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NO. 37051-8

**COURT OF APPEALS, DIVISION III
OF THE STATE OF WASHINGTON**

ZAIRE WEBB,

Appellant,

v.

WASHINGTON STATE UNIVERSITY, MICHAEL C. LEACH,
ANDREW LEHR, KAREN FISCHER, and KELLY MYOTT-BAKER,

Respondents/Cross-Appellants.

RESPONDENTS/CROSS-APPELLANTS' BRIEF

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I. INTRODUCTION

Zaire Webb signed an Athletic Financial Aid Agreement to play football at Washington State University, contingent upon him complying with University, Athletic Department, and team rules. Webb violated those rules in numerous respects and lied about those violations. Ultimately, his refusal to comply with these rules culminated in his arrest for stealing from Walmart.

Webb's conduct ended his status as a football student-athlete and the University's obligation to him under the Athletic Financial Aid Agreement. The University notified Webb in writing they were cancelling the agreement and his financial aid would terminate at the end of the semester. The notice provided Webb options to appeal the decision, including an option to have a hearing to which he could bring documents and witnesses, as well as have an attorney represent him.

Webb requested and was granted a hearing. He chose to attend the hearing without an attorney, presented no witnesses or documents, and simply denied the allegations against him. The three volunteer committee members that sat for the hearing unanimously found Webb neither credible nor convincing, and concluded the University was justified in cancelling the Athletic Financial Aid Agreement.

Webb brought suit alleging four causes of action related to the cancellation of his Athletic Financial Aid – breach of contract, intentional interference with contractual relations, negligence, and a 42 U.S.C. § 1983 due process violation. The trial court correctly found no genuine issue of material fact and dismissed the breach of contract, intentional interference with a contract, and negligence claims. The court, however, incorrectly and exclusively relied on *Conard v. Univ. of Wash.*, 62 Wn. App. 664, 814 P.2d 1242 (1991) *rev'd in part*, 119 Wn.2d 519, 834 P.2d 17 (1992) to find the hearing committee violated Webb's due process rights and were not entitled to qualified immunity. The court eventually found the hearing committee was entitled to qualified immunity because it acted functionally equivalent to that of a judge. Summary judgment in favor of the Respondents should be affirmed.

II. COUNTER-STATEMENT OF ISSUES ON APPEAL

1. Should summary judgment be affirmed as to Webb's breach of contract claim because he cannot establish Respondents breached the agreement, and Webb does not deny he breached the agreement?
2. Was Webb's intentional interference with a contract claim appropriately dismissed when he failed to establish Coach Leach was a third-party intermeddler, or had improper purpose or means when Webb was cut from the football team?
3. Did the trial court appropriately dismiss Webb's negligence claim because he cannot establish the existence of an independent duty of care to comply with due process requirements?

4. Was dismissal of Webb's 42 U.S.C. § 1983 due process claim against Lehr, Fischer, and Myott-Baker appropriate because they were entitled to quasi-judicial immunity for their role as volunteers in Webb's financial aid appeal hearing?

III. ASSIGNMENT OF ERROR

5. The trial court erred finding Lehr, Fischer, and Myott-Baker violated Webb's due process rights. CP 1092-93, 1097.
6. The trial court erred finding Lehr, Fischer, and Myott-Baker were not entitled to qualified immunity. CP 1092-93, 1097.

IV. ISSUES ON CROSS APPEAL

7. Did the trial court err finding Lehr, Fischer, and Myott-Baker violated Webb's due process when the court did not consider the interest at stake and it is not disputed Webb was provided notice, a hearing by objective decision makers, opportunities to present witnesses and evidence, and to be represented by an attorney?
8. Did the trial court err denying Lehr, Fischer, and Myott-Baker qualified immunity solely based on dicta in *Conard v. Univ. of Wash.*, 62 Wn. App. 664, 814 P.2d 1242 (1991) *rev'd in part by* 119 Wn.2d 519, 834 P.2d 17 (1992)), when no binding precedent recognizes a due process property interest in athletic scholarships?

V. COUNTER STATEMENT OF THE CASE¹

A. Conduct, Policies and Standards Pursuant to Webb's Scholarship Agreement

Zaire Webb played football for Washington State University under the terms of an Athletic Financial Aid Agreement (Agreement). CP 321. The Agreement provided Webb scholarship assistance, contingent on his

¹ Pursuant to RAP 9.12, the Court should only consider the clerks papers called to the attention of the trial court and enumerated in its order at CP 1095-98.

compliance with “academics policies or standards, athletics department or team rules or policies,” and other requirements. CP 253-54, 321.

