



LAW UPDATE SCHOOL BUSINESS

PHONE: (661) 636-4830 • FAX: (661) 636-4843
E-mail: sls@kern.org • www.schoolslegalservice.org

June 2022

FIRST AMENDMENT AUDITORS: ANTAGONISTIC CITIZENS OR ENSURING GOVERNMENT TRANSPARENCY

What is a “First Amendment Auditor”?

A First Amendment Auditor (“Auditor”) is an individual or group who enters a public space and video records the encounter with employees and/or the public. One Auditor stated that their purpose is to promote transparency and open government. Another told the Washington Post, “You put yourself in places where you know chances are the cops are going to be called. Are they going to uphold the Constitution, uphold the law...or break the law?” An Auditor may not say a word or respond to any questions, but merely video record everything hoping for some sensational reaction.

Why conduct such an audit?

Most Auditors claim they are protecting society, ensuring government transparency, and educating the public, and that video recording is not a crime. The true reason may be that there is significant money to be made by the Auditors. If there is a sensational response by the public employee, police are called, or physical confrontation ensues, the video could be uploaded to the Auditors’ internet platforms. One Kern County Auditor has over 340,000 followers on his YouTube channel.¹ Some Auditors claim to make up to \$30,000 a month from their YouTube channels dedicated to First Amendment Auditing. In addition to revenue from social media, if an Auditor believes their First Amendment rights have been violated, either through a physical confrontation or an arrest, a lawsuit can follow. An Auditor recently settled for \$41,000 in a claim against the Colorado Springs Police Department.

¹ San Joaquin Valley Transparency.

How are public spaces defined and access restricted?

An Auditor's right to video record on public property is protected by the First Amendment as an exercise in free speech.² However, not all public property is treated the same regarding access to the public and limitations upon free speech. Courts have created three types of public property: public forums, designated public forums, and nonpublic forums.

Examples of public forums are sidewalks, city streets, or public parks. Examples of designated public forums are school board meetings, a school district office lobby, or school office lobby.³ The government may enforce reasonable time and place restrictions that are narrowly drawn to achieve a compelling state interest. Examples of nonpublic forums are military bases, polling places, and courthouses. The government may enforce reasonable time and place restrictions which are compatible with the intended use of the property.

How does this affect a school district? Reasonable restrictions are appropriate to limit access, such as hours and location within school office or district office lobbies. An Auditor may not disrupt the orderly operation of a school site. Additionally, if the classrooms/facilities are open to the general public outside of school hours, they would be considered a designated, limited-purpose public forum during those times.⁴

What should a school district do to prepare for a potential audit?

Penal Code section 627 et seq. requires all "outsiders" to register with the school principal or designee upon entrance on school grounds. "Outsiders" are not considered individuals protected by Evidence Code section 1070, which is the California Shield Law for media. Courts have defined "media" broadly, including periodic publications found online.⁵ Since many "Auditors" consider themselves "citizen journalists," a court could consider them "media" within section 1070. Therefore, a district should adopt a policy requiring any media representatives, like all other visitors, to register with the principal or designee upon entrance to school grounds.⁶ Penal Code section 627.4 allows a principal or designee to refuse to register someone if there is a reasonable basis for concluding that the individual's presence or acts would disrupt the school, students, or teachers.

Additionally, school districts can ensure adequate signs in the lobby designate what areas are open to the public and what areas are only open to staff and students. A sign designating the end of the public space could say, "Staff and Students Only." Auditors are not allowed to wander

² *Glik v. Cunniffe*, 655 F.3d 78 (1st Cir. 2010).

³ *Cornelius v. NAACP Legal Def. and Educ. Fund, Inc.*, 473 U.S. 788, 801, 105 S. Ct. 3439, 87 L.Ed.2d 567 (1985).

⁴ *Lamb's Chapel v. Center Moriches Union Free School District*, 508 U.S. 384, 113 S. Ct. 2141, 2148, 124 L.Ed.2d 352 (1993).

⁵ *O'Grady v. Superior Court* (2006) 139 Cal.App. 4th 1423.

⁶ CSBA Gamut Board Policy Media Relations, BP1112.

freely or into areas that are not open to the public. Thus, signs designating prohibited areas are vital.

Finally, all staff should be briefed on how to act if an Auditor comes into a school or district office lobby. All employees should stay calm, be polite and patient. There should be no attempt to try and stop the recording, take an Auditor's camera, or try to intimidate them. Districts may request that their superintendent or other district personnel be notified immediately.

Please contact our office if you have follow-up questions.

~ Mark E. Pafford

School Business Law Updates are intended to alert clients to developments in legislation, opinions of courts and administrative bodies and related matters. They are not intended as legal advice in any specific situation. Please consult legal counsel as to how the issue presented may affect your particular circumstances.