GIVING WORKING PARENTS THE OPPORTUNITY TO BE THE MVP OF AN IEP TEAM

By Claire Dronzek[1]

[1] J.D. Candidate, Rutgers Law School – Newark, Class of 2021; Senior Notes Editor, *Rutgers Law Record*.

I. Abstract

On August 8, 2019, the United States Department of Labor ("DOL") issued three opinion letters, which are official, written opinions composed by the Wage and Hour Division of the DOL, that interpret "how a particular law applies in specific circumstances presented by the individual person or entity that requested the letter."[2] Two of the letters released in August 2019 addressed compliance issues related to the Fair Labor Standards Act ("FLSA"), and the third letter addressed a compliance issue related to the Family and Medical Leave Act ("FMLA").[3] FMLA2019-2-A, the letter regarding compliance with the FMLA, responded to an employee's request for an opinion on "whether an employee may take leave under the Family and Medical Leave Act (FMLA) to attend a Committee on Special Education (CSE) meeting to discuss the Individualized Education Program (IEP) of the employee's son or daughter."[4] Based on the facts presented by the requesting employee, the Wage and Hour Division concluded that attendance at such meetings is indeed a qualifying reason to take intermittent leave under the FMLA.[5]

This paper analyzes the conclusion presented in the above-detailed opinion letter and explores why a parent should undoubtedly be able to take leave under the FMLA to attend meetings concerning their child's educational and special medical needs. Further, this paper seeks to explore why a parent's attendance at such meetings constitutes essential care for a family member with a serious health condition within the meaning of the FMLA.[6] Finally, this paper seeks to explain the implications of FMLA2019-2-A on employers. Although DOL opinion letters are not binding,[7] it is essential for employers to treat this opinion as if it were in order to promote the well-being of employees with children who are entitled to special education services in public schools.

II. Introduction to the Family and Medical Leave Act

Throughout the twentieth century, when the rising cost of living was prevalent across a majority of America, the number of labor force participants within the country continued to steadily increase each year, and the labor force experienced drastic

[2] Megan Sweeney, *U.S. Department of Labor Issues Three New Wage and Hour Opinion Letters*, U.S. DEP'T OF LAB. (Aug. 8, 2019), https://www.dol.gov/newsroom/releases/whd/whd20190808.
[3] *Id*.
[4] Cheryl M. Stanton, *FMLA2019-2-A*, U.S. DEP'T OF LAB., 1 (Aug. 8, 2019), https://www.dol.gov/whd/opinion/FMLA/2019/2019_08_08_2A_FMLA.pdf.
[5] *Id*.
[6] *See* 29 C.F.R. § 825.100(a) (2020).
[7] *Compliance Bulletin: DOL Reintroduces 17 Opinion Letters*, SCOTT BENEFIT SERVICES, 2 (2018), https://lrshrm.shrm.org/sites/lrshrm.shrm.org/files/DOL%20Reintroduces%2017%20Opinion%20Letters(2).pdf.

changes.[8] For example, from 1965 to 1992, the number of working mothers with children under the age of eighteen increased from thirty-five to sixty-seven percent.[9] Single-parent families also rose from sixteen to twenty-seven percent of all families with children from 1975 to 1992.[10] To balance the increasing number of working Americans and the pressure on those employees to handle both the needs of their families and the responsibilities of their jobs, President William J. Clinton signed into law the Family and Medical Leave Act ("FMLA") of 1993.[11]

The FMLA was signed as a new piece of legislation requiring public and private employers, with fifty or more employees, to provide their employees with family and medical leave.[12] The legislation set out a minimum length of service and a minimum number of working hours that an employee must meet to become eligible to use the leave provided.[13] The core provision of the FMLA gave employees the ability "to take up to twelve weeks of unpaid leave for the care of a newborn or newly adopted child, for the care of a family member with a serious medical condition, or for their own illness."[14] Throughout the duration of leave taken by employees, the law requires employers "to maintain health insurance coverage and job protection."[15] President Clinton recognized that the failure of our government to provide family and medical leave options to American workers had placed a serious burden on working citizens: having to choose when to abandon their work to care for their family or take care of their own medical needs.[16] This burden fostered poor work environments in America with lower levels of productivity, higher levels of job turnover, and some levels of absenteeism.[17] The burden weighing on the shoulders of American workers left them to make a choice between job security and the pressing needs that arose in their families' lives or their own lives.[18] For example, this burden consistently weighed on working parents who cared for children with medical needs or employees with their own serious health condition that affected their ability to work.[19]

The enactment of the FMLA allowed American workers to enjoy the same rights as workers in other countries. Prior to 1993, the United States existed as "virtually the only

[8] Statement from William J. Clinton, President of the U.S., on Signing the Family and Medical Leave Act of 1993 (Feb. 5, 1993), https://www.presidency.ucsb.edu/documents/statement-signing-the-family-and-medical-leave-act-1993.
[9] *Id*.
[10] *Id*.
[11] *Id*.
[12] *Id*.
[13] *Id*.
[14] *Id*.
[15] *Id*.
[16] *Id*.
[17] *Id*.
[18] *Id*.
[19] *Id*.

