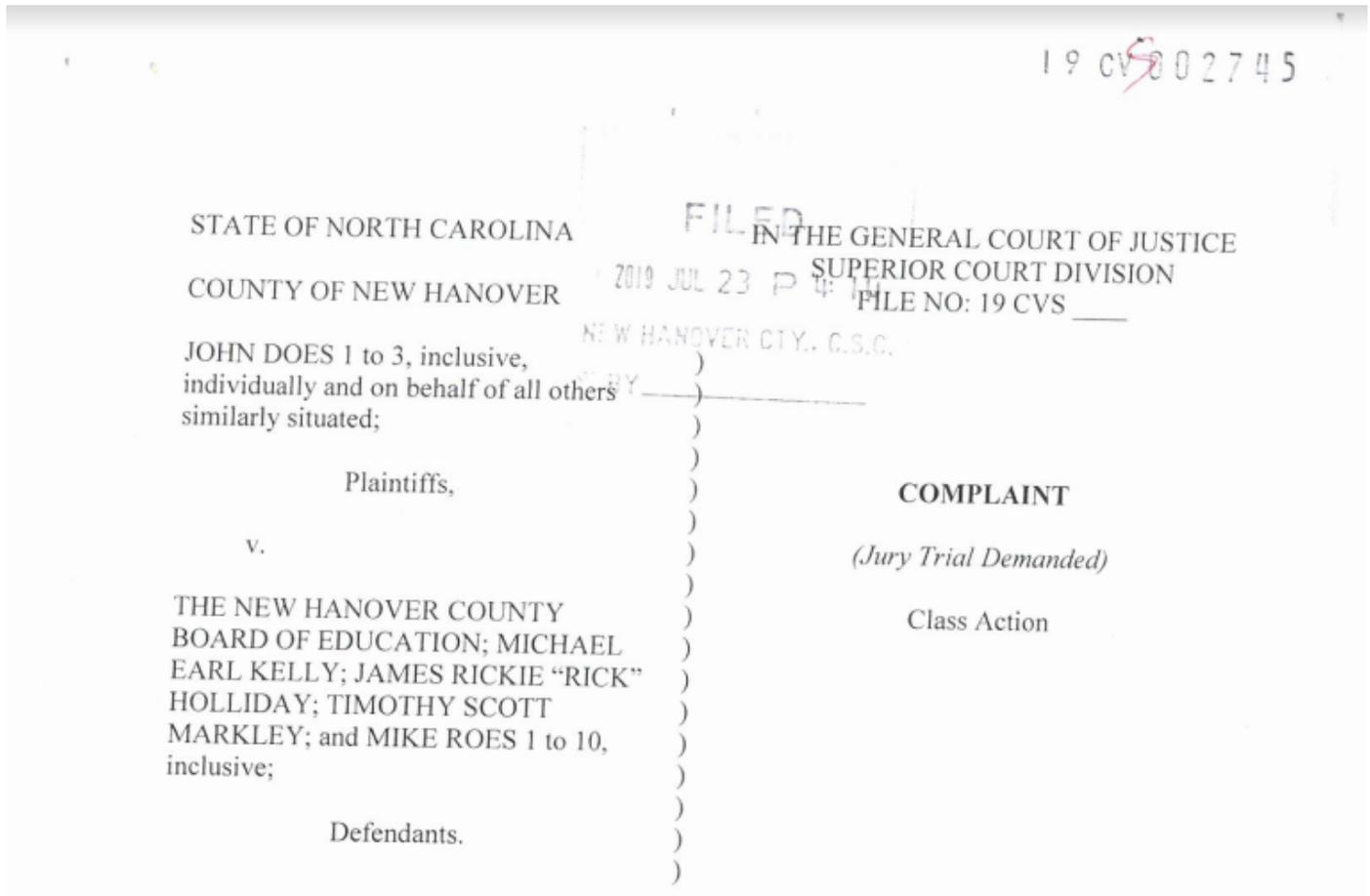


Deep dive: New Hanover schools face a class-action lawsuit, what does that mean?

