

>> Welcome, everyone, to this session on Special Education Hearing Officer Support of Amicable Resolution. My name is Cathy Skidmore. I am a Pennsylvania Special Education Hearing Officer, and I'm joined by my colleagues Brian Ford, James Gerl, Charles Jelley and Jake McElligott. And we're here to talk about something that I think has been a theme of this symposium and is certainly consistent with the mandates of the IDEA that the parties work together collaboratively whenever possible to resolve their disputes themselves. In fact, the IDEA has several requirements in its procedures to permit ongoing collaboration throughout the special education process. Once a due process hearing complaint is filed, the parties still have options to try to resolve the matter amicably, and we're going to talk a little bit about the various dispute resolution options and then things that we can do, as hearing officers, to understand and foster where possible the parties' interest in trying to continue to explore amicable resolution. We do encourage everyone to use the chat feature for any questions or any thoughts that you want to share along the way, but we have some things we need to get to first before we get to the actual strategies and techniques that we plan to talk about. So next slide.

>> Okay. Give me one moment, please. I am advancing the slide, but it is not advancing. I don't know if I'm the presenter or not, but the slide is not advancing.

>> If you can, Jake, stop sharing and then start sharing again.

>> I can do that.

>> And just make sure you can advance now before you share. Is it advancing?

>> Sure. Give me one moment, please. Okay. My test, it has now advanced. So let me ...

>> Okay, and you can start sharing again.

>> Okay. Give me one moment, please. Okay. Did the slide advance for everyone else?

>> We're not seeing it yet, so just make sure you've selected share screen down at the bottom in the Zoom toolbar. Yes, we see your screen, and go ahead and advance. Perfect.

>> All right. There we are. Thank you, Shane. Sorry about that glitch. Before we kind of dive into some details about how Pennsylvania goes about various aspects of dispute resolution, some involving hearing officers, some not, but certainly kind of understanding some details, we always like to give people a sense of the context of how we service here in Pennsylvania. We're very proud of the fact that Pennsylvania is recognized as an exemplar state, partnering with CADRE and with the understanding of OSEP in Washington that Pennsylvania is doing things the right way when it comes to families and school districts or LEAs, not seeing eye-to-eye and needing to move to a position where someone else or some other process needs to help them get to a position where they at least have a meeting of the minds, if not necessarily share the exact same views. Becoming an exemplar state requires that we share the full gamut, the full spectrum of services, understanding how they operate, understanding whether they are effective or not, and that would be everything, as we'll see a little bit more into the presentation, from the precomplaint processes through various kinds of avenues for resolution, facilitation, mediation, all the way through to a due process hearing if necessary. But we're always working and trying to not get to that state. Data goes into understanding those processes. It's collected on a very granular level. Our office, the Office for Dispute Resolution here in Pennsylvania collects a tremendous amount of data and makes it available to the public through their website in an annual report. And I think we all feel that we're not only doing things in a way that we hope is effective, but Pennsylvania is also a high volume state. So we're not wrangling a few cases or a couple dozen cases. We're talking about hundreds, upwards of a thousand complaints or more, that is special education due process complaints in addition to facilitations and mediations and other thrusts, other processes. So our special education bar on the parents side is very accomplished and very good. The school district bar is very accomplished and very good. Our educational advocate community is quite active. So when we run this up the flagpole, we say, "We're an exemplar state. CADRE and OSEP and others kind of look to us and kind of understand that we're doing things in a way that may be an example to others." We want everyone to bear in mind that it's happening a lot, and my colleagues here in this presentation and everyone at the Office of Dispute Resolution is working diligently every day with, quite literally, in excess of a thousand disputes every year. The numbers were down slightly in the COVID year, but they're back up on a trajectory that puts us on our normal path. So I think the advice that my colleagues and I will share with you over the coming hours, though, is going to be highly effective because it works, and we're humbled with the fact that others have recognized that.

>> We could probably go on to the next slide. So as we all know, the IDEA requires two mandated dispute resolution options, so we're going to talk a little bit about mediation. Jim, if you could?

>> Yes. Because this is a CADRE conference, and we probably have a good number of mediators listening, I'm not going to go into great detail about what mediation is because probably most of you could teach me about it. So I'm not going to pretend that you don't know, but just quickly, mediation is the process where the parties sit down with a trained and skilled impartial mediator to discuss the matter. Mediation has one big advantage over due process, and that is, it can actually work to repair the relationship between the parents and the local education agency which often is quite strained by the time they get to due process. So mediation has an advantage. Of course, facilitated IEP meetings and some of the other things we're going to talk about are similar in that regard, but I think mediation is just perfectly suited to work on relationship issues which often is what is behind at least part of this. Again, we're going to talk a little bit later, I think, about what hearing officers maybe can do in terms of suggesting or encouraging mediation without, at the same time, compromising anyone's right to have a hearing. All of the procedural safeguards under IDEA are important, and we shouldn't put any undue pressure on someone to use one method over another, but we should make sure that they know what their options are. And occasionally, I think, a little push can be very helpful. So again, that's mediation in a nutshell. Again, I'm sure that many of the people listening could explain the nuances of mediation to me in greater detail, but that's a good overview, I think.