advanced industrialized country without a national family and medical leave policy."[20] By enacting the FMLA, Congress sought to observe the "direct correlation between health and job security in the family home and productivity in the workplace" in America; there existed high hopes for more productivity, less job turnover, and reduced absenteeism.[21] The FMLA's main objectives are to allow employees to have a work-life balance, to promote the economic security of American families, and to aid the nation's interest in preserving family integrity.[22]

Public agencies, and public and private elementary and secondary schools are "covered" employers under the FMLA if they have fifty or more employees.[23] For an employee to be eligible to take intermittent leave under the FMLA, the employee must work for a covered employer, have worked at least twelve months, have completed at least 1,250 hours of service within the twelve months before the leave they seek begins, and must be employed at a work site with at least fifty employees within seventy-five miles of that work site.[24]

The FMLA allows eligible employees to take up to twelve workweeks of FMLA leave in a 12-month period for any of the four enumerated qualifying reasons: "for the birth or placement of a child for adoption or foster care; to care for a spouse, son, daughter, or parent with a serious health condition; for their own health condition; for military family leave."[25] Intermittent leave is addressed separately. Eligible employees may take intermittent or reduced schedule leave for: "employee's or qualifying family member's serious health condition when the leave is medically necessary, covered service member's serious injury or illness when the leave is medically necessary, or a qualifying exigency arising out of a military member's covered active duty status."[26]

Both employers and employees have important responsibilities when leave is sought.[27] Employers must provide notice, maintain group health insurance, maintain records of leave taken by a given employee, and reinstate the employee to the same or an equivalent job or position with the same or equivalent benefits upon return from their period of leave.[28] Providing notice includes general notice of the law to employees, notice of employee eligibility (with reason if the employee is deemed ineligible), notice of rights

[20] *Id*.
[21] *Id*.
[22] *The Family and Medical Leave* Act, U.S. DEP'T OF LAB. (July 13, 2019), https://www.dol.gov/agencies/whd/fmla/general-guidance (click "Family and Medical Leave Act (Microsoft PowerPoint)" hyperlink).
[23] 29 C.F.R. § 825.104 (2020).
[24] 29 C.F.R. § 825.110 (2020).
[25] *The Family and Medical Leave Act*, *supra* note 22; 29 C.F.R § 825.112.
[26] *The Family and Medical Leave Act*, *supra* note 22; 29 C.F.R. § 825.202.
[27] *See The Family and Medical Leave Act*, *supra* note 22.
[28] *Id*.

and responsibilities, and notice of designation.[29] Employers are absolutely prohibited from interfering, restraining, or denying employees' FMLA rights, discriminating or retaliating against an employee who exercised their FMLA rights, discharging or discriminating against an employee due to involvement in a proceeding related to the FMLA, or considering an employee's use of FMLA leave as a negative factor in employment actions.[30]

On the other hand, employees have the responsibility of providing sufficient and timely notice when the need for leave arises.[31] Additionally, at the request of an employer, employees may have to "provide certification to support the need for leave; provide periodic status reports; [or] provide fitness-for-duty certification."[32] In terms of notice requirements, employees must give thirty-days' notice (or as soon as practicable) for foreseeable leave, and must provide notice as soon as practicable for unforeseeable leave.[33] Providing certification is perhaps the most extensive requirement that employees seeking FMLA leave must complete. In the case of a serious health condition, medical certification must be submitted within fifteen calendar days of the request for leave; the employer must identify any deficiency in the certification in writing and give the employee an additional seven days to cure such a deficiency.[34] An employer, not an employee's direct supervisor, has the right to contact a health care provider to authenticate or clarify the certification submitted by an employee.[35] Authenticating a certification consists of contacting a health care provider to verify that the information requested was completed or authorized by a health care provider; an employer may not request any additional information.[36] Clarifying a certification consists of contacting a health care provider to understand the meaning of a response to a request for medical certification or to understand handwriting; an employer may not request any additional information beyond what is required by the certification form.[37] If an employer questions the validity of the initial completed certification, it is an option to require a second opinion at the employer's cost.[38] If there are differences between the first and second opinions, the employer may require a third opinion, which becomes the final and binding opinion.[39]

Within the extensive statutory scheme of the FMLA, there also exists enforcement mechanisms that employees may use to enforce their own FMLA rights.[40] To do so,

[29] 29 C.F.R. § 825.300-.301.
[30] 29 C.F.R. § 825.220.
[31] *The Family and Medical Leave Act*, *supra* note 22.
[32] *Id*.
[33] 29 C.F.R. § 825.302-.303.
[34] 29 C.F.R. § 825.305.
[35] 29 C.F.R. § 825.307.
[36] *Id*.
[37] *Id*.
[38] *Id*.
[39] *Id*.
[40] 29 C.F.R. § 825.400.

employees may file a complaint with the Wage and Hour Division or file a private lawsuit.[41] Either of the two actions must be taken within two years after the last action that the employee contends was in violation of the FMLA, or within three years if the employer's violation was willful.[42] It is evident from the extensive requirements that exist for both employers and employees that the key to the success of the FMLA in the workplace is communication.