1. Student athletes follow specific academic rules.

In addition to the standards, expectations, policies and procedures governing the conduct of all University students, Webb agreed to the Agreement’s terms that required him to adhere to Athletic Department and team rules. CP 321. Many of those rules are designed to ensure the student-athlete’s success, and Webb agreed to attend his classes, have weekly meetings with his advisors to discuss academic progress, and “maintain open and honest lines of communication with [his] academic advisor, coach, and professors.” CP 256, 257, 321, 253, 254, 325-464.

He also agreed to uphold “high standards of integrity and behavior which reflect well upon ... coaches, teammates, the department of athletics” and the University. CP 269, 359. Webb understood that failure to follow these rules would result in discipline by the coaching staff (CP 260) and that student-athletes receiving financial aid “risk having all or part of their athletic financial aid revoked for infraction” of the athletic code of conduct. CP 256, 258, 321, 325-464.

2. The Football Program’s Team Rules.

Coach Leach has been the University’s head football coach since November 30, 2011. CP 210. He has long maintained team rules.

CP 211-225. The rules are well known and often repeated: “don’t hit women, don’t do drugs, and don’t steal.” CP 259 (Webb Dep 47:23-24). It was equally well known that the repercussion for violating any of those three was, “You’re off the team.” CP 259-260 (Webb Dep 48:23-49:10), 269, 316.

B. Webb’s Noncompliance with University, Athletics, and Team Rules

1. Academic Noncompliance.

In May 2017, Katie Qualls became Webb’s Academic Advisor. CP 206. The University provides student-athletes with Academic Advisors to facilitate and promote their academic success. *Id.* Webb initially showed acceptable academic engagement and had a generally positive attitude toward Qualls. CP 207. This changed almost immediately, as “his academic engagement and performance worsened.” *Id.*

Webb enrolled in the first session of summer school, and though he was required to stay in touch with and be accountable to Qualls, he became uncommunicative, disrespectful, and antagonistic. *Id.* Webb admits that he missed at least “four or five” classes in the summer. CP 264-65. He “missed four of six quizzes in COM 102 and had a D+ in that class” and a C- in English 101. *Id.* Again, despite knowing he was required to attend class every day, he also missed classes and coursework when he left campus for

a week without informing either Qualls or the team's coaches. CP 207, 257 (Webb Dep. 37:13-15, 38:9-11), 268.

Qualls consulted her supervisor, Heather Erwin, about Webb's disrespectful attitude and poor academic performance. CP 207-08. Erwin forwarded Qualls' observations and concerns to Antonio Huffman, the Director of Football Operations. CP 202-04, 207-08. During the summer session, Qualls spoke with Erwin "three to four times per week" about "Webb's attitude and performance" and to Huffman "two to three times." CP 208. Webb's behavior was getting worse, and it "was unusual and troubling to [Qualls] as his academic advisor." *Id.*

Qualls stopped working with Webb when the summer semester ended in August 2017 (CP 208) and Melissa Olson took over as Webb's academic advisor. CP 116-118. Olsen scheduled weekly Wednesday meetings with Webb to discuss his academic progress. CP 117. It quickly became apparent to Olsen that Webb was skipping classes and not turning in assignments:

As of September 8, 2017, Zaire had not participated in COM 105 for three weeks and had missing assignments, and he was a week late in obtaining his caterpillar for ENTOM 103. As of September 15, 2017, Zaire had missed five DTC 101 classes, two UNIV 104 classes, and had not yet purchased his HD 101 books. As of September 25, 2017, Zaire had missed all of his three online quizzes in HD 101 and had a 42% in that class and he had received a 0/20 on his week four quiz in ENTOM 103.

On September 26, 2017, over a month after the fall semester started, Zaire still had not yet purchased his books. In tracking Zaire's academic performance, I noticed that he had numerous zeros, indicating he was not doing his work. During this time, Zaire often sent messages to me in which he tried to avoid study hall.

CP 117.

