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Law Student's ADHD Illegally Revealed, 9th Circ. Hears

By **Beth Winegarner**

Law360, San Francisco (June 12, 2013, 8:24 PM EDT) -- The University of San Francisco violated a law student's privacy and its student handbook by disclosing testing accommodations for the student's attention deficit hyperactivity disorder, his attorneys argued Wednesday, urging the Ninth Circuit to overturn a lower court's ruling that his disability wasn't subject to privacy laws.

After being diagnosed with ADHD during his first year of law school, Jason Tecza was allowed extra time on exams, as well as isolated space so he could concentrate. USF's student handbook promises to keep students' medical conditions private, but the school violated that when Tecza's testing accommodations were revealed during a study-abroad program in Europe, his attorney, Ewa Davison of Fenwick & West, argued Wednesday.

Ninth Circuit Judge Jay Bybee said he understood how disclosure of Tecza's disability could potentially violate his privacy rights, but he didn't understand how revealing the testing accommodation would.

"I would argue that the accommodations pertain to the disability," therefore disclosing the disability, Davison said.

Tecza's ADHD was revealed when other students in the study-abroad program were inadvertently given a copy of a paper he signed describing both his disability and the accommodations he received, according to his brief. Those accommodations were also apparent when he took his exam in a location separate from other students in the program, Davison said.

Judge Bybee, who explained that he has taught in study-abroad programs, said universities are constrained in such circumstances because "there were limited places we were allowed to go."

But Judge Marsha Berzon clarified the argument, saying, "He's not complaining about what room he was sent to or what people saw. He's complaining that a lot of people who were not in his class were given a piece of paper that said he was given an accommodation. Basically, this was a screwup. Is that a constitutional privacy violation?" she asked.

Though some disclosures might violate USF's handbook and constitute a breach of contract — as when USF professors discussed Tecza's accommodations in front of other students — other instances go further, Davison said.

USF's attorney, Michael Vartain of the Vartain Law Group, acknowledged that the student handbook constitutes a contract between the university and its students, but a breach of

that contract requires an intentional act, he argued. The disclosure of Tecza's testing accommodation was accidental, he said.

However, "There's no societal norm in California that accommodations are inherently a private fact," Vartain argued. "If you go that far, you impair the university's ability to provide accommodations.

Tecza sued USF in San Francisco Superior Court in May 2009, alleging breach of contract, invasion of privacy and discrimination under the Americans with Disabilities Act and the Rehabilitation Act, among other claims. After his disability was revealed, Tecza "lost sleep and suffered from continuing anxiety and embarrassment," and completed his law degree at Rutgers University — giving up a \$3,500 USF tuition grant in the process — "to avoid further humiliation and taunting," according to his brief.

USF removed the case to the California federal court, where U.S. District Court Judge Vaughn Walker granted the school's motion to dismiss. Tecza amended his complaint, and in May 2010, U.S. District Court Judge Richard Seeborg dismissed the case without granting Tecza the opportunity to amend, court documents said.

Judge Seeborg was wrong to conclude that Tecza's disability was not a private fact protected by the California Constitution, "even though the type of disability in this case is otherwise invisible to peers, faculty and administrators," according to Tecza's court filings.

Tecza's appeal comes as the administrators of the Law School Admission Test **face a lawsuit** claiming they unlawfully failed to provide accommodations to all test takers who requested them. In March, an individual LSAT test taker **dropped a similar suit**, which alleged that the administrators had wrongly told universities which students had received accommodations, after a California federal judge ruled that he wasn't certain such "flagging" was universally wrong.

Ninth Circuit Judges Jay Bybee, Marsha S. Berzon and U.S. District Court Judge Consuelo Bland Marshall sat on the panel.

Jason Tecza is represented by Tyler Alexander Baker, Yevgeniya A. Titova and Ewa M. Davison of Fenwick & West LLP

The University of San Francisco is represented by Michael Joseph Vartain, Stacey Lynn Leask and Kathryn Jean Burke of the Vartain Law Group.

The case is Jason Tecza v. University of San Francisco, case number 10-16270, in the U.S. Court of Appeals for the Ninth Circuit.

--Editing by Stephen Berg.