III. Introduction to Department of Labor Opinion Letters

As with all laws, the enactment of legislation undoubtedly comes with questions from those affected by the same, regarding both its effects and its interpretation. Within the United States Department of Labor ("DOL"), officials in the Wage and Hour Division ("WHD") play a role in the administration of the statutes and regulations set forth in two important federal wage and hour laws, namely, the Fair Labor Standards Act ("FLSA") and the Family and Medical Leave Act ("FMLA").[43] Upon request by a person or an entity, the officials working for the WHD (known as "administrators" or lower-level officials) may provide official written explanations of what these two laws require in a certain situation, based on the submitted set of facts.[44] Released infrequently by the WHD, the written explanations are known as "opinion letters."[45] WHD opinion letters are aimed at assisting the public in developing a clear understanding of what FLSA and FMLA compliance requires and assisting employers and employees in understanding their rights and responsibilities under the law.[46] In addition to the FLSA and FMLA, the WHD also has the power to issue opinion letters responding to questions arising under other federal wage and hour laws enforced by the DOL, for example, the Migrant Seasonal Agricultural Worker Protection Act ("MSPA") and the wage garnishment provisions of the Consumer Credit Protection Act ("CCPA").[47]

Opinion letters originated during President George W. Bush's administration in response to a rising number of specific employer compliance questions, many involving the FLSA.[48] The practice of issuing opinion letters was withdrawn in 2009 when President Barack Obama opted to address compliance questions through a different method.[49] However, on June 27, 2017, the DOL issued a statement announcing that the practice of issuing opinion letters would be reinstated, and on January 5, 2018, the DOL

[41] *Id*.
[42] *Id*.
[43] *See Final Rulings and Opinion Letters*, U.S. DEP'T OF LAB., https://www.dol.gov/whd/opinion/guidance.htm (last visited Oct. 13, 2020).
[44] *Id*.
[45] *Id*.
[46] *Id*.
[47] *Id*.
[48] *Compliance Bulletin*, *supra* note 7, at 1.
[49] *Id*.

reintroduced seventeen opinion letters that had been withdrawn during the Obama administration.[50]

DOL opinion letters are not the law; opinion letters are not legally binding and have been deemed merely guidance for employers and employees who are attempting to understand their legal rights and responsibilities under certain labor and employment laws.[51] So, one may ask, why do opinion letters matter? Aside from helping employers and members of the American workforce understand their rights and responsibilities, the reason that opinion letters matter exists in the legal context; employers who rely on opinion letters in navigating an employment issue have a possible good faith defense under the law if litigation ensues.[52] This principle allows employers to minimize their penalties in litigation if "they can prove they were making an honest effort to comply with the law" by relying on the DOL's guidance issued in an opinion letter.[53] It is absolutely possible that judges may disagree with an opinion letter in their own interpretation of the law and, nevertheless, proceed to find an employer to be noncompliant regardless of whether they relied on an opinion letter issued by the WHD.[54]

One may wonder how many requests for letters the WHD receives in a given year and how the officials could possibly respond to all of them. While the WHD reviews every request for an opinion letter, the members of this division use their discretion and traditionally have only answered a few requests.[55] Employers or employees that request an opinion letter may be left to wait for a response for several months, since publishing opinion letters is a rigorous process.[56] All in all, there exists around twenty reintroduced opinion letters that cover a variety of compliance topics, and employers are encouraged to review these letters and rely on them for guidance.[57]

IV. **Introduction to Individualized Education Programs**

"The Individuals with Disabilities Education Act (IDEA) is a law that makes available a free appropriate public education to eligible children with disabilities throughout the nation and ensures special education and related services to those children."[58] An Individualized Education Program ("IEP") is a highly individualized document designed for public school children who receive special education and related services, created by teachers, parents, administrators from the school district, and related services personnel

[50] *Id*.
[51] *Id*. at 2.
[52] *Id*.
[53] *Id*.
[54] *Id*.
[55] *Id*.
[56] *Id*.
[57] *Id*.
[58] *About IDEA*, IDEA, https://sites.ed.gov/idea/about-idea/ (last visited Oct. 13, 2020).

in an effort to "improve educational results for children with disabilities."[59] An IEP is considered "the cornerstone of a quality education for each child with a disability" because they are so highly individualized and require teamwork and an intensive process to create.[60] By examining the needs of a student who receives special education services, the aforesaid key players brainstorm, based on their knowledge and expertise, to determine the most effective educational plan for a student with a disability to follow each school year.[61]

After a child is identified as potentially in need of special education and related services in a public school district, the child is evaluated in numerous areas to determine whether they are eligible for those services, which is commonly performed by personnel hired by a given school district.[62] Qualified professionals and the child's parents then examine the results of such an evaluation to ultimately determine whether the child can be deemed "a child with a disability" as defined by the IDEA.[63] If the child meets the IDEA definition, the child is deemed eligible for special education and related services, and the clock starts ticking on a thirty-calendar day deadline for the school district's IEP team to meet and write an IEP for the child.[64]