>> Thanks. And then, Brian, do you want to talk a little bit about due process hearings?

>> Sure. Well, due process is sort of the other end of the continuum, where the efforts to resolve the matter without a due ... without someone else making the decisions have failed. I don't like to think of my job as the artifact of failure, but in some ways, that's what it is. When everything else has failed, due process is the last resort. It is, at least in Pennsylvania, a very formal, very court-like proceeding. This varies state to state in terms of practicing, in terms of process. It's much less formal in other places, and in some places, it actually happens in courtrooms. You can cross the river from Pennsylvania into New Jersey, and rather than being in the schools, you go out to the administrative law center which is absolutely like a courthouse. But for us in Pennsylvania, we are statewide hearing officers. We will go wherever the case is. At least, we used to go wherever the case is. You're going to hear about virtual hearings, and it's a term I don't like, but it's a term that's used. I'd much prefer remote hearings, but neither here nor there. And then head out and hear the case and resolve the issues. For those of you who are involved with SEAs, I don't know if any LEA folks are participating in CADRE. For the advocates and attorneys who may be here, the thing that makes due process stand out in comparison to all of the other dispute resolution options, it's the process through which the parties cede the most control to a third party to determine what happens next. You hand the reins over to a hearing officer who's not only going to preside over and manage and adjudicate the due process hearing itself, but who then is also going to determine not only what happened but what happens next. It's not the parties' decision anymore. It's the hearing officer's decision which makes it stand out in stark comparison to every other dispute resolution option that is offered either directly through the IDEA or through the Dispute Resolution Offices or equivalent offices in other jurisdictions.

>> We can go to the next slide now, Jake, and see. Charlie, do you want to talk a little bit about some of the other, alternative dispute resolution processes that we offer in Pennsylvania?

>> Thank you. When people feel like they're bogged down at the initial IEP, and when I say initial IEP, whatever IEP meeting you're going to, you can request a facilitator from the office, from Dispute Resolution to work with the parties. The parties need to agree to it. The facilitator is a trained individual who is going to try to keep the parties' focus on the nature of the dispute and what they can do to resolve the dispute and also to make the parties aware of what they can't resolve, so they can decide what it is they need to do to resolve it. Resolution meeting facilitation, once the complaint is filed, you get to your 15-day resolution meeting. Again, the facilitator can be there to try to bridge the gap between the parties in discussing what the nature of the dispute is. All of these are available with ... for families proceeding on their own or with the attorney involved. The third option that we offer is a hearing officer settlement conference. Hearing officers are randomly assigned if the parties ask to meet outside of the IEP process, outside of the resolution process to discuss settlement. One of the elements that happens here is, people think they want to resolve it, but they're stuck on some topic, some glitch, some aspect, and they want to run it through a hearing officer for some type of friendly conversation in reality, what I look at it as reality testing. Parties may agree that they want ... the student needs ... The district agrees the student should receive compensatory education. The parents agree. They disagree over how much or who's to do it or when it's to be done. So there is momentum towards settlement, but there is a bump that needs to be ironed out, or maybe it can't be ironed out. People have control. Parties are still crafting resolution in each of the three, but someone is helping them with the elements that they are unable to move ahead for whatever reason. It's not bad faith. It's just they're stuck in maybe anchoring their thoughts on a certain outcome, and that is interfering with their ability to work the process of resolution. Those are the three that are available. Jake, you tend to track the hearing officer settlement conferences. What's been your experience in tracking our numbers if ... I don't mean to drop this on you like a ton of bricks. But do you have a general sense of how the hearing office settlement conferences are going in terms of likelihood of success?

>> Sure, I have that. I have that in mind, Charlie, so that's no problem. I guess before I dive into it, I didn't want to interject, but, Brian, I thought your insight was brilliant actually, as you were talking that ...

>> Well, thank you.