Olsen felt Webb's risk of academic failure had increased from moderate to high and that his resistance to her help and disregard of his academic obligations was unusual. CP 117. Webb became "increasingly combative and disrespectful" toward Olsen and she had significant difficulty contacting and communicating with him. CP 117, 465-74, 475-76. He consistently ignored text messages and made excuses for meeting with Olsen at the regular scheduled time. CP 465-474. Because Webb presented such unusual challenges, Olsen spoke with defensive coordinator, Alex Grinch, who was also Webb's position coach, and asked Coach Grinch to instruct Webb to communicate with her. CP 117. This was only "one of several occasions in which [Olsen] informed Coach Grinch about [Webb's] difficult academic and interpersonal behaviors." *Id.* She also often communicated with Huffman about Webb's behavior. *Id.*

As Webb's academic and personal behavior became progressively more challenging, Olsen continually modified his educational support plan. CP 118. First, because Webb routinely skipped one of his classes to go home

and sleep, Olsen required him to come to her office to study during that time. *Id.* Webb admitted missing classes and showing up late for class. CP 265. His failure to attend class continued from summer session into the fall semester, and as early as September 11, 2017, a professor informed Webb he already had five absences and was at risk of failing the class. CP 476.

When Webb's interactions with and attitude toward Olsen continued to be disrespectful and disruptive, she required him to study in the Office of Defensive Quality Control Assistants, Kip Edwards and Darcel McBath. CP 118, 162. Webb admits that he caused disruption during a study hall with Olsen, when he offered another student "a cup" to use instead of going to the bathroom. CP 265. During this time, Head Strength and Conditioning Coach, Jason Loscalzo, was independently disciplining Webb for failing to meet team obligations. CP 118, 265-267. "Generally, discipline in this context involved requiring the student athlete to engage in some kind of physical activity supervised by strength and conditioning coaches and/or position coaches, such as riding an exercise bike under time and distance requirements." CP 113. Webb's discipline included riding the exercise bike for thirty minutes, which Webb decided on his own that he was not going to complete. CP 265-66.

Ultimately, Webb was required to appear at 6 a.m. daily in Coach Grinch's office. Webb was required to roll in the sand pit on Rogers Field (another form of discipline), shower, and study with Grinch for one hour. CP 118, 275. Webb concedes that lasted for several weeks because his grades and behavior did not change. CP 265-67, 271.

2. Increasing Pattern of Training and Conditioning Noncompliance.

As a football player, Webb was required to engage in strength training and physical conditioning supervised by the team's strength coaches. CP 112-13, 211-12. The strength coaches communicated regularly with the position coaches and Coach Leach "regarding the progress, effort and attitude of" the players. *Id.* Tyson Brown, the Assistant Strength and Conditioning Coach, interacted with and observed Webb frequently throughout spring, summer, and fall 2017. CP 112-13. Coach Brown observed that Webb was consistently non-compliant with strength and conditioning directives and coaching, and that he was dismissive of the strength and conditioning staff. CP 114. Brown observed Webb "acted as if he did not want or need to be directed or coached." *Id.* He felt Webb was "unusual and consistent in his lack of effort." *Id.* Brown shared his observations with Coach Leach. *Id.*

Coaches observed even Webb's *teammates* chastised him for his "indifference and poor effort." CP 113-114, 263. And, Webb admitted to

“slacking.” CP 263 (Webb Dep. 63:21-25.) Coach Loscalzo spoke with him at least twice about his “nonchalant attitude” (CP 262) and gave Webb a written summer evaluation stating he was extremely immature, had a spotty work ethic, and would rather “look cool than compete.” CP 263. Webb admits Loscalzo also once removed him from his conditioning group because he was taking “too many reps off.” *Id.* Loscalzo, too, shared his observations of Webb with Coach Leach. CP 211-212.

3. Student Code of Conduct Noncompliance/Team Rule Violation.

Webb’s poor conduct extended beyond the classroom and football field. On August 14, 2017, University police officers Daniel Tiengo and Erik Welter responded to a complaint of marijuana use in Global Scholars Residence Hall, a University-owned student living facility. CP 120, 123.