By **Benjamin Schachtman** - July 24, 2019



Filed in Superior Court this week, the complaint against New Hanover County Schools makes allegations against top administrators and the Board of Education. (Port City Daily photo / New Hanover County Superior Court)

WILMINGTON — Two Wilmington-based law firms announced Tuesday they will represent multiple victims of sexual abuse in a civil suit, alleging that negligence on the part of the school board and administration makes them liable for damages.

Attorneys Joel Rhine and Jim Lea **spoke publicly yesterday**, saying they – along with a team from the Lea/Schultz and Rhine law firms – had filed a class-action lawsuit in New Hanover County Superior Court on behalf of three plaintiffs, identified by pseudonyms to protect their public identity, as well future victims who may wish to join the suit, or who could benefit from a settlement.

The lawsuit names as defendants former teacher and convicted sex offender Michael Earl Kelly, the New Hanover County Board of Education, Deputy Superintendent Rick Holliday, Superintendent Tim Markley, and

as-of-yet-unnamed other employees. (Note: According to Board Attorney Wayne Bullard, there is no legal distinction between suing the school board and suing the district.)

The suit concerns both the interference with former students' access to education as well as the long-term psychological and physical damage resulting from Kelly's actions. Kelly is being sued directly for causing these damages; the school district and its employees – including Holliday and Markley – are being sued for various forms of negligence. In general, the suit alleges that the administration repeatedly failed to act on information about potential wrongdoing by Kelly; further, the suit explicitly alleges that Holliday was aware for decades of Kelly's inappropriate and criminal behavior and did not act to prevent that behavior from continuing. The suit also alleges Markley was negligent in supervising Holliday.

Like any lawsuit against a government body, suing a school board or district is complicated – but suits against schools have added complications, including the landmark state Supreme Court case, which originated in New Hanover County.

Much of what happens in the lawsuit will depend on how the school system chooses to defend itself. It's also important to note that the lawsuit isn't just about money — the victims' attorneys are also asking for reform in the school system, including “clearing house” of the current New Hanover County Schools (NHCS) administration, including Superintendent Tim Markley.

What follows is a breakdown of the major issues that will shape how the lawsuit unfolds.

Allegations



Michael Early Kelly, seen here in early 2018, would eventually plead guilty to over 50 charges, including numerous felonies. Now, a civil suit will find whether he and his employers and supervisors are liable for damages to his victims. (Port City Daily photo / Benjamin Schachtman)

At the root of the allegations is the argument that Kelly's victims "have suffered and will continue to suffer a lifetime of mental anguish, emotional distress, shame, humiliation, mental pain and suffering, depression, post-traumatic stress, loss of future earning capacity, self-mutilation, suicide attempts and the destruction of healthy, loving relationships."

These allegations are serious in and of themselves, but the lawsuit also contends that by failing to protect the students from Kelly's actions the school board and district failed to provide a "safe and positive learning environment," as mandated by the school's policy. (The suit does not directly address state constitutional claims, but Rhine and Lea said they are well prepared to present those as well if need be).

The plaintiffs' claims against Kelly include those crimes for which he has already pleaded guilty, but also holds open the possibility that there were other victims, "likely dozens of other male students over the years he taught."

The allegations against the school board and administrators are more complicated and numerous, and make up much of the complaint filed on Tuesday.

The suit alleges that administrators, specifically Holliday, were aware of multiple complaints against Kelly. The suit alleges that Holliday himself was aware of Kelly's behavior as far back as 1993 and "refused to take any action (while the suit does not concern the actions of former teacher Richard Priode, it notes that Holliday was also informed of concerns about that employee, indicating a pattern of behavior).