>> Well, you're welcome. When we're involved, when the hearing officer or the administrative law judge is involved, that's it. The train has left the station. We can still resolve things at that point, but once things are in our hands, in terms of fact finding and evidence and rulings, that's it. And everything to that point, the things on our screen, the things that Charlie described, the things we'll talk about in a little more detail involve the parties directly. They have an ownership in that that doesn't exist in a hearing, and I thought that was a great insight. And I will often, more times than not, in a majority of my cases, I will say to everyone, "We're going to start. Do you guys want to take 15 or 20 minutes to continue talking about whatever it is you've been talking about?" Because once we start the hearing, things move in a direction, and it can be difficult. The inertia of that can be difficult to kind of step away from later. So I thought that was a great insight, and I just want to note that. In terms of the hearing officer settlement conferences we offer here in Pennsylvania, I said in my earlier remarks that our bar on both sides, the parents bar and the school district bar, are very sophisticated in this field, in special education law. And sometimes we, as colleagues, would sit around and talk to tell our war stories, and you would say something like, "Well, man, I can't believe that that case went to decision. How could that case not settle?" Regardless of what the view is, in terms of a prevailing party, you sit back, and you say, "How is it they got to this point with me, and they didn't resolve the case before that?" Just based on the way things had come together factually. That led us to develop this hearing officer settlement conference process which I think has been wildly successful in terms of our expectations. The way it works is, when a complaint is filed or even before a complaint is filed, and we're trying to bolster that aspect of things, but counsel will come to a point where they say, "We think we've got this thing resolved, but whatever it is that's holding us up, it would be really helpful to have a hearing officer's view or opinion about the situation or the issue." Now it's not evaluative mediation. We want to be clear about that. We're not trying to kind of work some giant agreements between the parties. In our state, counsel will have done 90 to 95 percent of the heavy lifting. They were at a point where they say, "Look, we're ready to settle this thing. We're ready to resolve, but we have this one or two little things that we just can't seem to get around." And I say little only because it's one or two things, but sometimes it's substantively a very meddlesome issue between the parties. We have seen a lot of success with parties coming to us. I, for example, might be the presiding hearing officer, and Cathy might be assigned as the settlement hearing officer, and she simply takes on a very informal role to say to in this ... in most cases, counsel, both parties represented. We do offer it to pro se parents who represent themselves. It's available to any pair of parties. But Cathy, in my example, as the settlement hearing officer, would say, "What's holding things up? What is it that you guys can't seem to come together on?" And she, from her perspective in the hearing officer chair, can wrap her arms around that and maybe give them some insights or ideas about moving past that. I have to say, I think most people really want to hear what hearing officers have to say in those conferences. They are very interested in knowing from a fact finder's perspective, a decision-maker's perspective what we have to share. And I think the settlement rate bears that out. We normally run in roughly 82 percent settlement, out of hearing officer settlement conferences. And that's not only a very healthy number obviously, but it's always in a situation where the parties have kind of put their hands up in the air and said, "Well, we just can't get past this." So it's not just resolution, if you will. It's resolution on an issue that is just holding things up. They're ready. They're ready to resolve the case, but they just can't because of this one thing or these two things, and so it's not only a settlement rate kind of into the 80 percents,

and that's annually. That's a very steady number. But it's on cases that really should resolve, and very talented counsel on both sides in those cases have not been able to get there. So we see it as an excellent resource, and I think our bar has generally embraced it here in Pennsylvania in terms of the number of requests, and I think I can speak for all of us here, my colleagues. I just did it last week. Sometimes we'll be talking with counsel in a prehearing kind of situation, and we'll offer it to them from recommendation. "Why don't you guys think about a hearing officer settlement conference? Because I think what you're describing to me here probably should resolve." And nine times out of 10, they agree with that, and they're off to ... In my case, I believe, Jim, you just got assigned to hearing officer settlement conference and in that case I'm describing, where I said to counsel, "Have you thought about a hearing officer settlement conference?" And Jim will be trying to maybe help them navigate through things. We do want to be clear, though, that the settlement hearing officer and the presiding hearing officer do not communicate in any way. We want people to have a very frank and honest discussion, as in any kind of resolution initiative. Let's really try to be honest with each other and not feel something is going to come back and kind of nip us in the rear end. Let's be honest and open and try to work towards resolution. So I only know that Jim is the resolution hearing officer because the presiding hearing officer is always notified of that assignment. I have no sense and will have no sense of how Jim's settlement hearing conference will unfold. But we all hope that ODR will report to us that the conference was held, and the parties will say, "Hearing Officer McElligott, we were able to resolve this through the hearing officer settlement process." It's been wonderful. We've been at it now about 3 to 4 years, I would say, and those settlement rates have been consistent, 80 to 85 percent every year. So thanks, Charlie, for the opportunity to talk in a little more detail about that.