When officers Tiengo and Welter arrived at Global Scholars, the Residence Advisor/Hall Director informed them that Room 303 was the only occupied room on the third floor because it was “move in week”. CP 121. Tiengo and Welter approached the room and when they reached the door, Webb opened it. CP 121, 124. Tiengo and Welter, who had received law enforcement training, both immediately recognized the smell of marijuana coming from the room. *Id.*

Tiengo also recognized Webb as one of the two occupants of the room because Tiengo had encountered Webb in spring 2017, when he “was a suspect in the theft of a John Deere Gator belonging to WSU Athletics.” CP 121; 124.² Tiengo and Welter confirmed Webb’s identity and the identity of the other occupant of the room, Anthony White, through their respective driver’s licenses. *Id.*

Officer Welter observed Webb “had glassy, bloodshot eyes.” CP 124. Officers Welter and Tiengo asked him and White if they had smoked marijuana and both Webb and White admitted they had. CP 121, 124. Officers Welter and Tiengo then asked Webb and White if they still had marijuana in their possession and Webb retrieved marijuana from a desk drawer. *Id.* Because the University prohibits students from possessing or using marijuana on University property, the University police reported this encounter to the University’s Office of Student Conduct (OSC), which opened an investigation. CP 128.

On October 12, Webb met with OSC Conduct Officer, Holly Campbell, as part of the OSC’s investigative process. CP 129, 303.³ During

² In one year, Webb came before the Office of Student Conduct for violations of the student conduct code on three occasions: (1) theft of the gator/tractor in spring 2017, (2) use of marijuana on campus in summer 2017, and (3) theft from Walmart in fall 2017. CP 128.

³ This October 12 meeting arose from a subsequent OSC complaint regarding Webb’s theft from Walmart, but Campbell and Webb also discussed his August 14 use and possession of marijuana, which was still pending because Webb repeatedly requested the adjudication of that complaint be continued.

that meeting, Webb changed his story. He told Campbell that Officers Welter and Tiengo were mistaken in believing they smelled burned marijuana in his room and in observing him with marijuana. CP 129, 121, 123. He claimed what they actually smelled was burned “white sage,” which his mother had sent him with instructions to burn it in his room. CP 129. Webb’s mother and father corroborated in separate emails to Campbell that they sent Webb white sage to burn and claimed that burned white sage smells like marijuana. CP 129, 140, 141. Webb also claimed that the substance he gave the officers was not marijuana or even white sage, but instead was tobacco. *Id.*

Webb has since admitted that his story about burning white sage in his room was a lie. CP 282, 304-05 (Webb Dep. 226:17-229:7), 317 (Webb Dep. 278:3-18). He now claims he was lying “to cover-up for his roommate” during the student conduct investigation. CP 304.

Webb rescheduled his OSC hearing for the marijuana infraction “four or five times,” ultimately failing to appear. CP 302-303. The OSC found him responsible for using and possessing marijuana in his dorm room on August 14, 2017. CP 129, 305. The OSC did not notify Coach Leach of its investigation or finding. CP 192-193, 196, 213, 302-303. Had Coach Leach known of the August 14 incident, he would have dismissed Webb and White from the team at that time. CP 213.

4. Team Rule Noncompliance.

On September 25, 2017, Football Chief of Staff, Dave Emerick, requested on Coach Leach's behalf that Head Athletic Trainer, Andrew Gepford, schedule a drug test for three football student-athletes, one of whom was Webb. CP 198. Emerick summarized the "reasonable suspicion" for drug testing Webb as his poor attitude in the weight room, difficult attitude with academic advisors and poor academic and overall performance. CP 198, 477-480 (definition of reasonable suspicion for testing).

Based on Emerick's request, Gepford contacted Loscalzo and Erwin, both of whom provided information supporting a drug test of Webb. CP 199. Gepford forwarded the request and information to the Associate Director of Athletics, the Senior Associate Director of Athletics/Director of Athletic Medicine, and Deputy Director of Athletics. *Id.* On September 26, all three agreed with Gepford that there was reasonable suspicion to drug test Webb. *Id.* Gepford asked Head Football Athletic Trainer, Andy Mutnan, to schedule the test for October 3, 2017. *Id.*

On the morning of October 3, Mutnan instructed Webb to come to the trainer's office for a drug test immediately after he completed his 7 a.m.

workout.⁴ CP 199, 278-79. Webb should have arrived at the trainer's office at approximately 8:00 to 8:30 a.m. CP 199. Instead, he did not show up until 10:34 a.m. CP 199, 278-80, 481-82. Despite knowing that he was expected to report immediately, Webb claims he chose to shower and then leave the facility to go to his dorm room to eat a sandwich and drink a protein shake. CP 279-280.

