.

1. <https://www.youtube.com/watch?v=6xqx4k83ztc>  
2. Squidward: “People talk loud when they wanna act smart, right?” Plankton: [loudly] “Correct!” <https://www.youtube.com/watch?v=WpOl-WrCDc4w>

### SOUTHEAST REGION OFFICE

331 East Butler Avenue, New Britain, PA 18901  
**PHONE** 215 345 9111 | **FAX** 215 348 1147

### CENTRAL REGION OFFICE

P.O. Box 956, Hershey, PA 17033  
**PHONE** 717 641 9025 | **FAX** 717 641 9026

### NORTHEAST REGION OFFICE

2 South Main Street, Suite 303, Pittston, PA 18640  
**PHONE** 570 654 2210 | **FAX** 570 655 1875