Related: [Former students, parents say they reported teacher misconduct to Holliday, board members, up to 20 years ago](#)

In addition to the Board, Holliday, and Markley, the suit also names multiple "Mike Roes" (i.e. John Does) as placeholder defendants in the case. Attorneys believe that, pursuant to discovery, other administrators and staff will be found potentially culpable and, per the complaint, "plaintiffs will amend their complaint to show the true names and capacities of such fictiously named Defendants as they are ascertained."

At issue for the court is whether or not Kelly engaged in harmful behavior and whether that behavior was committed as part of his employment by the school district. Further, the court will have to decide if any of the defendants had knowledge of Kelly's behavior, whether they facilitated it, whether reports of that behavior were suppressed, whether Kelly's conduct was "ratified" by the schools (through promotion, awards, etc.) and whether his supervisors (and by extension the board) were negligent in hiring, retaining, supervising, investigating, or reporting Kelly.

Statutes of limitation

The first issue is whether or not the victims *can* file suit, which involves several factors. The first of these factors are statutes of limitation and repose.

In the case of Kelly's direct actions, a ten-year statute limits the scope of the lawsuit to a period from July 23, 2009 until February 7, 2018 (when Kelly was arrested). All of Kelly's victims were minors and so that statute is tolled – essentially, it doesn't begin – until they reach the age of 18.

However, Kelly pleaded guilty to criminal offenses dating back earlier than 2009, and the lawsuit alleges that the administration was aware of this behavior. As part of their argument, lawyers ask that this alleged negligence be tolled as well, in part because of alleged "fraudulent concealment" of this knowledge and also because the alleged negligence occurred continuously.

Update: A new North Carolina law has expanded the statute of limitations for some cases. Find details [here](#).

Governmental immunity

The next factor is ‘governmental immunity,’ which is essentially the county-level version of “sovereign immunity” – the state’s inherent (but limited) immunity from torts. These protections are sometimes extended to public officials, including board members and school superintendents. For centuries, these forms of government immunity protected official bodies from lawsuits, but more recent developments allowed legal action under certain circumstances. School boards, for example, waive their right to immunity in any situation for which they carry liability insurance.

This is somewhat of a catch-22: if a school board doesn’t carry insurance for something, for example negligent hiring practices, they can’t be sued for that issue. **There is also the North Carolina Schools Boards Trust (NCSBT), created in 1982.** The non-profit NCBST is a “risk management partner,” which claims that its “services rival those of any insurance company” without forcing school boards to waive their immunity – since, under state statute, it is not considered an insurance company.

Governmental immunity for North Carolina schools was fundamentally altered by a case filed in 2006; a New Hanover County family sued the Board of Education and the Roland Grise Middle School principal for failing to protect their son from sexual assault. The Board’s defense was governmental immunity, since they did not carry negligent hiring or supervision insurance. The case eventually went to the state Supreme Court, which **ruled that the student’s constitutional right to an education defeated any claim of immunity.**

Craig v. New Hanover Board of Education became a landmark case and is cited in numerous other lawsuits, but the ruling doesn’t always mean a plaintiff will prevail over an immunity defense.

In 2011, a student sued the Charlotte-Mecklenburg School (CMS) district and her former teacher, Richard Priode, who had been convicted of felony indecent liberties with her. The **Jane Doe v. CMS** case alleged that CMS was negligent in hiring Priode without a proper background check; the plaintiff’s attorneys argued this would have revealed evidence of past misconduct, potentially including alleged misconduct at Laney High School between 1997 and 2001. Attorneys also argued that the district disregarded complaints and warning signs about Priode.

CMS didn’t carry insurance for this kind of negligence and fought the plaintiff’s constitutional claim.

The plaintiff, who had since graduated, appeared in court and spoke about the psychological damage Priode had inflicted on her and how they had impacted both in high school and beyond; she told court she had been

in therapy to deal with the fallout from his criminal behavior, noting it was the counseling process that had allowed her to come forward with her claims against the school.

But despite the victim's testimony, the court didn't find her state constitutional right to education had been violated, and the case was dismissed.