The next step in the process is to schedule the IEP meeting. In doing so, school staff must schedule the meeting at a location and time agreed upon by the parents and the school, contact any potential meeting attendees, notify the parents within a reasonable time before the meeting so that they may take advantage of their opportunity to attend, inform the parents about what the meeting entails and who will be in attendance, and inform the parents that they have the option of inviting people to the meeting who have "knowledge or special expertise about the child."[65] At the IEP meeting, the team assembled by the school district and the child's parents discuss the child's needs and draft the IEP.[66] The school district must obtain consent from the parents to provide special education and related services to the child.[67] Once parental consent is obtained, the student begins to receive the services soon after the meeting.[68] In an instance where the parents do not consent to the proposed IEP, the parents may voice their concerns to the IEP team and attempt to come to an agreement through mediation, a due process hearing, or they may file a complaint with the state education agency.[69]

---

[59] *A Guide to the Individualized Education Program*, U.S. DEP'T OF EDUC. (Aug. 30, 2019), https://www2.ed.gov/parents/needs/speced/iepguide/index.html#process.
[60] *Id.*
[61] *Id.*
[62] *Id.*
[63] *Id.*
[64] *Id.*
[65] *Id.*
[66] *Id.*
[67] *Id.*
[68] *Id.*
[69] *Id.*

To comply with the IDEA, any given IEP "must include certain information about the child and the educational program designed to meet his or her unique needs."[70] The first mandatory piece of information is current performance, in which the IEP states the child's present levels of performance in educational testing, which commonly comes from evaluation results from classroom tests or observations by related service providers.[71] The next requirement is a statement of annual goals that the child can be reasonably expected to accomplish within the next year, which must be measurable.[72] Goals are commonly broken into "benchmarks" and may address academic, social or behavioral, and/or physical needs pertaining to the child's education.[73] The IEP must next list the special education and related services that will be provided to the child, the dates and locations of when and where services will commence, how often and where the services will be provided, and the extent of time the services are expected to be provided.[74] The IEP must also address the level of participation the child will have with nondisabled children in class and school activities.[75] It must address whether the child will participate in state and district-wide tests, and if so, what modifications will be provided to assist in the testing procedure.[76] Finally, the IEP must articulate the ways in which the child's progress will be measured and the procedures in place to notify the parents of the progress their child is making based on the program.[77]

While providing services to an eligible child, the school assures that the IEP is carried out as planned in its entirety and that progress toward the articulated annual goals is measured and reported to the parents.[78] At least once a year, the IEP team reviews the child's IEP during a formal meeting, where the child's parents must be invited to attend, in the event the parents have suggestions for changes or would like to voice concerns with the current goals of the IEP and the current placement of the child.[79] If the child's parents disagree with the IEP during the annual review, they may opt to conduct additional testing or an independent evaluation of their child.[80]

The annual review meetings are perhaps the most important part of the IEP implementation process because it provides the child's parents with the opportunity to see how the document they helped draft is being implemented and how their child is responding.[81] The IDEA mandates that the school district hold a meeting to review a

[70] *Id.*
[71] *Id.*
[72] *Id.*
[73] *Id.*
[74] *Id.*
[75] *Id.*
[76] *Id.*
[77] *Id.*
[78] *Id.*
[79] *Id.*
[80] *Id.*
[81] *See id.*

child's IEP at least once a year, but the team may extend this requirement and review and revise an IEP more often.[82] A meeting may be arranged if the teachers or parents are concerned that the child is not showing any signs of progress towards the goals articulated in the IEP, or if the child is progressing well and has met most of the goals of the IEP within the year and therefore, is in need of new goals.[83] Explanation of the rules and regulations of creating, implementing, and reviewing an IEP evidence how essential an effective IEP is to the educational goals of a child with a disability. It is even more evident how important it is for both parents and teachers to be informed of the progress that any given student is making in accordance with their goals.

V. **FMLA2019-2-A**

The question presented that gave rise to the opinion letter at issue in this paper, referred to as FMLA2019-2-A, was "whether an employee may take leave under the Family and Medical Leave Act (FMLA) to attend a Committee on Special Education (CSE) meeting to discuss the Individualized Education Program (IEP) of the employee's son or daughter."[84] The employee who submitted the request for an opinion from the WHD — a mother of two children with qualifying serious health conditions under the FMLA — received certification from doctors supporting her need to take intermittent leave to provide care for her children.[85] In prior years, her employer had approved her request to take FMLA intermittent leave, specifically in response to her need to take her two children to medical appointments.[86] However, her employer denied her FMLA leave request to attend IEP meetings at her children's school, so she took her issue to the WHD.[87]

In her submission of facts to the WHD, the employee and her spouse explained that their two children receive various pediatrician-prescribed types of therapy provided by their school district, including occupational, speech, and physical therapy.[88] They further explained that their children's school holds meetings four times throughout the year to review the children's "educational and medical needs, well-being, and progress"; speech pathologists, a school psychologist, occupational therapists, physical therapists, teachers, and school administrators attend these meetings as well.[89] The school's meetings give the parents insight into their children's progress, address any areas of concern that have arisen since the last meeting, include a review of recommendations from the children's primary doctors and a review of any new test results, and lastly, provide

[82] *Id*.
[83] *Id*.
[84] Stanton, *supra* note 4.
[85] *Id*.
[86] *Id*.
[87] *Id*.
[88] *Id*.
[89] *Id*.

recommendations of any additional therapy if needed.[90] The employee's ultimate question to the WHD was whether she may take intermittent FMLA leave to attend such meetings.[91]