Gepford told Webb there were concerns about his attitude in the weight room and toward his academic advisors, his training with the team, and his poor academic performance. CP 199. Gepford provided Webb a copy of the University's drug-testing policy and a drug-testing acknowledgement form, which Webb signed and dated. CP 199, 281. Gepford then took a urine sample from Webb, which he processed pursuant to the University's drug-testing policy and mailed to the laboratory for evaluation. CP 199-200. On October 7, Webb's sample was returned as too "dilute" to test. *Id.*

C. Webb's Arrest for Stealing from Walmart

On October 4, 2017, the day after Webb was tested for suspected drug use, Webb and Anthony White, his teammate and roommate, were at the Pullman Walmart. CP 151. They proceeded to the self-checkout (SCO)

⁴ Webb was aware that he might be drug tested as an NCAA student-athlete. CP 255, 258.

register furthest from the SCO hosts and closest to the store's exit. *Id.* At the SCO register, White scanned some items, but bagged other items without scanning them. CP 152. Webb was with White and watched as he did this. *Id.* Zane Casper, an Asset Protection Associate, confirmed White was not scanning all the items he and Webb were bagging by viewing the SCO host's computer screen. *Id.*

Once Webb and White finished bagging the merchandise and placing it in their cart, they paid for the items they scanned and exited the store, making no effort to declare or pay for the un-scanned items. *Id.* When Webb and White were outside the store, Casper and Walmart Customer Service Manager, Alex Aguilar, approached them, identified themselves as Walmart asset protection personnel, and asked them to return to the security office. *Id.*

Once Webb and White were in the security office, Casper asked them for identification and they both claimed they had none. *Id.* Instead, Webb lied and provided a false name and address. CP 291-92. Because Casper could not confirm Webb and White's names without identification, he contacted the Pullman police, which sent Officer Aaron Breshears. CP 152, 178-191.⁵ When Breshears questioned Webb and White, they again

⁵ The Whitman County Prosecuting Attorney did not seek any information from Casper regarding his observations of Webb and White's theft from Walmart.

lied and claimed they had no identification. When Breshears told them without identification they would be detained, they produced their Florida driver's licenses. CP 152, 178-191, 292. Breshears asked for Webb's local address and he lied again. CP 292-93 (Webb Dep. 180:17-24, 181:21-23.)

When Webb disclosed his identity to Breshears, Casper realized that Webb and White had both lied and given him false names, dates of birth, and residential addresses. CP 152. Webb admits he lied to both Casper and Breshears. CP 293 ("I gave them false information, yes.") Breshears arrested Webb and White for shoplifting. CP 292. Webb admits he knew at that time he had been arrested. CP 292.

At 11:03 p.m., Breshears sent Pullman Chief of Police, Gary Jenkins, an e-mail stating he arrested Webb and White for shoplifting and that they were both WSU football players. CP 179-183. Among the numerous items Webb and White shoplifted were five packets of pectin and four home drug-test kits, which cost \$35 each. CP 152-60, 483-84, 485-86. Webb claims he took drug tests for "no specific reason" (CP 289, 293-294, 295); yet, he conceded the only reason to take a drug test kit is to test for drug use, and that drug use by a football player at the University will result in the player being dismissed from the team. *Id.* He also claimed he was not aware pectin is used to mask marijuana on drug testing until OSC Conduct

Officer, Holly Campbell, told him. CP 287-88. Webb claims the pectin was for canning apples and bananas in their dorm room. CP 284-287.

On October 5, 2017, Chief Jenkins confirmed that Webb and White were football players, (CP 179) reviewed Breshears's arrest report, and called Huffman to inform him of the details of the arrest, including that the stolen items included home drug-test kits. CP 179, 202-05. Huffman informed Coach Leach of the information Chief Jenkins provided. CP 202-205, 210-225. Webb's and White's arrest for theft were also reported to the OSC for investigation. CP 128.