>> I think it's important, too, to point out, and we can do on to the next slide, as well, the options that we were just talking about are all voluntary which means both parties have to agree. I'm sure you're all familiar with this representation of the dispute resolution continuum, starting with the most ... the least formal on the left and then moving to the right toward due process. Parties have the right to a due process hearing, but these other options are all voluntary on the part of both parties, so both parties have to agree. Yes, we want an IEP facilitator or, yes, we want to participate in mediation, but same with resolution meeting facilitation and hearing officer settlement conferences. We do have to have voluntary participation by both parties which really is the only way to make sure that there's a good chance of success, if both parties are interested in exploring amicable resolution. And all of these options to the left of due process are still available even after the parties have filed a due process complaint. We can go on to the next slide. Jake, if you want to talk a little bit about what we alluded to a little bit earlier about something we've all been living with during the pandemic.

>> Right, thanks, Cathy. So 2 years ago, in the fall of 2019, I think the experience of most people generally, and I will speak for myself specifically, but I think all of us ... you say, "Well, we're going to do this by videoconference," and people say, "Well, what's that? How's that going to work? What are you talking about?" Fast forward 2 years, and now someone says to you, "Well, I'll forward you the Zoom link." And you say, "Oh, okay." It's a different world than it was before the pandemic, and resolution processing is no different. I will say in our experience here in Pennsylvania was ... I think serendipitously put us in a place where we had virtual or remote, whatever your preferred term is, technologies or platforms available. Cathy and I actually co-led a pilot to investigate videoconference platforming for hearings, specifically hearings, some years ago. I think it was maybe 6 or even 7 years ago. And we put ourselves in a position to understand how that might work. I don't think to anyone's surprise, it was not widely adopted, and I think I'm being generous there but ... And there were lots of reasons for that. I won't go into them, but we had various reasons for kind of exploring that. Global pandemic and the shutdown of society was not on our list of reasons, but as of March 2020, we were glad that we had that on the shelf. We were up and running with virtual hearings, that is, videoconference platforms to hold hearings when Pennsylvania schools closed as of Monday, March 16, and at first a temporary closure and then a permanent closure for the rest of the school year. By the latter half of April, so approximately 4 to 6 weeks, we were already holding hearings using videoconference platforms, and that continued throughout that summer, that spring, that summer last school year and even through to today. We're still returning to in-person processes, but there we are. So what do we make of virtual platforms to resolve special education disputes? I think especially after we always talk about the spectrum and the continuum, and I think you'd find that, in people's opinions, some people probably love it. Some people probably hate it. Many are probably just scattered along the middle somewhere. It's certainly different for us all, isn't it? And by the way, we would normally be gathered somewhere in a conference room in Oregon for this, right? But here we are. So things are very different for us all. I'll just share my opinion. Everyone has theirs. I'll share my opinion. Necessity aside, the necessity that we all found ourselves in, I think there are reasons to think about virtual processes as a means towards resolution. For myself, I have found the hearing process to be much less kind of adversarial. Sometimes you're in a room, a physical room, and there's the parent, and there's people from the school district, and that is not a comfortable situation for anyone. And it's very clear that they're not ... They maybe don't even want to be there together. At the very least, they're kind of set that they're ready to hold this hearing. I don't find that in the virtual environments. I find that it's a kind of very ... If you will, it brings a placidity to the process. People aren't necessarily kind of envenomed towards each other in the way that I sometimes, not all the time, but sometimes would feel in live hearings. I don't know if other people have that experience or not, but I just find people behaving with a little more understanding, and I think that's driven entirely by the environment. I also think it helps, for example, in my hearings when the witness testifies, I have everyone turn off their webcams except the witness, the council, myself and the court reporter at his or her option. So if people are kind of frowning and nodding their head and shaking their head and scowling when they hear an answer to a question, they're muted, and they don't necessarily see it nor does anyone else, and that's the kind of thing I'm talking about. Again, that's a personal opinion, but I'll kind of leave that there. It's certainly here to stay. Here in Pennsylvania, we have returned to in-person hearings. By and large, we have found most of our parties and most of counsel we work with comfortable with videoconference hearings.