What could immunity claims mean for the current lawsuit?

Policy Number: CU 8416542	Prior Policy:
Billing Type: DIRECT BILL	
Coverage Is Provided In PEERLESS INSURANCE COMPANY - A STOCK COMPANY	
Named Insured and Mailing Address: NEW HANOVER COUNTY BOARD OF EDUCATION 6410 CAROLINA BEACH ROAD WILMINGTON NC 28412	Agent: SURRY INSURANCE AGENCY - SCHOO L BR PO BOX 128 DOBSON NC 27017-0128 Agent Code: 2410329 Agent Phone:

POLICY CHANGE ENDORSEMENT

POLICY PERIOD: From: 07/01/2017 To: 07/01/2018 at 12:01 AM Standard Time at your mailing address shown above.

DESCRIPTION OF CHANGE

CHANGE EFFECTIVE DATE: 07/01/2017

**AMENDING NAMED INSURED TO REMOVE: C/O NEW HANOVER
COUNTY RISK MANAGEMENT**

**AMENDING AUTO UNDERLYING LIMIT TO \$3,000,000
AMENDING EMPLOYEE BENEFITS RETRO DATE TO 07/01/2017
AMENDING SEXUAL MISCONDUCT UNDERLYING DEC TO SHOW A
RETRO DATE OF 08/23/1994
ADD FORM 14-161 SEXUAL MISCONDUCT FOLLOW FORM
DELETE FORM 14-61 ABUSE OR MOLESTATION EXCLUSION**

In July of 2017, NHCS updated its insurance policy to include sexual misconduct. (Port City Daily photo / NHCS)

According to a copy of the NHCS insurance policy, the district has recently altered its coverage in ways that will impact the lawsuit. On July 1, 2017, the policy was updated to remove an exclusion for abuse and molestation, and insurance for sexual misconduct was added.

The amended policy reads:

The following is added to paragraph under : 1. Insuring Agreement SECTION I – COVERAGE 1. We will pay on behalf of the “insured” those sums in excess of the “retained limit” that the “insured”

becomes legally obligated to pay because of “loss” arising out of: a. A “wrongful act” but only to the extent of the “insured’s” “vicarious liability”; b. The “insured’s” negligent: (1) Employment, (2) Investigation, (3) Supervision, (4) Retention, (5) Training, (6) Reporting to proper authorities, or failure to report to proper authorities,

