

# **STUDENT MENTAL HEALTH AND THREATS OF VIOLENCE\***

## **The Public School's Legal Role**

NMSBA Annual Convention  
December 3, 2016

Presented by  
Carol S. Helms, Partner  
John F. Kennedy, of Counsel  
Cuddy & McCarthy, LLP

**\* Thanks to the NSBA Council of School Attorneys and the Mickes O'Toole law firm of St. Louis for use of their source materials from COSA's recent seminar in Portland, Oregon!**

# Agenda:

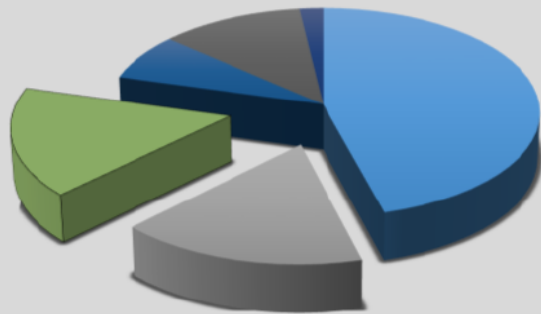
## Mental Health Issues:

- Awareness
- Identify, Assess and Provide FAPE
- Protect Against Discrimination, Harassment and Bullying
- Duty to Warn and Crisis Intervention
- Collaboration with Mental Health Professionals

## Addressing Student Threats of Violence



## Leading Causes of Death in Youth Ages 10 - 24



■ Unintentional Injury

■ Homicide

■ Suicide

■ Malignant Neoplasms

■ Heart Disease

■ Congenital Anomalies

Nearly **50%** of children will have a diagnosable mental illness at some point before they turn 18.

*(Child Mind Institute)*

Suicide is the **3rd** leading cause of death in youth ages 10 – 24.

*(National Alliance on Mental Illness)*

**90%** of those who died by suicide had an underlying mental illness.

*(National Alliance on Mental Illness)*

# Legislation

- In the 2013-2014 fiscal year, 14 states enacted legislation or appropriations for Mental Health First Aid/training for educators. Seven more states considered legislation.
- In 2015, at least 18 states considered legislation related to school mental health.
- To date in 2016, at least one state has passed legislation requiring training related to student suicide risk factors.