OSEP, of course, put out some guidance about using virtual or videoconference platforms for mediation. I don't work in mediation. None of us do, so I can't speak to that. But I think we all have to be ready to harness these technologies because they're here to stay. They're not going away. We're not going back to ... We're certainly not going back to every interaction being held in person, and I would even say we're probably not even going back to a place where most are. A healthy, healthy percentage, if not a majority on some level are going to continue to do this. I'll send you the link. So how does that affect resolution? I don't know, right? I'm sure there's a PhD candidate somewhere hopefully working on that question. If not, there should be because, I think, as I say, it's here to stay, and we all have to understand how it's going to maybe impact how we approach these things regardless of whether it's a facilitation, mediation, settlement conference, hearing, whatever it might be. People just aren't going to be getting together the way we used to, for better or for worse, and I think there are pros and cons. But I will say it works, and I think we've all found that, right? Everyone's life has kind of adjusted to where we are now, and again, this conference is a perfect example of that. So that's kind of an overview and a lot of Jake in there, but I don't know if any of my colleagues have anything to share about that, or anyone ...

>> I want to underscore something that you said about it being here to stay because I'm very surprised by that, but it's absolutely true. Cathy and Jake were way ahead of the curve on piloting this pre-COVID, and I'm not talking by a little bit. I'm talking by a lot. You go back 7 years when we couldn't have possibly conceived of the world that we're living in now, they were on it, and the resistance from the bar and from certain parties was pretty significant. Jake downplayed that a little bit, but there was pretty significant resistance. Now, as our office is opening up back to hearings in-person, the procedures that we're following give the parties the option right on the complaint form to say, "I want a remote hearing. I want an in-person hearing." And we all sort of default to in-person when that box is not checked or the parties don't use the form. What I'm getting, and I don't think that I'm alone amongst my colleagues is, the folks who use the form on the parent bar side, a significant number of them, and sometimes people that I would not have expected are saying, "Yes, I want a remote hearing." And sometimes when they're not using the form or the box isn't checked, and they get that hearing notice saying, "We're all driving in and showing up in person," then I get the request, "Can we please move this to a remote hearing?" And if that request is unopposed or joint, I always grant it. So the parties have adopted this. They've adapted, and in many places, it's become preferred because we're giving them the choice. And having the choice, many are choosing to stay with remote videoconference platforms like Zoom. So that is remarkable. It's unexpected, and it also shows that it seems to be working because we're having these hearings, and they're going to decision, and we're writing our decisions, and we're sending them out, and the process continues. It's efficient. It's effective, and I do notice that sometimes it can spark, if not necessarily resolution but increased collegiality which I think is a good thing.

>> And I think that's a great point, Brian, because, first of all, you're absolutely right. Jake and Cathy worked on this for a long time, and it met with a lot of resistance for people for reasons that, some of them, I think people were sort of afraid of the technology. And I know Charlie has done a lot of competency kind of questions for whether or not, if you're practicing in this area, you really should know how to do a virtual hearing. Is it one of the skills that you need to know? But, yeah, I've talked to many lawyers who said, "I used to really be against virtual hearings, and now it really seems like it's not that bad. It's pretty good." And there are advantages. I do think ... Just for one thing, here in Pennsylvania, it snows sometimes, right? And if a snow happens on a hearing day, before the virtual platform was widely accepted, that pretty much meant a continuance, an extension of the decision deadline and a longer process, whereas now people might well have the option to do a virtual hearing. They might really want to do that. Again, it requires some quick maneuvering from logistics, but that's just one of many side benefits from that. Plus you mentioned, Brian, that it does sort of encourage settlement. I think having a hearing date that is going to go is one of the best motivators of settling a case if people ...

>> Rain or shine.

>> Yeah. Yeah, if even snow won't make it go away, then, yeah, then more than likely, if it's going to settle, it will. There's nothing like the reality of looking at where you're going to end up to cause that, so I do think that's a good point.

>> Charlie, do you want to take ... There's a question about what happens if parties don't agree on a particular format?

>> Let me just read the question.

>> Part of it was answered but not all of it.

>> Virtual versus in-person, what would become the default? Would both parties have to agree to a particular format? I think Brian has said that we start off, unless requested, with an in-person, and then we move based on the request. If it's joint, I've agreed. I haven't had the situation where it has been opposed. So frankly I don't know what I'll do because I don't know what is the basis for posing the request. A long time ago, people opposed having phone testimony, and then that became acceptable because people became aware that they could accomplish what they needed to accomplish. So there's some ... The issue of who controls the in-person versus the remote is not unique to Special Education Disputes. It is happening with the Veterans' Administration. It's happening with the Social Security Administration. It's happening in all forms of administrative law, criminal law and civil law. So that question is unanswered. And what do you do when people don't want to do what the other one wants to do? Later on, we'll get into the prehearing conference. It's something that people probe in the prehearing conference. Do we have agreement or disagreement, and what's the basis of it, and where are we going with it? There was a second question.

>> Yeah. Go ahead.

>> Has anyone expressed concerns about confidentiality when you have nonwitnesses turn off their cameras during remote hearings? Can someone take that?