In the WHD analysis, an administrator named Cheryl M. Stanton ("Stanton") first outlined the relevant legal principles pertaining to the facts provided, specifically, the relevant statutes within the FMLA.[92] The first applicable portion of the statute was the definition of a serious health condition within the FMLA, defined as "an illness, injury, impairment, or physical or mental condition that involves inpatient care or continuing treatment by a healthcare provider."[93] Stanton goes on to explain that the FMLA provides in relevant part that when employed by a covered employer, an eligible employee "may take up to twelve weeks of job-protected, unpaid FMLA leave per year 'to care for the spouse, or a son, daughter, or parent, of the employee, if such spouse, son, daughter, or parent has a serious health condition.'"[94] "Physical and psychological care," as well as "mak[ing] arrangements for changes in care," constitute care for a family member.[95] Based on a family member's serious health condition, an employee is permitted to use FMLA leave "intermittently or on a reduced leave schedule when medically necessary."[96] To support an employee request to take leave, an employer may require an employee to submit a certification issued by a health care provider that meets certain criteria on a timely basis.[97]

Relying on the general legal principles that applied to the requesting party's facts, Stanton provided the ultimate opinion: "Based on the facts you provided, your wife's need to attend CSE/IEP meetings addressing the educational and special medical needs of your children – who have serious health conditions as certified by a health care provider – is a qualifying reason for taking intermittent FMLA leave."[98] Stanton reasoned that the mother's attendance at the CSE/IEP meetings constitutes care for her children, who are family members with a serious health condition, within the meaning of the applicable statute.[99] Furthermore, 'care for a family member' includes "mak[ing] arrangements for changes in care," such as taking leave "to help make medical decisions on behalf of a hospitalized parent or to make arrangements to find suitable childcare for a child with a disability."[100]

---

[90] *Id*. at 1-2.
[91] *Id*. at 2.
[92] *Id*.
[93] *Id*.
[94] *Id*.
[95] *Id*.
[96] *Id*.
[97] *Id*.
[98] *Id*.
[99] *Id*.
[100] *Id*.

Stanton cited as precedent three federal court opinions in reaching the official conclusion.[101] In 2012, the U.S. Court of Appeals for the Sixth Circuit addressed the question of whether the plaintiff could take intermittent FMLA leave to go to a hospital "in order to make a decision with his sister regarding whether his mother should continue on life support" in *Romans v. Michigan Department of Human Services*.[102] There, the court held that the plaintiff's circumstances were a qualifying reason to take FMLA leave, since the plaintiff's situation involved care for a family member.[103] The plaintiff making a decision as to whether a parent should continue on their current medical treatment can be logically encompassed as a situation in which an employee is taking leave to make arrangements for changes in care within the meaning of the statute.[104]

In 2014, the U.S. Court of Appeals for the Seventh Circuit addressed whether an employee may take FMLA leave to provide physical and psychological care to a terminally ill parent while that parent travels away from home in *Ballard v. Chicago Park District*.[105] There, the plaintiff was a Chicago Park District employee who lived with her terminally ill mother and acted as her primary caregiver.[106] As part of the mother's end-of-life goals discussed with her hospice social worker, the plaintiff's mother expressed an interest in taking a trip to Las Vegas with her family, including the plaintiff.[107] The plaintiff requested unpaid leave and accompanied her mother to Las Vegas, where they toured the city while the plaintiff continued to serve as her mother's caretaker.[108] The dispute arose when the plaintiff was terminated months later as a result of her absences from work that accumulated during the trip.[109]

The defendant-employer, Chicago Park District, argued in district court that the plaintiff's leave did not qualify under the FMLA because the plaintiff did not provide care to her mother while on the trip, so the trip "was not related to a continuing course of medical treatment," but was merely recreational.[110] The court held that the plaintiff's leave to care for her mother, although the care took place in Las Vegas, was a qualifying reason to take FMLA leave.[111] The court reasoned that the location of where an employee provides care to a family member is irrelevant; as long as an employee takes leave to provide such care, the employee receives FMLA protection.[112]

---

[101] *Id*.
[102] Romans v. Mich. Dep't of Human Servs., 668 F.3d 826, 840 (6th Cir. 2012).
[103] *Id*. at 841.
[104] *Id*.
[105] Ballard v. Chi. Park Dist., 741 F.3d 838, 839 (7th Cir. 2014).
[106] *Id*.
[107] *Id*.
[108] *Id*. at 840.
[109] *Id*. There was a dispute over whether the plaintiff's employer notified her of the denial of her request for leave prior to the date she left for Las Vegas. *Id*.
[110] *Id.* at 840, 843.
[111] *Id.* at 840.
[112] *Id*.