# Legislation

## New Mexico Statute

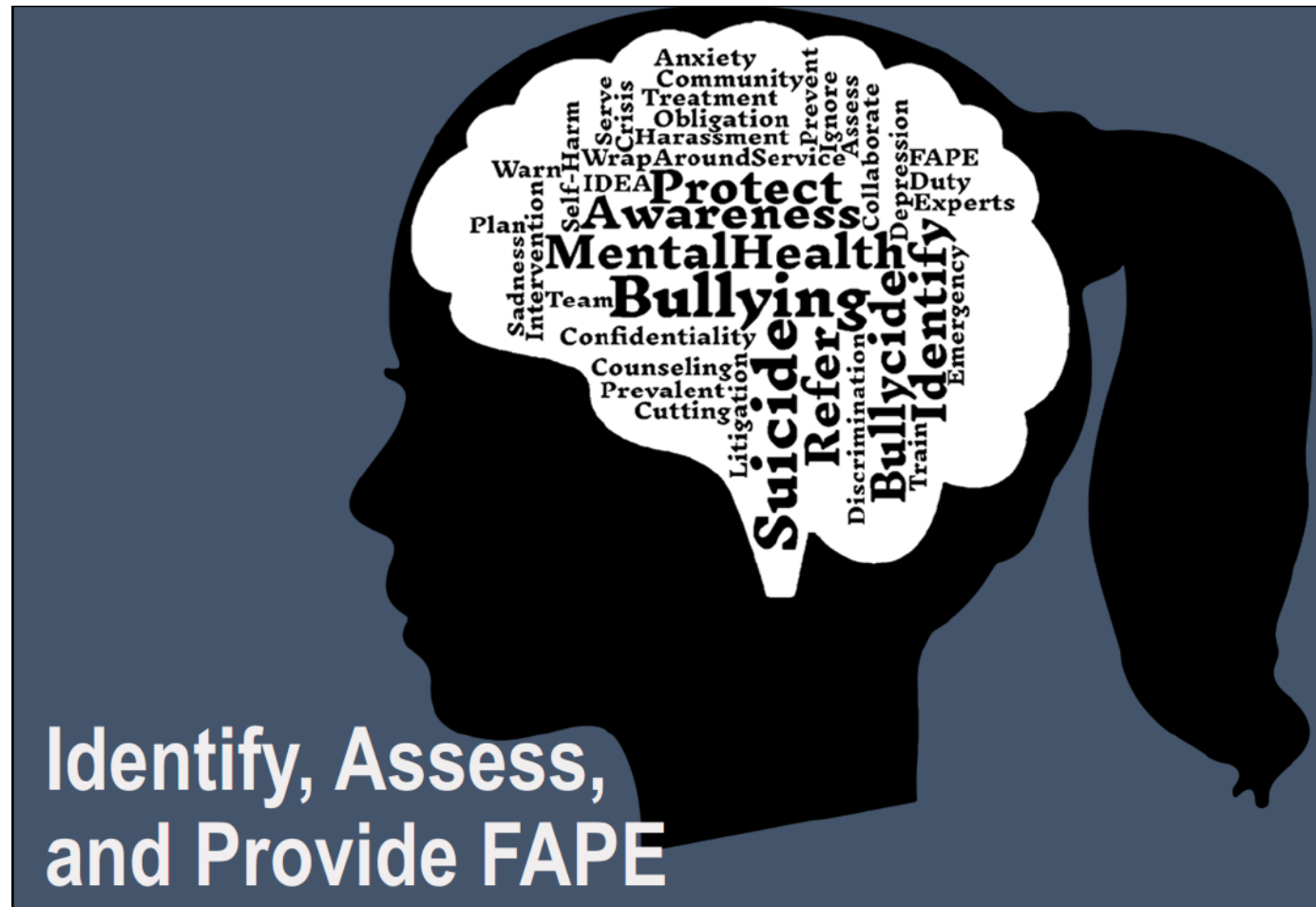
- NMSA 1978 Section 22-2D-3,
  - Enacted in 2003, requires public schools to create a family and youth resources program to assess student social and health care needs; to make referrals to providers; to recruit providers and coordinate community services to address unmet services, such as counseling for drug and alcohol abuse, family crises, mental health, and unemployment; to promote family support, and; to assist students in staying in school and succeeding academically and emotionally.

# Legislation

## New Mexico Regulation

- NMAC 6.29.6,
  - PED regulation adopts health education curricular standards and benchmarks for each grade level to address physical and mental health risks to which students are exposed, including bullying, sexuality, tobacco and drug use, personal safety and mental, social and emotional wellbeing.





# Child Find Obligation

## IDEA:

Child find is the affirmative, ongoing obligation of states and local districts to identify, locate, and evaluate all children with disabilities residing within the jurisdiction that either have, or are suspected of having, disabilities and need special education as a result of those disabilities.

34 CFR 300.111(a)(i)

# Child Find Obligation

## Section 504:

- Requires districts to annually “undertake to identify and locate every qualified [individual with a disability] residing in [the district's] jurisdiction who is not receiving a public education.” 34 CFR 104.32(a)
- Requires districts to evaluate students “who, because of handicap, need or are believed to need special education or related services.” 34 CFR 104.35(a)

# Child Find Violations – Case Example

*In re Student with a Disability*, 112

LRP 5256 (NM 2012): District violated its child find obligation by assessing student after suicidal threat but failing to evaluate student despite long history of behavior and attendance issues.

# Providing FAPE

- Conduct a comprehensive evaluation
  - Determine related aids and services
    - Determine what is required for student to receive educational benefit
  - Consider parent counseling
  - Don't overlook bullying and mental health concerns raised at IEP meeting
    - **T.K. v. New York City Dept. of Ed, 810 F. 3d 869 (2<sup>nd</sup> Cir. 2016)**

# Practice Pointers

- Screen students early
- Refer for special education consideration
- Don't make eligibility decisions solely on grades or behavior without adequate evaluation
- Determine appropriate related service, including social work, mental health or psychological counseling
- Do not implement practices that result in exclusion of students with disabilities



Protect Against Discrimination,  
Harassment and Bullying

# Potential Federal Law Claims

- IDEA
  - Generally no money damages, only educational relief for educational injuries.
  - Strong administrative exhaustion requirement.
- Section 1983
  - Premised on violation of constitutional rights (usually 14<sup>th</sup> Amendment).
- Section 504/ADA
  - Generally requires either deliberate indifference, bad faith or gross misjudgment.



