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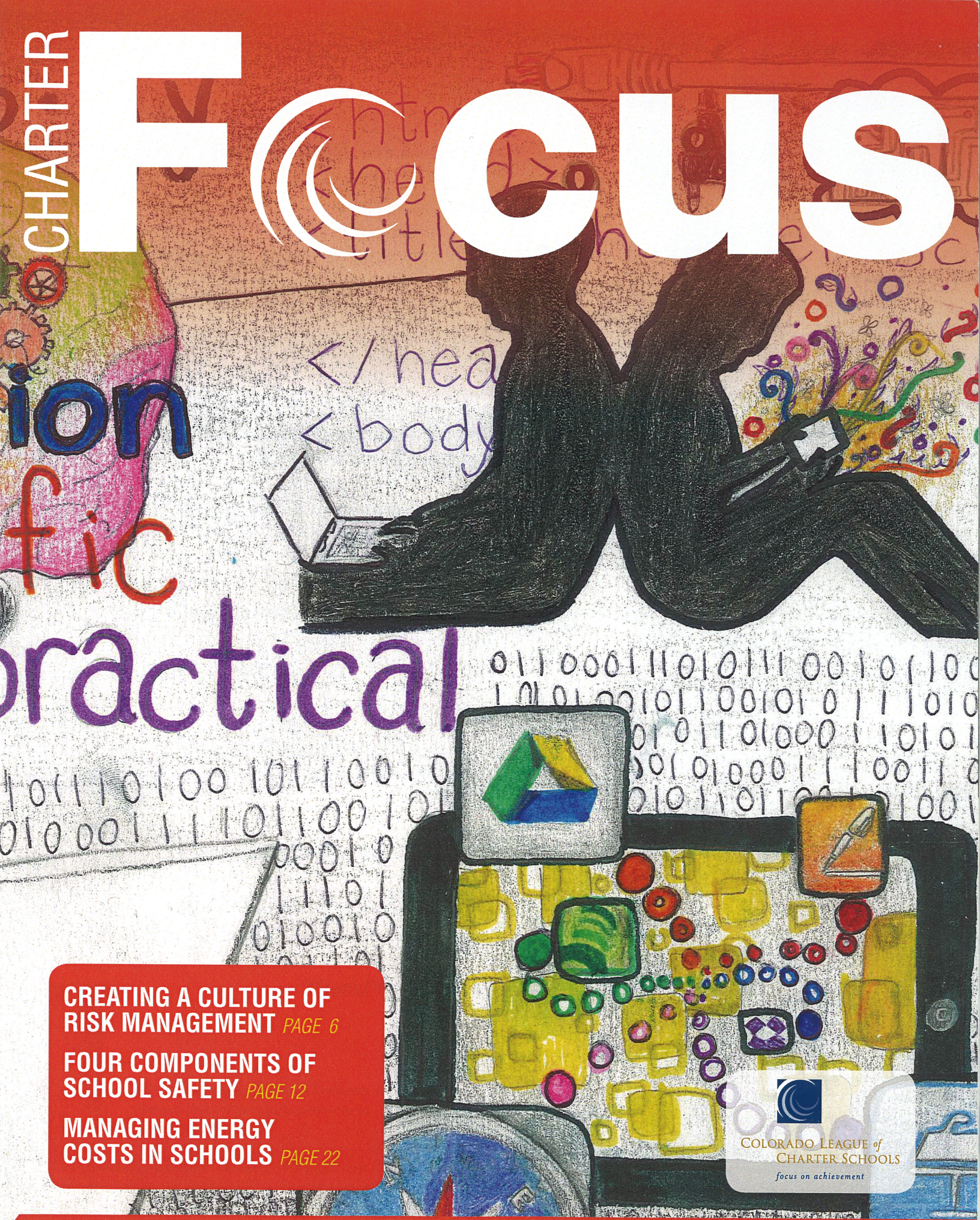

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RECOGNIZING AND ADDRESSING UNLAWFUL HARASSMENT BY THIRD-PARTIES WITHIN YOUR SCHOOL

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While bullying between students has been the subject of numerous articles in recent years, schools sometimes fail to recognize that harassment of its employees and students, whether by a parent or other third-party, must also be addressed. Failure to take such complaints seriously can have adverse consequences for the school.

Recognizing unlawful harassment and having the tools to effectively manage situations in which harassment is present, are essential components of a school's efforts to minimize legal risk. It is important that all employees understand that harassment may come from outside your school, just as easily as it may originate from within your school. This article explores the legal parameters of unlawful harassment under Title VII of the Civil Rights Act of 1964 ("Title VII") as it relates to school personnel and students, specifically focusing on "third-party harassment," or harassment that stems from individuals who are not co-workers or students — parents, guardians, or other visitors to the school building, such as athletic coaches or guest speakers, and other third-parties.

