

LAW OFFICES OF  
**BURBIDGE & WHITE, L.L.C.**

## **July 2010 USBA Legal Update**

A recent experience we had with one of Utah's school districts offers some useful reminders about the legal precedents and standards relating to graduation, extracurricular activities and the rights students do and do not have to participate in such activities.

This case involved a student who was expelled from a district high school for serious misconduct occurring while the student was already on disciplinary probation (the expulsion was for burglarizing the school, accessing pornography and on-line games through multiple teachers' computers, and causing damage to several of the computers). While expelled, the student continued course work through independent, on-line schooling. Upon review of the expulsion, the student asked for some school participation, including enrollment in driver education and chorus and (if the student earned enough credits for a diploma) participation in graduation ceremonies. The principal denied this request in part because he learned the student had (after the request) basically repeated the expulsion misconduct at the city library. The student appealed to the board of education, which upheld the principal's decision.

About 10 days before graduation, the student sued for a court order to compel the district to allow him to "walk" at graduation, and the district asked for our help. The student argued that graduation is an extracurricular activity and that because the student was taking on-line courses, the student was entitled to participate in graduation under Utah Code Ann. § 53A-2-214, "Online students' participation in extracurricular activities." Besides arguing that the student had no protected right to participate in graduation ceremonies, we pointed out that because this statute subjects on-line students to the same eligibility standards as regular students, this student was ineligible to participate in graduation even if the statute applied to graduation ceremonies. In essence, this statute only gives on-line students equal opportunity; it does not give them preferential treatment and is not a "get out of jail free" card. The court agreed with these and other arguments we made and refused to grant the order, ruling in favor of the district on all issues. The student then dropped the lawsuit.

This result is consistent with the way courts have usually responded on this issue. Although there are no Utah cases discussing the issue, the prevailing view is that there is no right to participate in commencement: "The large majority of jurisdictions that have been presented with the precise question we are confronted with have ruled that a student has no life, liberty, or property interest in a graduation ceremony for purposes of due process." *Nieshe v. Concrete School Dist.*, 127 P.3d 713, 719-20 (Wash. Ct. App. 2005). Because "walking" at graduation is a privilege rather than a right, students can be denied participation as a punishment for misconduct or for failing to meet eligibility requirements. At the same time, it is important to remember that "walking" is different from "graduating" (receiving a diploma), and many courts recognize that students do have a property right to graduation and a diploma if course requirements have been met. In general, participation in graduation is treated like participation in extracurricular activities, in that courts do not recognize a constitutional or property right to such participation. Also, we need to keep in mind that even though there is no property right in "walking," the proper due process procedure should be followed before privileges are denied, and privileges cannot be taken away to punish students for exercising a constitutional right such as freedom of speech (as the federal 10<sup>th</sup> Circuit Court of Appeals ruled in the Brian Seamons case). Finally, because the right approach in these cases often depends on the particular facts, it is usually a good idea to consult with district counsel about these types of problems.