# State Law Claims

- **State Anti-Discrimination and Harassment Laws**— May apply to claims of disability discrimination/harassment by students against school districts.
- **Tort Law** — Immunities for school districts and public employees may apply, but remember the adage, “Bad facts make bad law!”

# Disability Harassment/Bullying – Case Example

## *Estate of Lance, et al. v. Lewisville Indep. Sch. Dist. (5<sup>th</sup> Cir. 2014)*

- Affirmed summary judgment in District's favor on Section 1983 and Section 504 claims.
- “Section 504 does not require that schools eradicate each instance of bullying from their hallways to avoid liability.”

# OCR Disability Harassment Administrative Standard

OCR considers several factors, including:

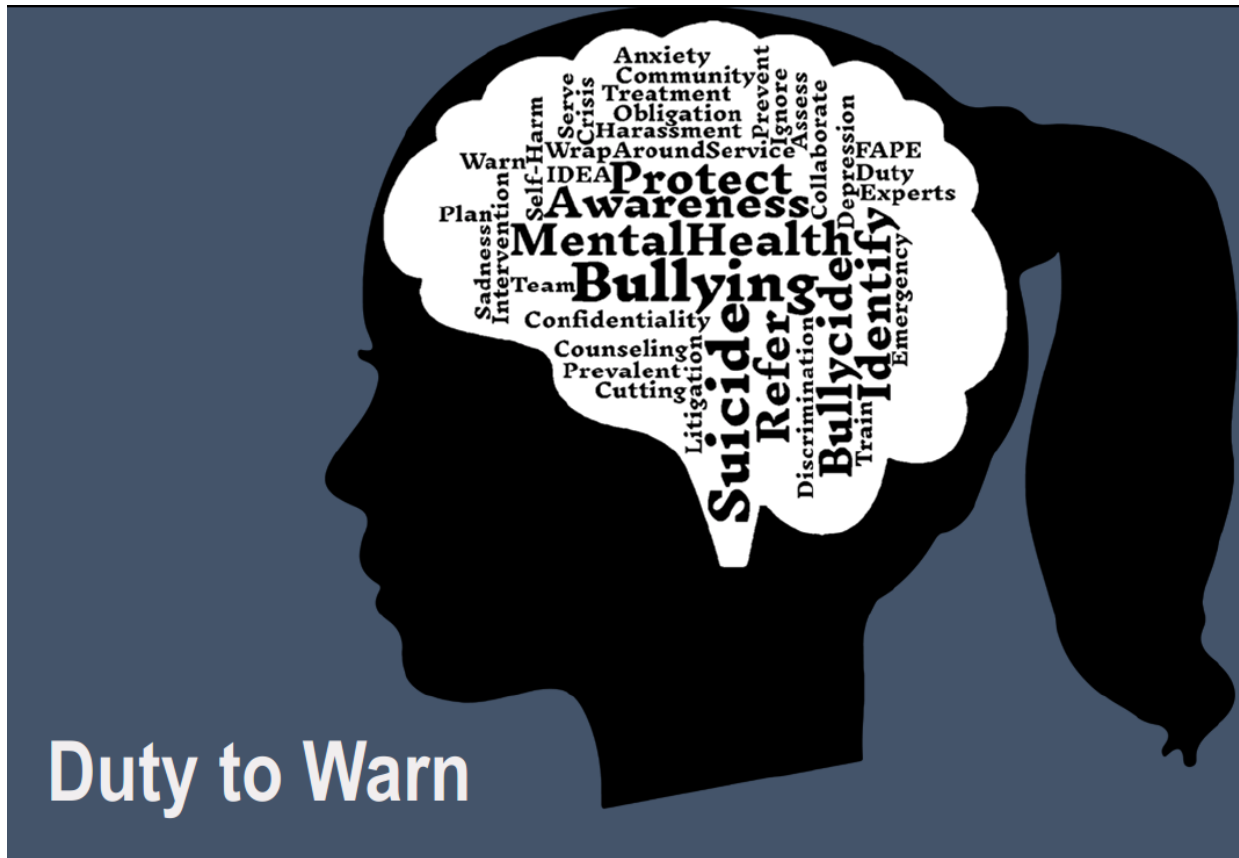
- Was a student with a disability bullied by one or more students based on the student's disability?
- Was the bullying conduct sufficiently serious to create a hostile environment?
- Did the school know or should it have known of the conduct?
- Did the school fail to take prompt and effective steps reasonably calculated to end the conduct, eliminate the hostile environment, prevent it from recurring, and, as appropriate, remedy its effects?