D. Webb's Dismissal from the Football Team

The next morning, on October 5, when Webb appeared in Coach Grinch's office for 6 a.m. discipline and study, he failed to tell Grinch about his arrest the night before, because he "didn't feel any need to." CP 296, 298, 300. When Webb went to the weight room for conditioning after concluding his discipline with Grinch, Loscalzo pulled him into his office and asked, "What did you get arrested for?" CP 298. Webb lied and denied being arrested. *Id.*

Later that morning, after concluding his conditioning, Huffman asked Webb, "Why were you at Walmart stealing?" Webb said, "I wasn't stealing." *Id.* Huffman reminded Webb about the rule prohibiting theft and advised him he would likely be dismissed from the team. CP 298-300.

Later that day, Huffman called Webb and told him to “come back to the office.” CP 300. When Webb returned, Huffman told him that Coach Leach had dismissed him from the team. CP 487-488. Huffman gave Webb a status update form stating financial aid would continue to the end of fall semester in December. CP 300, 487-88.

E. Webb’s Athletic Financial Aid Appeal Process

The National Collegiate Athletic Association (NCAA) outlines rules and regulations for when a student-athlete’s athletic financial aid is reduced or cancelled during the period of the award. CP 899-907. The rules explain that member institutions must notify the student-athlete in writing about the opportunity for a hearing. CP 907. The notice should also explain the institution’s policies and procedures for conducting the hearing. *Id.* Finally, the institution must have established reasonable procedures to conduct a hearing, with the ultimate responsibility delegated outside the athletic department. *Id.* The University is a NCAA member institution.

Here, Webb was told on October 5, 2017, (the day after he was arrested for theft) that he was cut from the team for stealing. CP 298, 300, 487-488. Webb was also given a status update form explaining financial aid would continue to the end of the semester. CP 487-488. On October 9, Webb received a letter from Student Financial Services informing him his athletics scholarship will be canceled January 1, 2018. CP 491-498. The

letter explained that Webb had a right to request a hearing if he felt cancellation was unfair or unjustified, and it included three attachments outlining the process for athletic aid appeals. *Id.* The attachments explained that if Webb chose to appeal, he could choose Option A - written appeal, or Option B - formal hearing. *Id.* Both options explained a step-by-step process for how the appeal would proceed. *Id.*

Webb filled out the Appeal Petition Form, and chose the hearing option. CP 499-500. The form that Webb filled out clearly explains that he could attached any documentation he believed relevant to the appeal. *Id.* Webb chose not to submit any other documentation. *Id.*

After filling out the petition form, Webb received another email confirming which appeal option he chose, and again explaining the process for both types of hearings. CP 501-503. He received Coach Leach's written statement repeating the basis for dismissal prior to the hearing. CP 506-509. Upon receiving Coach Leach's statement, Webb was invited to submit any additional information he wished, or he could simply bring the information to the in-person hearing. CP 509. He did not provide, submit, or bring any additional information. CP 168, 171-172, 175. Webb appeared at the in-person hearing without an attorney and without any other witnesses. *Id.* He contested the basis for his dismissal from the football team to a three-

person committee of volunteers selected from departments around the University. CP 165-177.

Webb states that during the hearing, he talked for “close to half an hour” and disclosed his numerous “academic issues, missing classes and assignments, a missed workout ... the stationary bike punishments, and rolling in the sand.” CP 315-16. Yet, Webb claimed, “he did not know of any other incidents [other than the shoplifting] that would have been of concern to the coaches or a factor in his dismissal from the football team.” CP 167 ¶ 18.

At the hearing, Webb did not provide the Committee with evidence or explanation to support his claim that he was wrongly arrested for theft by Pullman Police. CP 168. 171, 175. The Committee unanimously found that Coach Leach was justified in dismissing Webb and that the cancellation of the Agreement was justified. *Id.* The University informed Webb of the Committee’s decision in writing. CP 313, 515-17.

VI. ARGUMENT

A. **The Trial Court Properly Concluded the University did not Breach a Contract**

Webb’s breach of contract claim arises solely from the cancellation of the Agreement, the only explicit written contract he had with the University. CP 242; 253-254; 320-324; *Ruegsegger v. Western NM Univ.*

Bd. of Regents, 141 N.M. 306, 313, 154 P.3d 681, 685-86 (2006) (citing *R & R Deli, Inc. v. Santa Ana Star Casino*, 128 P.3d 513 (N.M. 2006) and *Envtl. Control Inc. v. City of Santa Fe*, 38 P.3d 891 (N.M. 2002)). He does not allege breach of promises related to academic matters or access to educational opportunities. *Id.*