>> In my experience, no. Yeah. In my experience, no. The literal answer to the question is, no, we don't get that objection. But I think beyond that, the concern about confidentiality is a real concern. One of the things that I like about a virtual hearing or remote hearing ... See, you got me saying it ... about our remote hearing is that I know exactly who's logged in. If it's a big room with audio-video gear plugged in, I know who's in that room. That's usually the exception, not the rule. Other than that, I know exactly who's on ... in the room with me, the virtual room. I can know when they have their cameras on. I can know when they have their microphones on. And the thing that is most surprising, and I don't know if this has anything to do with a remote hearing itself, or if people are just honest, but I have been really delighted and surprised by the level of candor that I get when I go through my litany of questions about where you are and what you have with you. Before a witness ... Just for an example, before a witness will testify, I'll ask. And it takes a few minutes to go through, but it's worth your time. Where are you today? What are you using to connect with? What else is running on that computer? Can you shut that down? Who else is with you in the room? Who else is with you in the building? What paper do you have with you? What notes do you have with you? What other devices do you have with you? And there's a lot of that. And frankly, folks tell me things way beyond what I need to know. "Yes, I'm in my bedroom, but my husband is downstairs, and he's leaving in 20 minutes. So you may hear the garage door go up," and on and on. "And, yes, I have my phone with me, but" ... And then you literally see them throw the phone. It's out of reach. That's happened. "Oh, I do have these notes with me. Here." And then they hold it up to the camera. "Is this okay?" Well, no, you can put them away. The candor that we get out of that is really surprising, and maybe it shouldn't be surprising. Maybe we should expect when we put people under oath to tell the truth. But I'm getting, almost unsolicited, just a tremendous amount of information about the environment that people are calling into from. And when I get it, everyone who's on the call gets it which really aids everyone's comfort. And this is, I believe, more secure and has greater confidentiality protection than what we used to do in some cases because it would be fairly common for us to all convene in person, and then parents' expert witness, who is three counties away and on a very business schedule, will call in on a conference call to the hearing. I'd rather be able to see the person. So this is, I think, an enhancement to confidentiality because we have very granular control over who can hear what and when by having people in or out of the video session, and when people are not driving in for this, it's easier to throw them out of the room, to be very blunt about it.

>> And I think, Brian, too, that that voir dire of the environment is important. I normally do it off the record, except with the witness. But off the record, before we go on, I'll say, "We're all in different locations. Is anyone with anyone else, or are we all alone?" And again, I find the same thing, candor. And literally 99 percent of the time, everyone is alone. And when they're not, it's normally counsel with a client who's not testifying.

>> And I think that's it's ... You mentioned the oath, I think, too, Brian, and I think that it's important to show that we take the oath seriously even though this is a remote hearing or a virtual hearing. I always make the person stand up when they take the oath, even though it's cumbersome because they've got the camera trained on themselves, and they have to move it. But if you treat the oath like it's a serious thing, I think people are more likely to understand that it is a serious responsibility, so I think that's true. And the other thing you mentioned, about seeing people testify, I think one of the early objections to virtual hearings was that you wouldn't be able to observe the demeanor of the witness. And, again, there's a debate as to how good we really are about being able to tell when people are telling the truth, but aside from that, I think if you see them testifying virtually, you observe pretty much just about the same information you would in an in-person hearing. I don't think it's that much harder to make demeanor determinations. Again, I would never recommend that anyone base a decision solely upon a demeanor determination, but I don't think it's that much harder to do by a virtual platform. You still see the person testifying. You still can see their face, as Jake said. I think that it's not that much harder. So I think one of the initial objections to it is actually gone but ...

>> Jake, at this point, could we skip to two slides ahead so that we can get to the heart of what it is that we're talking about so we don't run out of time?

>> Sure.

>> So the next thing we wanted to really talk about is, what are some hearing officer strategies that we can employ, and what should the hearing officer do in order to make sure he or she remains sensitive and alert to the potential interest of the parties to continue to explore potential resolution? Rather than go forward with the hearing and hand everything over to Jake or to Brian or to Jim or to Charlie to decide and say, "Here's all the evidence. You make this decision for us," and then have to live with it. So let's talk a little bit about how we can do that. What are some things that we can be alert to? Jake had mentioned earlier that he often would say to parties, "Well, before we go on the record, do you want to take 15 minutes and see if you can..." Sometimes people say yes. Sometimes they say no. So, Charlie, do you have any suggestions, some things that you have tried in the past that you have found? How can you detect when the parties might be interested? Are there some questions, or how is that approached in your experience?

