



MEMBER ALERT

“First Amendment Auditors” and Site Visits by Other Non-District Related Individuals (In consultation with Rob Cutbirth, NBSIA General Counsel)

School District/County Superintendent Offices and school sites face risks from external visitors who have not been background checked and who have no business with the Member. There are physical risks (on the day of the visit, or a later time after a “scouting” mission is conducted), there are discrimination and harassment risks (the sharing of messages inconsistent with Members’ policies and governing laws), and operational risks (intruding into instructional and private areas impairing the work and educational environments, as well as concerns relating to confidentiality and privacy of students, staff, and others).

“First Amendment Auditors” are now common in the United States. Their goal is to see if a public agency will interfere with their legal ability to videotape and/or photograph public officials and/or public areas of public buildings. While many “Auditors” are peaceful, others present in an aggressive manner intended to provoke an adverse response. When they believe their right of access and/or right to video has been improperly impaired (right or wrong), after engaging in improper outbursts at the site (using inappropriate language or actions/gestures), they can file suit alleging a claimed breach of their Constitutional rights where they can seek compensatory damages and attorneys’ fees. While the “Auditors” are being “compensated” for their activities by posting ad-driven videos to YouTube and similar platforms, the Courts have not found this “commercial” aspect to their activities a basis to lessen or negate their inspection and/or filming rights.

Multiple Members have now been “visited” by the Auditors; more such visits are now expected in the near future. We therefore provide the following guidance regarding ways Members might practically and legally prepare for and respond to visits by “Auditors” or other individuals photographing or videoing your sites.

Requirement to Train

One area of potential exposure is the alleged duty to train staffs on how to respond to these “Audits,” as well as other areas where a Member may be legally called upon to protect a student’s, employee’s, and/or citizen’s constitutional rights (something partially addressed in “Boot Camp” training sessions). Such exposures only arise, however, when there is a “deliberate indifference to the rights of persons with whom the untrained employees come into contact,” and there is pattern or practice of denials of rights made known to a Members’ decisionmakers.¹ While a limited risk, Members should still consider advising staff of issues below, and help also ensure that the District/Superintendent’s Office is immediately notified whenever these types of site visits or videotaping incidents occur.

Legal Right of Site Visits and Videotaping

Courts have consistently held that individuals have a right to come into public areas and videotape those areas and public officials performing their work functions in those areas.² They can then post or share those videos as they wish. The question then becomes what parameters are applicable to such activities.

- **The video/audio recording cannot be concealed.** Before starting a videorecording of individuals having a private conversation (even in a public space), the individual must gain permission from all participants or confirm that the conversation is being held in a manner for which there can be no expectation of privacy. *Penal Code Section 632*. If a reasonable person might believe the conversation to be overheard or recorded by others, no permission is required.
- **Public Areas.** Public areas are those areas (internal or external) where members of the public can freely and lawfully come and go during normal business hours. A “public area” is not the same as “public property” or a “public place;” without clear legal guidance in this area, it is probably best to

¹ Connick v. Thompson, 563 U.S. 51, 61 (2011).

² Marker v. City of San Jose, 2012 U.S. Dist. LEXIS 106875 (NDCal., 2012), and cited cases.

consider a “public area” as one “readily accessible” by the public.³ As a result, ***immediate attention should be given to the placement of short/simple signs indicating areas where the public is prohibited in order to establish workable boundaries.*** Before or after such signage is erected, however, if an Auditor appears, you can appropriately assert that he/she cannot:

- Walk behind public counters, or walk down “private” hallways, because those are areas where the public would not generally be allowed without express approval or an escort by a Member’s employee for the express purpose of conducting a business function unique or special to them.
- Hold cameras over countertops to see computer screens, documents, or other matters not otherwise publicly viewable. They are only entitled to videotape areas that are generally accessible/viewable by the public. Yet, this serves as an important reminder for confidential information not to be readily available to the public’s eyes/ears.
- Use telephoto lenses or enhanced recording devices that would give them access to areas/enhanced areas that would not be subject to normal viewing or hearing.
- Arrive and start walking through a protected area without following standard protocols for registering at a front desk; the Auditors do need to follow standard procedures for registering (as would be the case with any other visitor), and their visit is subject to the same time restrictions and limitations applicable to any other member of the public.

Unfortunately, the Auditors can engage in conduct distressing to employees, or members of the public (parents/students) conducting business at your sites. For members of the public wanting support services, they can be offered an opportunity to meet in a private area (a private conference room, particularly as to anything confidential) or return another day/time to complete their business. A concerned employee may transfer work functions (at least temporarily) to a private location, although public-facing employees still need to be readily available to those needing assistance. The filming cannot be stopped due to an employee’s or member of the public’s discomfort.

We have not found a situation where the Auditors have gone to an actual school site. This may be because school sites have different sets of statutes that limit “Free Speech” rights by visitors and third parties. Site Administrators (or their designee) may direct an individual who is causing a disruption, including volatile, hostile, aggressive, illegal or offensive behavior, to immediately leave school grounds. This statute assumes two things: (a) the individual is at a school site/place where students are present in a learning environment (including immediately adjacent locations), and (b) the individual has acted in an inappropriate manner which would include a failure to register as a visitor, or engaging in inappropriate language or the videotaping of students in a manner contrary to law. (See standard BPs/ARs 1250 and 3515.2, and authorities therein, including Penal Code Section 626.7 and Education Code Section 32210 “[a]ny person who willfully disturbs any public school ...” is guilty of a misdemeanor.”) Site administrators should immediately telephone your Assistant Superintendent and/or other designated District/Superintendent’s Office representative for urgent responsive support and guidance if an individual is engaging in these acts.

In the end, we urge you to:

- Keep calm, be friendly (you are on camera), and try to shorten the event *by not challenging the Auditor over access to areas not of a safety or confidentiality concern*; and
- Reach out to NBSIA to help with any needed messaging or response to challenging individuals or the aftermath of such visits when edited videos are made public in a way causing safety or operational concerns. We can also assist with language/placement of signs, and brief staff trainings as requested.

³ People v. Jimenez, 33 Cal.App.4th 54 (1995)