# Practical Tips for Minimizing Liability

- Carefully review surveys and results
  - Consider use of climate/anti-harassment/anti-bullying committees in district and buildings
- Training for employees can be critical
  - Make sure training is in line with district practices
  - Tailor training to buildings and positions
  - Document efforts to address the problem

# Defense Strategies

- Serve notice to preserve electronic information, including social media, immediately
- Aggressively seek discovery of electronic/online information
- Scrutinize causal link between alleged wrongful act and injury
- Utilize expert witnesses



Duty to Warn

# Failure to Warn – Case Examples

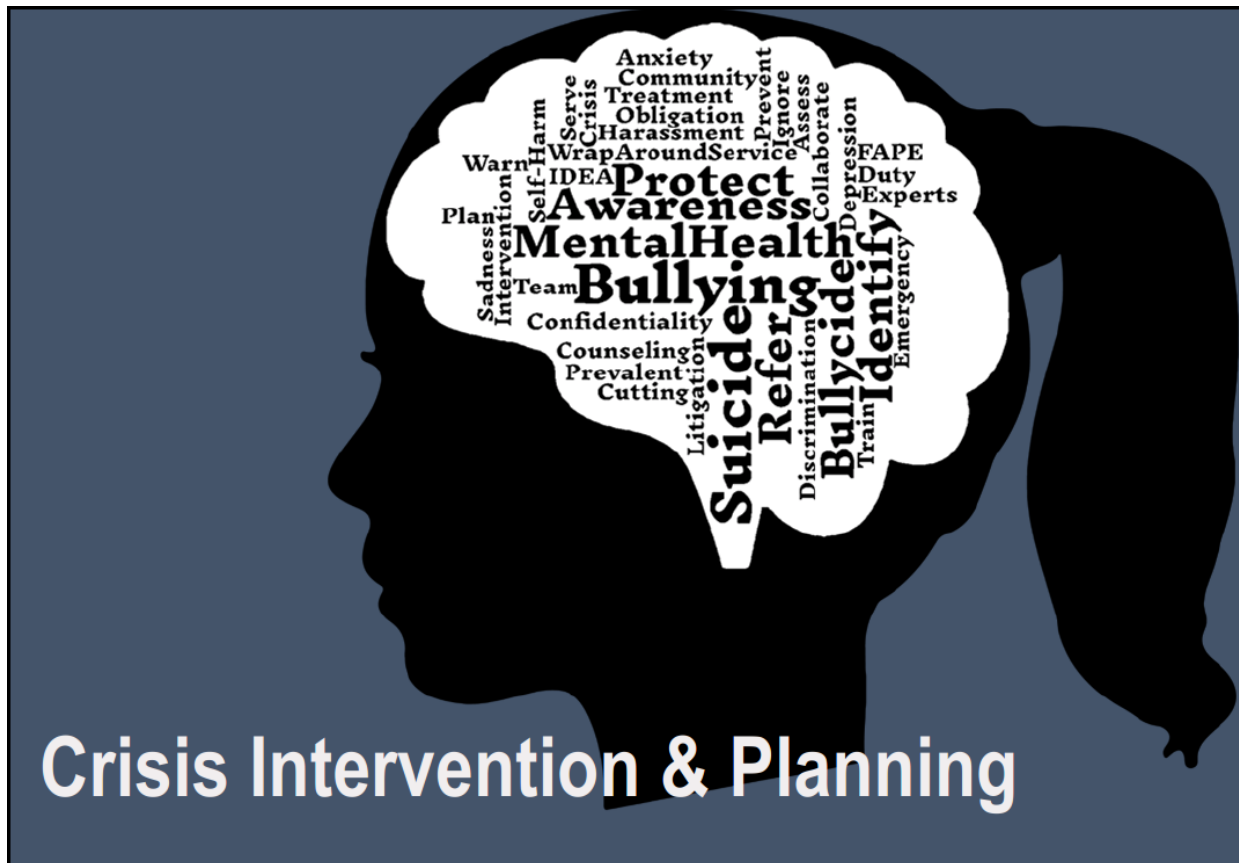
*Armijo By & Through Chavez v. Wagon Mound Pub. Sch.*, 159 F.3d 1253 (10th Cir. 1998)