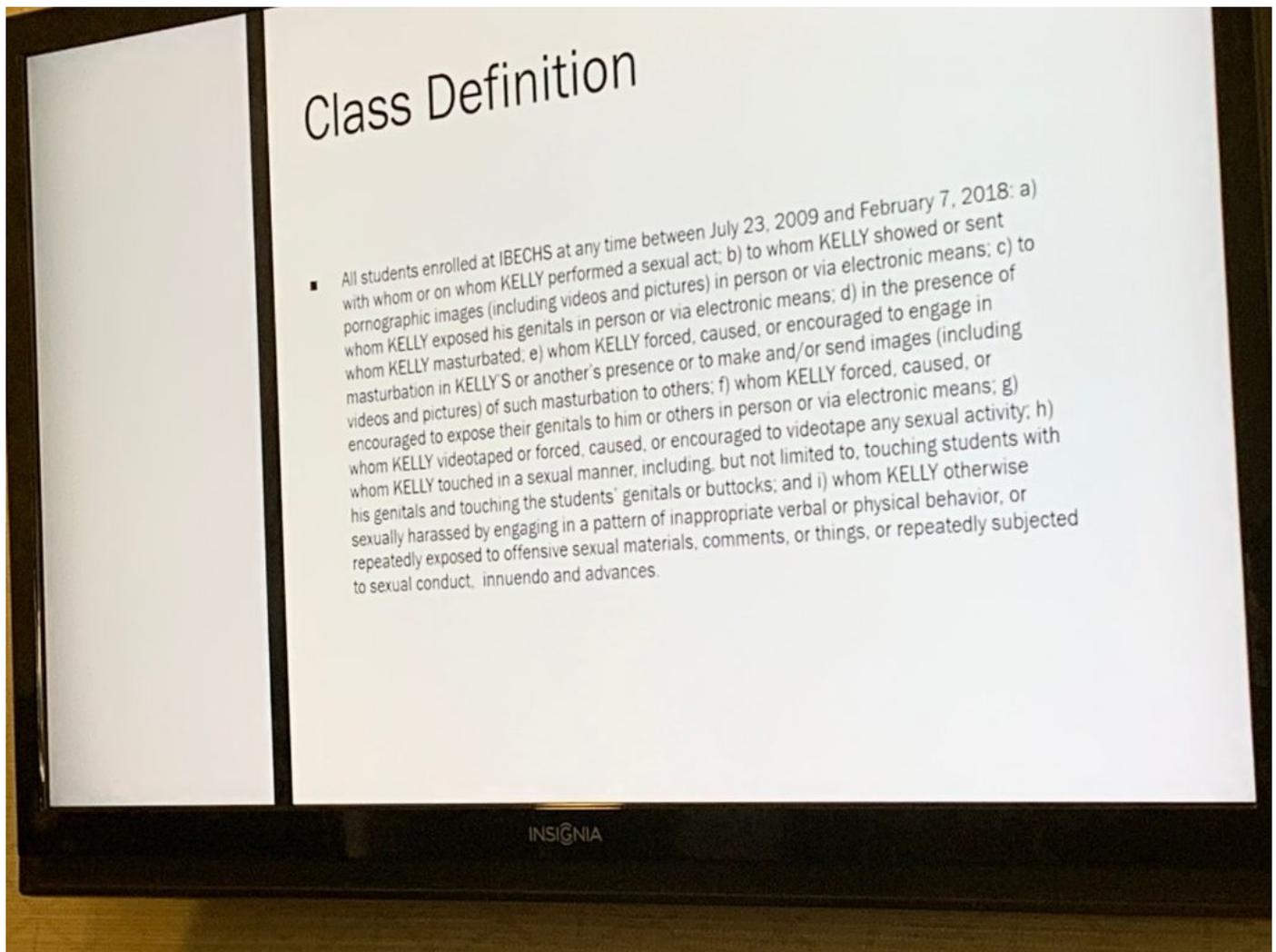
The added coverage is for \$3 million and was backdated to August 23, 1994.

Rhine and Lea stated they hope the Board will choose to take an insurance payout and create a fund to support the victims of Kelly. However, if the Board chooses to go to court over it, Rhine and Lea said they’re prepared to bring constitutional claims, as well federal Title IX claims and “1983 claims” (civil rights violations), all of which have defeated local immunity in previous cases.

The concern, for some, is that if the Board *does* choose to fight the plaintiff’s constitutional claims, it is possible that the victims will be required to appear in court to testify – as was the case in Jane Doe v. CMS. Given the traumatic nature of the victims’ experiences, testifying could be a painful – and public – process.

As for the immunity of public officials, including members of the Board and Markley, the case law is complicated; in general, courts require plaintiffs to show “**malice or corruption**” in negligence suits. Rhine and Lea said they were prepared to handle these types of legal issues, as well.

Class action



From a presentation on the class-action lawsuit by Jim Lea and Joel Rhine. (Port City Daily photo / Benjamin Schachtman)

Rhine, Lea, and their team are asking the court to allow the lawsuit to proceed as a class action, meaning it would be able to include those who fall under the parameters of the suit — which, in general, are that prospective plaintiffs were students at Isaac Bear Early College during the timeframe of the suit, and were victims of Kelly.

So far, three pseudonymized plaintiffs have officially filed, but others could join the suit provided they meet the class definition. If the school agreed to a settlement, or provided a fund for Kelly's victims, those meeting that definition would presumably also be eligible.