>> One, if there's a prehearing conference, I call or by using a platform. Two, if we're in person, it's ... To borrow from the hostage negotiation field, is there proof of life? Is there a way that you're seriously thinking about something other than what the request was? And it's a calibrated no question. It's a simple question. It's ridiculous for me to ask if you guys are still willing to talk about trying to resolve this before we go on the record. It is a no-oriented question. People will tell you no because they have power. They're in control when they say no to you. When people say yes, they tend to wonder what's the next question going to be because get yes-battered in this world. If I say yes to this, do you want me to say yes to that? And it tends to be reciprocity and all of those things going back and forth. So I encourage people that I will listen. I will do my best to understand. I will hear, but I start off with a calibrated no question. Is this ridiculous? Do you find any other ways? Have you ... Easy one, have you given up on trying to work this out? No. Well then, what do you want to do? Why are we here? And, yes, we've given up. And if they've ceded that over, then they really feel like they need a different form of dispute resolution. Then the format, here's how we're going to do the format. At the end of my sessions, I will tell the lawyers and the participants, "Thank you. You've helped me understand. I would hope that you continue to talk to each other." The session ends doesn't mean the talks end. My e-mails will always say, "Are you talking? What's the status of the talks?" And I'll get them back, "We're not. Gave up. Don't want to. Are you ordering us to talk?" No, I'm not going to order you to talk if you don't want to talk. I get those e-mails. We all get them. People are smiling. Is this an order to talk? No. The other thing I do in the prehearing is I try to identify what the ... get the parties to state the issue and then try to find out, what is the emotional baggage that everybody is bringing in? Parent's side, participant's side at the LEA, the teacher, the witness, the counsel. Vision drives decision, and if there is something that is an emotional issue that has caused a blink in forcing an issue, someone has been slighted, to not understand that helps me ... well, to understand that helps me understand why certain witnesses, the intensity of their testimony, how they maneuver through the questions in trying to answer them as they lived ... At all times, trying to give the parties the opportunity to control and to craft what they think they need to do to get the dispute organized for me. My role in the hearing is to help you organize the hearing so I understand it, and then I can find facts to move it ahead.

>> To follow up on something Charlie said, he mentioned that sometimes that people want to say no to a question rather than say yes. I often will say, "Have the parties had the opportunity for a resolution meeting?" And it's surprising how often, even though there's that requirement in all parent-filed complaints, the answer is no. And sometimes I'll say, "Well, if this is a parent-filed complaint, the parties are required to participate in a resolution period ... or resolution meeting. I'm going to leave the room now." And I've done that several times, when 20 minutes later they've reported they have a resolution, and I can go home. That's ... Or I can turn off the Zoom Meeting that we're holding. So that I think Charlie is right about that. Sometimes it just depends on how you phrase the question. If anyone in the audience has any suggestions, any signs that you might think we might be looking for, that would be helpful to add to the chat window.

>> I'll throw one in. I think that there's another very good opportunity for hearing officers to help the parties come to an agreement that happens right after the parties make opening statements. I think that what I find in the overwhelming majority of cases is that there's not a whole lot of facts in dispute. Rather, there's very vigorous disagreement about what those facts mean. The parties don't really disagree about what happened and when. In most cases, they don't really disagree about the quantum of progress that the student made. What they're really disagreeing about is, was that quantum of progress meaningful, and what happens next? So when I hear that in opening statements, parents make an opening statement. School makes an opening statement. I'm listening for facts that are in dispute because the purpose of the hearing is not to take legal argument. It's to provide a forum for them to present facts. I know it's a lot more than that. There's a certain catharsis to it, as well. But technically that's what it's for, and if I don't hear that factual dispute, I'll go off record. I'll pull them aside and say ... There's ways to do this on a remote hearing as well. "I didn't hear really any facts in dispute. So I know that you're not here to establish the facts. Is this purely a legal dispute? And if it's purely a legal dispute, do you want to talk to another hearing officer? Because I'll put this on pause, and you can do that through this settlement conference, or you can do that through mediation and talk about ... If the real dispute is about what happens next, maybe you can mediate that, or maybe you can do that through a facilitated process. Or if it's a genuine legal dispute, talk to one of my colleagues." So there are opportunities, and also I used to listen to things like what Charlie said with a little bit of skepticism about, have you really given up on this? But Charlie knows what he's talking about, and I've seen him do it. In fact, I've seen him do it before he became a hearing officer in a case that I was involved in, where Charlie was a lawyer, where I went out to the due process hearing, and Charlie represented his client very well. It was one of those where I'm scratching my head, thinking, "What am I doing here?" because Charlie had all the facts and all the law on his side. And then as I'm ... Not quite as I'm driving home but shortly thereafter, I get the notice of settlement after the hearing concluded. So there's wisdom there. Don't think that just because you're in the due process hearing, don't think that that means that possibility of settlement is precluded. Come to it with that mindset.