- 16 year old special ed student suspended after harassing an elementary student and threatening the teacher. Student driven home by school counselor and dropped off, though parents were not home. Student committed suicide. Court affirmed refusal to grant summary judgment to principal and counselor under “danger creation” theory because school officials knew about student’s impulsivity, prior threats of suicide and access to firearms.

# Counselor's Duty to Warn

- *Eisel v. Bd. of Ed. of Montgomery County*, 376 A.2d 447 (Md. 1991): held that school counselors have a duty to use reasonable means to attempt to prevent suicide when they are on notice of child or adolescent student's suicidal intent.
- ASCA Ethical Standards for School Counselors dictates that when school counselors work with a potentially suicidal student, the counselor must notify the parent/guardian.





# Plan Ahead

- Formulate and implement a crisis intervention plan for each building in conjunction with mental health experts.
- Consider steps to promote student feelings of connectedness in the school community.
- Publicize in all school buildings ways for students to seek help, such as confidential hot line telephone numbers.

# Plan Ahead

- Do annual training on crisis intervention, including the warning signs/risks of suicidal behavior and how to respond to concerns or threats of self-harm.
- Trainings should include at a minimum:
  - Directive to report immediately to administration and mental health professionals
  - Directive not to leave student alone
  - Child find obligations

# Longer Term Considerations

- Refer for evaluation for special education/504 or reconvene IEP/504 or crisis/SAT teams:
  - Look at data from suicide intervention
  - Consider social-emotional-behavioral needs not currently addressed
  - Consider increased supervision, monitoring, counseling/mental health services
- Re-entry conference
- Consider safety plan
- Monitor student closely and keep in contact with parents

# Removing a Student from School

- Is this a threat against others?
- Is discipline appropriate?
- Provide due process
- Is this a special education student?
  - Has the student's placement been changed?

# Boston (MA) Public Schools

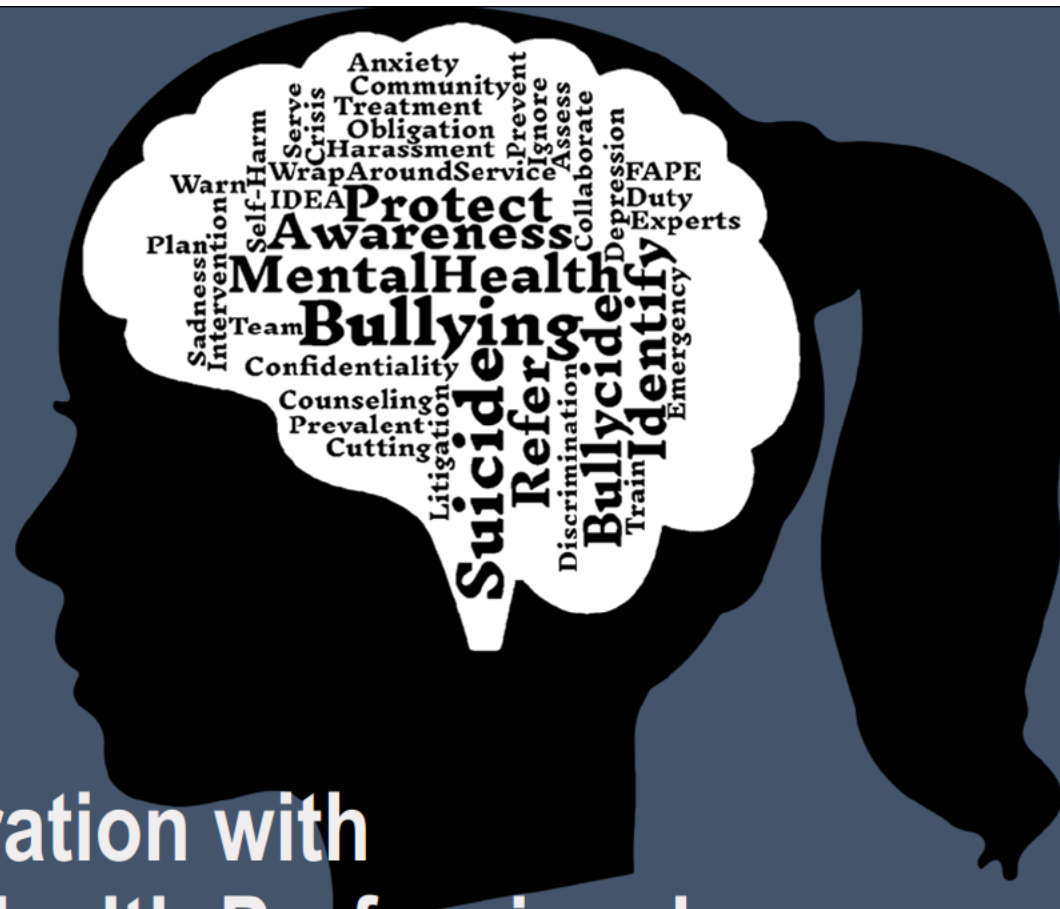
## 53 IDELR 199 (OCR 2009)