Third-Party Harassment of Teachers and Employees

Employees' claims of harassment fall under a number of state and federal statutes, most notably Title VII and, in cases where the charter school is deemed a governmental entity, Section 1983, Title 42 of the United Stated Code ("§ 1983"). When an employee asserts a third-party harassment claim against the school, there are at least three parties involved—the harassing party, the employee, and the employer. Under Title VII, an employer may be held liable for third-party harassment when (1) a management-level employee knows, or should know, that a hostile or offensive environment exists, and (2) the employer fails to prevent the hostile or offensive work environment.[1] A hostile work environment arises when a workplace is permeated with discriminatory intimidation, ridicule, and insult, that is sufficiently severe or pervasive to alter the conditions of the victim's employment and creates an abusive working environment.[2] Under the controlling laws, the discrimination and harassment that leads to a hostile work environment must be based upon an individual's protected class, such as gender, race, religion, or age. Thus, the mere fact a parent or other third-party is aggressive or inappropriate is not enough to establish a claim of third-party harassment or hostile work environment under Title VII. Rather, the basis for the third-party's conduct must be the employee's protected class. Currently, the classes protected by law in Colorado are race, national origin, ancestry, gender, sex, sexual orientation, transgender status, religion, creed, age, pregnancy, disability, genetic information, military status, veteran status, and marital status. In addition, a school and individual employees, may be held liable under §1983 in instances of third-party harassment. A governmental entity is subject to liability when (1) it has an official discriminatory policy statement, or makes an official discriminatory decision, that is adopted by the entity's "officers," or (2) its discriminatory practice is so permanent and well settled that it

constitutes a "custom or usage."[3] Beyond a school's official policies or permanent discriminatory practices, individual employees also may be held liable under § 1983 if they are "deliberately indifferent" to known harassment. As such, employees must act upon any known harassment, even if it stems from a third-party.

As the name "third-party" harassment suggests, even when the hostile work environment is brought about by someone outside of the direct control of the school — like a parent, delivery person, or invited guest — the school nonetheless has a duty to take prompt corrective action in order to prevent an abusive working environment. Notably, this applies to harassment by anyone who is not an employee, and therefore applies equally to unlawful harassment of an employee by a student. In fact, one court has even gone so far as to suggest that third-party harassment can stem from a non-human, and that a macaw kept in a patient's hospital room is capable (though, of course, highly unlikely) of creating hostile working conditions![4]

Although no Colorado court has addressed third-party harassment under Title VII or Section 1983 in the context of schools and school employees, this concept *has* permeated numerous other employment situations, including the food service industry, medical workers, law enforcement, and other professions. Schools are not immune from claims of third-party harassment, and with the number of people who interact with teachers and other school personnel throughout the course of a school year, third-party harassment remains a very real issue that must be addressed.

Third-Party Harassment Of Students

Students may bring unique claims under Title IX of the Education Amendments of 1972 ("Title IX"). Title IX applies to public and private educational institutions that receive federal funds, and protects all students, both male and female, from sex discrimination and sexual harassment.[5] If a third-party sexually harasses a student and the harassing conduct is sufficiently serious to deny or limit the student's ability to participate in or benefit from a school program, and if the school knows or reasonably should know about the harassment, the school is responsible for taking immediate effective action to eliminate the hostile environment and prevent its recurrence.[6] If an employee who has authority to address the alleged discrimination has actual knowledge of the discrimination and fails to adequately respond, the school may be liable for monetary damages.[7]

While it may be more commonly understood that harassment of this nature (that which is initiated by school personnel, based upon a school policy, or even by a fellow student) can lead to a legal claim under Title IX, these concepts are equally applicable to harassment by a third-party. For example, if a visiting athletic coach engages in harassing conduct that forces a student to withdraw from an athletic team, and the school becomes aware of the circumstances, it must take prompt action. Similarly, if a parent-volunteer in an extracurricular program creates a harassing environment, the school must act. Ultimately, the school has an obligation to provide an environment free from harassment, regardless of the source.

Minimizing Risk

Just as all charter schools must adopt and implement a policy concerning bullying prevention and education under C.R.S. § 22-30.5-116, it is equally important to implement a policy to help prevent, or at least minimize, instances of third-party harassment. Here are some important steps your school can take to prevent and address third-party harassment:

- Create a collaborative, comprehensive policy that clearly details how to report such conduct and the steps the school and school personnel will take to prevent and respond to claims of harassment.
- Take all claims of harassment seriously, and promptly and thoroughly investigate all claims.
- If the claim is substantiated, take prompt, appropriate remedial action.
- Ensure that all school personnel understand to whom they should report claims of harassment--whether it is conduct they endured or witnessed.
- Conduct regular trainings to teach and reinforce the policy, so that all school personnel are able to recognize and appropriately respond to actual and alleged harassment.
- Include within the policy, and discuss with personnel, that harassment can originate from various sources, including third-parties.
- Discuss harassment with your legal counsel and review guidance documents provided by the U.S. Department of Education.
- Discuss the similarities and differences between bullying and harassment so that school personnel do not unintentionally minimize a potentially serious situation.

Ultimately, taking active steps to identify and prevent third-party harassment will allow you to focus your efforts on what matters most — educating your students in a safe environment. FOCUS

[1]Lockard v. Pizza Hut, 162 F.3d 1062, 1074 (10th Cir. 1998).
[2]EEOC v. PVNF, LLC, 487 F.3d 790, 799 (10th Cir. 2007) (citing Herrera v. Lufkin Indus., Inc., 474 F.3d 675, 680 (10th Cir. 2007).
[3]Murrell v. School Dist. No. 1, 186 F.3d 1238, 1249 (10th Cir. 1999).
[4]Dunn v. Wash. County Hosp., 429 F.3d 689, 691 (7th Cir. 2005).
[5]20 U.S.C. § 1681(a).
[6]See 34 C.F.R. 106.31(b).
[7]Davis v. Monroe Cnty. Bd. Of Educ., 526 U.S. 629, 650 (1999); Gebser v. Lago Vista Indep. Sch. Dist., 524 U.S. 274, 290 (1998).

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