The court recognized a policy concern raised by the Chicago Park District, the notion that employees may take a vacation and bring a family member with a serious health condition to have the leave covered by the FMLA.[113] However, the court noted that certifications required by the family member's health care provider would likely diminish the risk that employees would abuse FMLA leave provisions in this context.[114] The court also properly highlighted that the FMLA "speaks in terms of 'care,' not 'treatment'"; the fact that the plaintiff did not participate in some sort of ongoing treatment for the family member's health condition did not matter due to the legitimate forms of ongoing care that she provided.[115]

The final case that the WHD administrator relied on, *Wegelin v. Reading Hospital & Medical Center*, was heard in the United States District Court for the Eastern District of Pennsylvania in 2012, and is arguably the case that most closely aligns to the situation presented in the opinion letter at issue.[116] *Wegelin* presented the question of "whether a parent of a special needs child is entitled to FMLA leave to make suitable arrangements for the care of her child."[117] The plaintiff was employed as a technician's assistant at Reading Hospital and was also the mother of an elementary school age child with pervasive developmental disorder and congenital blindness in one eye.[118] Her child required special education services in school and could not be left alone due to her health conditions.[119]

The plaintiff was assigned to a parking garage within walking distance to her job location at Reading Hospital, but used an improper parking pass in a different garage to park closer to her job location.[120] As a result of this action, the plaintiff was disciplined and sent to park in a remote lot that required taking a shuttle to get to her job location.[121] Due to the extra time required each day for travel, the plaintiff explained that she was unable to pick up her daughter from her current daycare on time in the evening and requested time off to find a new daycare that had the capacity to take care of her daughter for an extended period of time.[122] The plaintiff was given one week of paid time off to find a new daycare for her daughter, but did not report to work the following week on the date she was set to return, and, as a result, Reading Hospital terminated her employment.[123] Reading Hospital contended that the plaintiff's attempt to find a new

[113] *Id*. at 843.
[114] *Id*.
[115] *Id*. at 840.
[116] Wegelin v. Reading Hosp. Med. Ctr., 909 F. Supp. 2d 421 (E.D. Pa. 2012).
[117] *Id*. at 423.
[118] *Id*.
[119] *Id*.
[120] *Id*.
[121] *Id*.
[122] *Id*. at 424.
[123] *Id*.

daycare did not constitute a "need to care for" her daughter due to her serious medical condition.[124]

Ultimately, the court held that the plaintiff was entitled to FMLA leave to make arrangements for a change in her daughter's care as a result of her new parking assignment at work.[125] The court reasoned that making arrangements for "changes in care" is a reason for qualifying leave expressly covered by FMLA regulations.[126] The court explained that the statutory language is silent on whether the facility providing the care had to be "one that provides medical treatment," and the fact that a daycare is not a specialized medical facility did not negate the plaintiff's need to use leave.[127]

In addition to the three federal cases discussed above, WHD administrator Stanton relied on an existing WHD policy articulated in an opinion letter published in 1998.[128] FMLA-94 addressed the question of whether an employee was entitled to FMLA leave to attend "Care Conferences" related to the health condition of her mother.[129] A Care Conference was described by the employee as a meeting in which her mother's health care providers, such as nurses, dieticians, physical therapists, activity directors, and doctors, would gather to "discuss the individual's condition, immediate needs, incidents, and general well being."[130]

In FMLA-94, the WHD concluded that attendance at a Care Conference would be considered a covered event, consistent with the rationale "that providing physical and psychological care and comfort to family members with serious health conditions would be a legitimate use of FMLA leave."[131] The WHD concluded that the employee's attendance at her mother's care conference was clearly essential to her ability to provide appropriate care to her mother.[132]

WHD administrator Stanton concluded in the opinion letter at issue that similar to FMLA-94, the previous opinion letter, the employee's attendance at her children's IEP meetings is essential to her ability to care for her children appropriately, both physically and psychologically.[133] The administrator concluded the letter by stating that the child's doctor did not have to be present at the school meetings for the leave to qualify as

[124] *Id*. at 430.
[125] *Id*.
[126] *Id*.
[127] *Id*.
[128] Stanton, *supra* note 4, at 2-3.
[129] Michelle M. Bechtoldt, *FMLA-94*, U.S. DEP'T OF LAB. (Feb. 27, 1998), https://www.dol.gov/sites/dolgov/files/WHD/legacy/files/FMLA-94.pdf.
[130] *Id*.
[131] *Id*.
[132] *Id*.
[133] Stanton, *supra* note 4, at 3.

intermittent FMLA leave.[134] With that analysis and conclusion, another reason why an employee may take FMLA leave was added to the long list compiled over years of dispute between employers, employees, and legislators.

VI. Reaction to the Opinion in FMLA2019-2-A

As with the release of opinion letters in the past, employers are likely to feel like the more affected party when the WHD publishes such an opinion. Such an opinion likely means more requests for leave and more paperwork for employers to meet the requirements of the FMLA. To ease the minds of employers, many employment lawyers or those in counsel roles in corporations release blog posts in response to WHD opinion letters, giving advice to employers on where to go from here.[135] With this opinion, many lawyers recognized that FMLA leave was very likely to increase due to the rising number of households around the country with children with special needs.[136] The United States Department of Health and Human Services conducted a National Survey of Children with Special Health Care Needs, finding that about twenty percent of all households with children have at least one child with special needs.[137] In a world where the number of working parents appears to be consistently on the rise, it is likely that many more eligible employee-parents will request FMLA leave to attend IEP meetings as a result of this opinion.[138]