- School told parent to pick up son who expressed suicidal ideation and to have him psychologically evaluated before he could return to school.
- District had a policy that students returning from “emergency treatment for suicide intervention must bring a letter from an appropriate medical/mental health provider.”

# Boston (MA) Public Schools

## 53 IDELR 199 (OCR 2009)

- OCR Concluded:
  - Student was excluded from school based on his failure to obtain a medical clearance with regard to a suicide risk that reasonably could have been related to his disability.
  - Student's exclusion from school for 17 days constituted a significant change in placement.
  - When a school takes action with respect to a significant change in placement, the district must conduct an evaluation of the student



## Collaboration with Mental Health Professionals



# Mandated Referrals/Notifications

- **McKinney-Vento Homeless Education Assistance Improvements Act**
  - Requires LEAs to provide referrals to mental health services for homeless students
- **State Referral or Hotline Laws**
  - Example: Hotlines for neglect of medical/mental health treatment

# Student Records/Confidentiality

- District may disclose education records to child welfare agency representatives when reporting or investigating child abuse and neglect.
  - FPCO guidance 2004
  - NMSA 1978 Section 32A-4-3(E)
- FERPA exception for health and safety emergency may also apply.
  - Is knowledge of information necessary to protect the health or safety of student or other individuals?

34 C.F.R. 99.31(a)(1)

# Addressing Student Threats of Violence:

- Is it a “true threat”?
  - Reasonable person would interpret it as serious expression of intent to inflict bodily harm or take a life
    - Depends on context and circumstances
      - Not a joke, impulsive response to displeasure
- Threat Assessment
  - Notice of threat from parents, staff, peers or anonymous tip.
  - Timely initial assessment of risk
  - Immediate notice to response personnel
  - Report to law enforcement

# Addressing Student Threats of Violence:

- Determine Scope of Response to Threat
  - Lockdown/closure of school facilities
  - Emergency removal of student(s) concerned
  - Search for weapons or hazardous materials
  - Implement crises response plan
  - Notifying parents, community, media

# Addressing Student Threats of Violence:

- Further investigation of threat
  - Interviews with students, parents, staff
  - Search of social media
  - Review of records
  - Involve experts, school psychologists
- Follow up response after threat is contained
  - Support, use of safety plans
  - Student discipline
- Debrief, lessons learned, changes to improve future reaction/response

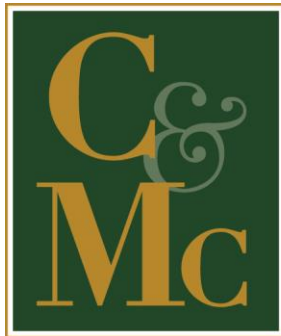
# THANK YOU!

Carol S. Helms, Partner

[chelms@cuddymccarthy.com](mailto:chelms@cuddymccarthy.com)

John F. Kennedy, Of Counsel

[jkennedy@cuddymccarthy.com](mailto:jkennedy@cuddymccarthy.com)



**CUDDY & McCARTHY, LLP**

---

*Attorneys at Law*