Discovery

According to Rhine and Lea, the legal team for the plaintiffs has conducted interviews with dozens of people, including potential future plaintiffs, witnesses, and experts. But that's only part of the legal process — the next phase is 'discovery.'

Discovery allows attorneys to subpoena witnesses and request documents. As part of that process, attorneys have filed a Freedom of Information Act (FOIA) for public documents, including 10 years worth of the following:

- Minutes from committees handling Title IX or similar issues
- Insurance policies
- Any documents “made or received” by Kelly, including electronic documents, recordings, images, footage, etc.
- Emails, texts and other electronic messages between Holliday and Kelly
- Complaints about Kelly dating from 1999 to the present

While discovery often utilizes the same tools as the public records requests used by media outlets, it typically generates documents much faster — in large part because, as Rhine pointed out, discovery is backed by a judge with the power to hold individuals in contempt if they do not comply in a timely matter.

The Brooks, Pierce investigation

The plaintiffs’ attorneys have expressed concerns about how the investigation contracted to the Brooks, Pierce law firm by the Board will impact the lawsuit. Those concerns included how Brooks, Pierce would communicate with Tharrington Smith, a firm being retained by the board to defend the current civil suit.

Other questions included:

- Will Brooks, Pierce share information from their investigation to be used in defending the Board and administrators from the current civil suit?
- Will Brooks, Pierce and or NHCS fight discovery requests for information gathered during the investigation? Will Brooks, Pierce’s investigation results be made public and if so, will any part of those results be redacted?
- If Brooks, Pierce contacts Kelly’s victims (or their families), will they advise them that they have the right to their own legal counsel, the right to decline participation, and be informed on how their information will be disseminated? Will current students be compelled by NHCS to speak with Brooks, Pierce?
- Will these victims be advised that, “Brooks, Pierce represents NHCS whose legal interests are directly opposed to the victims because NHCS may be liable for damages suffered by them” — and, further, that “information gathered and prepared during the investigation, including in the interview, may be used against them, including any lawsuit the victims may file against NHCS, Michael Kelly, or anyone else?”

According to Lea, the Brooks, Pierce law firm has not responded to these questions yet. NHCS has also declined to answer several of the same questions, including [how the results of the investigation will be made public](#).

Damages

Like the majority of legal complaints, the suit filed this week does not specify damages — it only uses the \$25,000 minimum necessary to file in Superior Court (smaller claims are handled by District Court or magistrates).

Rhine, Lea, and their team did not disclose the total damages they would sue for — but they noted that the \$3 million from NHCS's insurance policy could be used to fund a trust for Kelly's victims.

Again, things will depend on how NHCS decides to defend the case. As Lea noted, a settlement would allow the district some say in what kind of compensation individual victims receive; however, if the case were to go to trial, compensation would be up to a jury — with little limitation on the kinds of pain and suffering damages that could be assigned.

Reform

Rhine noted that monetary damages were important, both because of the need to compensate the victims and because those damages would be a lasting caution against failing to address future incidents. But, as Lea added, the lawsuit is not “just about money.”

“We want to see rules with teeth,” Lea said.

The initial complaint does not specify particular changes that plaintiffs would like to see at NHCS (the suit asks only for “other and further relief” as the court sees appropriate.) However, Lea noted that plaintiffs wanted to see serious reforms, including “safe reporting” policies that would address what has been described as the current climate of fear of retaliation as well as an end to “closed-door meetings” to discuss issues in the school system.

Lastly, the plaintiffs' attorneys want to see NHCS “clear house” of the current administration, including Superintendent Tim Markley.

“They need to take the rot down to the bottom,” Lea said.

(Editor's note: At press time, NHCS had just received a copy of the complaint. According to Board Chair Lisa Estep, the board and others will take time to read and reflect on the suit before commenting.)

Send comments and tips to Benjamin Schachtman at ben@localvoicemedia.com, [@pcdben](https://twitter.com/pcdben) on Twitter, and (910) 538-2001

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