Some lawyers have read the opinion letter and have found that FMLA leave for IEP meetings should be manageable, given the nature of scheduling of IEP meetings.[139] Since IEP meetings are typically scheduled in advance and only occur a handful of times per school year, some feel that periodic leave to attend would not be too disruptive, given that employers can require employees to provide notice of the meetings.[140] Lawyers have emphasized that an employer can require the employee to attempt to schedule a meeting time with the school that would be least disruptive to their job responsibilities, unless the employee can show that the meetings must occur at a certain time on a certain day.[141]

---

[134] *Id*.
[135] *See, e.g.*, Anthony L. DeProspo, Jr., *New DOL Opinion Letters Provide Important Guidance For Employers*, SCHWARTZ HANNUM PC (Dec. 2018), http://www.shpclaw.com/new-dol-opinion-letters-provide-important-guidance-for-employers?p=11399; *WHD Releases New FMLA and FLSA Opinion Letters*, HAWAII EMPLOYERS COUNCIL (Sept. 24, 2019 6:28 AM), https://www.hecouncil.org/news/2019/09/24/main/whd-releases-new-fmla-and-flsa-opinion-letters/; Carrie Hoffman, *DOL Issues New Wage and Hour Opinion Letters*, FOLEY & LARDNER LLP (July 6, 2020), https://www.foley.com/en/insights/publications/2020/07/dol-issues-new-wage-and-hour-opinion-letters.
[136] *See* Allen Smith, *Parents May Take FMLA Leave for Special Education Meetings*, SHRM (Aug. 8, 2019), https://www.shrm.org/resourcesandtools/legal-and-compliance/employment-law/pages/fmla-leave-for-special-education-meetings.aspx.
[137] *Id*.
[138] *See id*.
[139] *Id*.
[140] *Id*.
[141] *Id*.

Some corporations have expressed concern that expansive interpretation of this opinion letter will result, given that caring for a child with a serious health condition may include various activities.[142] Significantly, the letter does not give parents the right to request FMLA leave for all school appointments for children in special education programs.[143] A fear is that employees will attempt to apply this letter to an emergency meeting at their child's school if their child has a serious health condition, has a bad day, and the parent is contacted about it.[144]

Notably, not every child who utilizes special education and related services also has a "serious health condition" within the meaning of the FMLA.[145] Thus, only those parents who can complete the certification process with their employer, certifying that their child has a serious health condition within the meaning of the FMLA, may take FMLA leave to attend that child's IEP meeting.[146]

From an employee perspective, the opinion letter has brought great relief to many working parents with children with serious health conditions and to stay-at-home parents as well.[147] One of the reasons that this particular request for an opinion may have gained the attention of WHD administrators is that a parent's presence at an IEP meeting is not mandatory – the meeting can be held with the school district representatives and the applicable service providers without the parent present.[148] Since the IEP team can be compromised of multiple health care professionals, many parents have likely felt pressured in the past to let the meeting continue without their presence if they were unable to take time off from work.[149] This pressure likely left parents in the dark about their child's progress in school and the educational plan that their child follows on a daily basis.[150]

While some families are fortunate enough to have one at-home parent that can attend meetings, the most concerning cases are those in which both parents are not available to attend the IEP meeting. For example, single working parents face enough pressure in their daily lives to juggle the responsibilities of their job and their children. Single

[142] *Id*.
[143] *Id*.
[144] *Id*.
[145] Caroline Kane, Tracey Truesdale, & Kendra Yoch, *DOL Gives Working Parents FMLA Pass to Attend Children's Special Education Meetings*, JD SUPRA (Aug. 19, 2019), https://www.jdsupra.com/legalnews/dol-gives-working-parents-fmla-pass-to-39200/.
[146] *Id*.
[147] *See* Jessica Watson, *Labor Dep't Says IEP Meetings Qualify For Family and Medical Leave*, PARENTSTOGETHER (Dec. 19, 2019), https://parents-together.org/labor-dept-says-iep-meetings-qualify-for-family-and-medical-leave/.
[148] *See id*.
[149] *Id*.
[150] *Id*.

working parents with children who also require special education services likely experience even more pressure to contact their child's school more often and to remain informed about their child's daily educational progress or behavior in school.

Other parents have expressed that the implications of this opinion letter will improve their family lives and marriages in a substantial way.[151] For example, some families with one working parent and one at-home parent would only have the at-home parent attend IEP meetings in the past, if the working parent could not take the time off work, which would create stress in their marriage.[152] IEP meetings sometimes include crucial decisions regarding changes in a child's services, and the stress that must have weighed on the sole parent at the meeting — without the time to consult their absent spouse — was undoubtedly burdensome. With this letter, at-home parents who have been in attendance at these meetings alone in the past are optimistic that having the working parents involved in the educational planning process will improve their family life and the working parent's understanding of their child's education significantly.[153]

VII. **Analysis of the Opinion in FMLA2019-2-A**

In a perfect world, all parents would act in their children's best interest at all times. We know that this is not always the case, but the working parents who give parenthood full priority as their "other full-time job" are the true heroes. Working parents fight for their rights at work so they may use the time they are entitled to take, to dedicate to that "other full-time job." The ultimate opinion articulated in FMLA2019-2-A seems to state the obvious when analyzing the question considering the objectives of the FMLA. It is curious whether the WHD chose this letter because they had received similar submissions of facts in previous requests for opinion letters, or whether this letter just seemed worthy of a response. Since the DOL releases opinion letters so infrequently, it is plausible that numerous working parents who could not take FMLA leave to attend IEP meetings had reached out for assistance over the past few years. Nevertheless, this set of facts brought to light an interesting question, and the decision is crucial to parents' ability to participate in their child's special education experience.

