

# SWEET | STEVENS | KATZ | WILLIAMS

Lawyers for education.

## THE LEGAL IMPLICATIONS OF SAME SEX MARRIAGE FOR SCHOOL ENTITIES

As many of you have already heard, on Tuesday, May 20, 2014, Judge John E. Jones, III of the Middle District of Pennsylvania entered an order in *Whitewood v. Wolf* declaring Pennsylvania's Defense of Marriage Act unconstitutional. The effect of this order not only means that same sex couples in Pennsylvania may legally marry (and county clerks have already accepted hundreds of applications), but also that same sex couples who were legally married in other states are entitled to have those marriages recognized here in Pennsylvania. The order was written to be effective immediately, and Governor Corbett has indicated that his administration will not seek an appeal. Thus, unless some other party seeks intervention in the litigation and is granted a stay from the Third Circuit, changes from this ruling must be considered immediate.

For our clients, the implications will fall into two different categories. As employers, schools and municipalities must offer the same benefits to all legally married employees. The most obvious example would be health coverage. The vast majority of our clients offer insurance for spouses, and as of May 21, 2014, such coverage must be offered to same sex spouses whether legally married in another state or who marry here starting Friday, May 23, 2014. In addition to insurance, most collective bargaining agreements include benefits that are specific to "immediate family" (such as bereavement leave) which now will also encompass same sex spouses.

The second category concerns parents of students of our school clients. The Individuals with Disabilities Education Act, 20 U.S.C.A. §§ 1400, *et seq.*, has long recognized individuals "acting as parents" for purposes of both participation and legal decision making. 20 U.S.C.A. § 1401(23). Our consistent advice has been not to inquire into the specific legal arrangement with couples who live together and are jointly raising children, unless a dispute arises. That advice remains unchanged. The Family Educational Rights and Privacy Act, 20 U.S.C.A. § 1232g ("FERPA"), has a stricter definition of "parent". Under FERPA, a "parent" includes "a natural parent, a guardian, or an individual acting as a parent in the absence of a parent or guardian." 34 C.F.R. § 99.3. Thus, for FERPA, if no adoption has taken place, a same sex spouse would be akin to a "step-parent" and would not automatically be entitled to any FERPA rights. We recognize that this presents some thorny implications. For example, a lesbian couple who marry, and one of whom then carries a child raised by both parents from birth, will still face an additional legal hurdle which does not confront an opposite sex couple. Nevertheless, because FERPA's definition of "parent" only recognizes an individual "acting as a parent" in the absence of the natural parent or guardian, like step-parents, same sex spouses who are not identified on the birth certificate or have not gone through the adoption process will not normally have automatic FERPA rights. Of course, this is only likely to be relevant if there is a dispute, since a "parent" under FERPA can always execute a release to permit access to records for his or her same sex spouse or partner.

In all other respects, the most simple analysis is to simply treat every same sex spouse in the same way as you have treated opposite sex spouses up to this point. As Judge Jones observed in his opinion, "in future generations the label *same-sex marriage* will be abandoned, to be replaced simply by *marriage*." Obviously, however, in the meantime the issues around same sex marriage continue to evolve at a rapid pace.

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