>> Right, and again, to follow up on Charlie's point and Brian's point, I think, is that the constitutional theme of an administrative hearing like a due process hearing is the right to be heard. And really, people want you to hear what they're saying. So sometimes during a hearing, even though it's probably not going to help me write my decision, I will ask a question maybe of a parent, maybe of a special education teacher who seems to be maybe a little bit upset that starts with, "I hear you saying blank," whatever, and I summarize what they said in two or three words. And then I ask the question I was really interested in which probably has nothing to do with that. But I think making people feel like they're heard is a good step toward resolution whether it's a hearing officer decision or them settling it. And again, I know we're low on time here, but one other thing that I think hearing officers can do that helps a little bit, sometimes in a decision, it's good to point out to people that there are other procedural safeguards, the mediation, IEP facilitation, all the things that we talked about here, the hearing officer settlement conference. We're talking about the education of a child so cooperation, and in *Schaffer v. Weast*, Supreme Court said that the kind of cooperation between the parent and the school officials is crucial for the education of a child. So I think it's good sometimes to remember that. Sorry, okay, I know we're low on time, but ...

[Chatter]

>> I just want to add one thing operationally. I have moved to a place where I do my opening statements separate from any evidentiary session. So I schedule opening statements at 4 or 5 p.m. so everyone's day is open, 1 hour. I have some preliminary things to talk about, 20 minutes for each side. We're done 45 minutes to an hour, and I do that in every case. And it kind of gives that space to allow people to continue talking, for me to make recommendations. The opening statements are on the record, so we have ... They're transcribed, but we haven't taken any evidence yet. And that's where I insert myself to say, "Have you guys thought about a hearing officer settlement conference? I encourage you to keep talking," whatever it might be, and I do that in every case because if you ... What I find is if you go directly from the opening statements to, "Let's bring on the first witness," it doesn't have the opportunity to breathe as much in terms of people considering whether they want to go. Because once you start with an examination, once a witness gets called, it's highly unlikely the case will resolve. Sometimes they do. But nine times out of 10, they don't. Ninety-nine times out of 100, they don't. So I've taken the position of scheduling opening statements 45 minutes to an hour. Thank you very much, ladies and gentlemen. We'll schedule additional sessions hereafter, and then I can use that space to say, "Why don't you guys keep engaging? Why don't you do a hearing officer settlement conference?" I encourage the parties to continue whatever it might be, but do the things we're talking about here, but they need time. They need time and space to do that, so that's how I help them get that.

>> But we also have to keep in mind that once a due process complaint has been filed, there are timelines that apply. So the hearing officer has to also keep in mind, "Okay, this case has been assigned to me. I have it scheduled for a hearing for whatever purpose, opening statements or evidence. I also have a very important decision due date that I, myself, as the hearing officer, cannot move on my own." So we have to keep in mind as well, we certainly want to give parties the opportunity to explore potential resolution, but we also have to make sure that if they're going to do that, we're not missing a decision due date because things cannot simply be placed on hold indefinitely in these matters. So that's important to make sure. And there's one question I wanted to get to. It's an excellent question. I'm not sure that we really are going to be able to answer it, but the question is, "Are there any cultural considerations that come into play when you're trying to understand what should be done?" And since I know it's a big question for the short amount of time that we have left, but absolutely, I think that that's something that's ... something that we probably all wrestle with to some extent. It's certainly something to give a lot of thought to. I would, myself, be interested in any resources, and we will certainly share them if we come across any. If anyone in the audience has resources for understanding those cultural differences in this type of a situation or others, I think that would be very valuable information for all of us. One other thing, and I don't ... I think we only have less than a minute less. I have sometimes borrowed a line from a former colleague of mine who would say at the end of a due process hearing ... and Jake just mentioned often by the time there's a witness, it doesn't settle. She would often say, "My feelings will not be hurt if you tell me I don't need to come back." And that sometimes gets people to smile, and sometimes that was successful. The parties did continue talking, and they reached a resolution. But I think at this point, Melanie, you can correct me if I'm wrong, but I think we're just about out of time.

>> You are not wrong, Cathy.

>> Oh, there's a good resource. I'm sorry?

>> I said, "You are not wrong, Cathy."

>> Okay, great. Someone has just posted a resource on here. We can make it available on Discord, I think, or CADRE can send it out. So thank you, just contact information. We thank you all very much for joining us here today.