As stated above, President Clinton signed the FMLA into law a few decades ago to relieve the pressure on working Americans to handle both the needs of their families and the responsibilities of their jobs.[154] A parent's attendance at a child's IEP meeting is arguably one of the most pressing needs for working parents with children in a special education program. It is reasonable to believe that a majority of parents with children who have a "serious health condition" within the meaning of the FMLA are extremely attentive to their child while the child is at home or anywhere else in their presence,

[151] *Id*.
[152] *Id*.
[153] *Id*.
[154] Clinton, *supra* note 8.

presumably acting as their primary caregiver. Thus, the parent likely knows how their child acts in just about every circumstance, for example, how the child best communicates their needs, how the child displays major and minor emotions, etc. Teachers, who may have more than one student entitled to special education services on their hands at one time, may not know the ins and outs of each child's behaviors quite like their own parent does. Therefore, a parent's attendance at an IEP meeting — where they may have the opportunity to explain their child's behavior at home and perhaps, whether the skills taught in school are successfully transferring to the home environment — is absolutely essential. Hopefully, parents would also be able to provide insight to teachers who may be struggling to connect with their child and try to work together to determine the reason. The potential benefits, to all parties involved, of having a parent attend these meetings seem too great to be ignored.

Notwithstanding the benefits of parents being able to take FMLA leave to attend IEP meetings, the ultimate concern about the implications of this letter likely comes from employers. Although DOL opinion letters are not binding,[155] it would be in every employer's best interest to treat this particular letter as binding within their company. The fear amongst employers seems to be that the more situations that constitute a qualifying reason for taking FMLA leave, the further employees will push and try to align the qualifying circumstances with their own.[156] But why should those employees who may take advantage of more opportunities for leave ruin the opportunities for the hardworking, honest Americans that really do need it? The fear that employees will take advantage of their employer is likely a performance issue specific to an employee, curable by the employer dealing with that specific employee, not by taking the opportunity for leave off the table for all employees.[157]

Congress sought to cure America's prevalent workforce issues, the lower levels of productivity, higher levels of job turnover, and some levels of absenteeism discussed earlier, with the introduction of the FMLA.[158] When employers foster work environments where employees are able to take FMLA leave when they are rightfully entitled to it and need it, they will likely see higher levels of productivity, less job turnover, and less levels of unexpected absenteeism. It is likely true that generally, employees who feel respected and valued both as an employee and as a person with responsibilities outside of the office will dedicate years of service and valuable time to their employers.[159]

---

[155] *See Compliance Bulletin*, *supra* note 7, at 2.
[156] *See* Jon Hyman, *The Law Is a Floor, Not a Ceiling: Granting FMLA for Individualized Education Program Meetings*, WORKFORCE (Aug. 13, 2019), https://www.workforce.com/news/the-law-is-a-floor-not-a-ceiling-granting-fmla-for-individualized-education-program-meetings.
[157] *Id*.
[158] Clinton, *supra* note 8.
[159] *See* Hyman, *supra* note 156.

To mitigate the risk of employee leave abuse when it comes to children with serious health conditions and special education meetings, employers must educate! It is recommended that managers receive proper training on the documentation that can be requested from an employee to support their leave request, i.e. a certification displaying that the child has a serious health condition within the meaning of the FMLA.[160] It is perhaps even more important for managers who handle requests for leave to be trained on what types of school meetings are covered and which types are not, as FMLA2019-2-A does not apply to all meetings regarding special education and related services.[161] With the proper training of managers, employees will be less likely to try and attend meetings outside the scope of this opinion if their managers are educated and inquisitive about what type of meeting the employee is planning on attending.

VIII. **Conclusion**

In conclusion, FMLA2019-2-A gives working parents a chance: a chance to participate, a chance to learn, a chance to voice their concerns. A parent's attendance at annual IEP meetings is undoubtedly essential to their ability to provide the proper psychological and physical care to a child with a serious health condition.[162] If a parent does not have the opportunity to participate and learn about what teachers are doing with their child at school for a good portion of each day, how will they be able to help the student transfer those skills to daily life outside of school? How will they know if their child is making progress from year to year? There are endless ways in which in-depth knowledge of a child's individualized education program will assist a parent in caring for the child in the long run.

Of course, there are parents who may choose not to take FMLA leave under these circumstances and leave the IEP meetings to be conducted by only specialists and school administrators. But for those working parents who value parenthood as their "other full-time job," this DOL opinion letter provides the opportunity for them to be the most valuable player (MVP) of their child's IEP team.

[160] Amanda Thibodeau, *IEP Meetings Covered Under FMLA*, MASSACHUSETTS EMPLOYMENT BLOG (Aug. 15, 2019), https://employmentlawblogma.com/2019/08/15/iep-meetings-covered-under-fmla/.
[161] *Id*.
[162] *See* Stanton, *supra* note 4.