Questions regarding the construction of a contract or the legal effect of its terms present a question of law properly resolved by summary judgment. *Marquez v. Univ. of Wash.*, 32 Wn. App. 302, 306, 648 P.2d 94 (1982) (citing *Murray v. Western Pac. Ins. Co.*, 2 Wn. App. 985, 992-93, 472 P.2d 611 (1970)). “In construing a written contract, the basic principles require that (1) the intent of the parties controls; (2) the court ascertains the intent from reading the contract as a whole; and (3) a court will not read an ambiguity into a contract that is otherwise clear and unambiguous.” *Mayer v. Pierce Cty. Med. Bureau*, 80 Wn. App. 416, 420, 909 P.2d 1323 (1995).

Webb does not dispute the existence of the express written Agreement or that the Agreement is clear and unambiguous. Webb also does not dispute his non-compliance with the Agreement’s terms. Appellant’s Opening Br., p. 24-27. Instead, Webb claims the Agreement incorporated the student-athlete handbook by reference, binding both parties to the handbook terms. Appellant’s Opening Br., p. 24.

Scholarship agreements bind the student, not university, to compliance with regulations stated as a condition of the agreement. *Ruegsegger* 154 P.3d 681, 685-86 (2006). Here, the clear and unambiguous language of the Agreement expressly states:

The assistance may be reduced or cancelled during the period of award or reduced or not renewed for the following academic year or years of the student-athletes five-year period of eligibility *if the recipient*:

...

(e) Violates a nonathletically related condition outlined in the financial aid agreement or violates a documented institutional rule or policy (e.g. academics policies or standards, athletics department or team rules or policies)

CP 320 (emphasis added). In unequivocal terms, the Agreement broadly bound the University to provide scholarship related expenses, so long as *Webb* (i.e., the recipient) (1) remained a student-athlete on the football team, and (2) complied with University, Athletic Department and football team rules and policies. *Id.* The Agreement does not refer, either expressly or by implication, to any University obligations other than payment of scholarship expenses contingent on *Webb*'s contractual performance. *Id.*

Webb cites no legal authority supporting the notion that the Agreement incorporated the student-athlete handbook as binding on the University, or that the student-athlete handbook created express contractual obligations. If no legal authority is cited, courts may presume that counsel,

“after a diligent search, has found none.” *Oregon Mut. Ins. Co. v. Barton*, 109 Wn. App. 405, 418, 36 P.3d 1065 (2001).

Webb instead points to cases involving an employer/employee relationship—an analogy that does not hold weight. He cites *Thompson v. St. Regis Paper Co.*, 102 Wn.2d 219, 223, 685 P.2d 1081 (1984) for the proposition that in specific situations, an employee manual may bind the employer to certain promises contained therein. Appellant’s Opening Br., p. 25-26. *Thompson* is distinguishable for multiple reasons, including the fact the relationship between the employer and employee there did not include an express contractual agreement. *Thompson*, 102 Wn.2d at 221 (“The appellant, Kenneth L. Thompson, began working for St. Regis Paper Company in 1963. *There is no written agreement concerning his employment.*”) (Emphasis added). Therefore, the court’s analysis and conclusions are premised on the fact the case did not involve a written contract. *Id.* at 229 (“absent specific contractual agreement to the contrary, we conclude that the employer’s act in issuing an employee policy manual can lead to obligations that govern the employment relationship.”) Unlike *Thompson*, the relationship in this case is based on an express written contract that clearly outlines the obligations of each party.

In addition, relationships between Universities and their students are unique and not comparable to that of an employer/employee. *See Marquez*,

32 Wn. App. at 306 (student/university relationship is unique and cannot be stuffed into one doctrinal category like contracts.) For example, in *Marquez* the court found an announcement in a law school handbook did not create a right for the plaintiff to obtain a law degree “absent his meeting and maintaining reasonable standards established by the Law School.” *Id.* The *Marquez* court only looked toward the law school handbook because a formal contract did not exist, and is rarely prepared in the student-university relationship. *Marquez*, 32 Wn. App. at 305. Unlike *Marquez*, here there is a formal contract offered by the University and signed by Webb (CP 321), and he is not claiming loss of educational opportunities. CP 242; *see also Conard*, 62 Wn. App. at 670.

In *Ruegsegger v. Western NM University Bd. Of Regents*, 154 P.3d 681 (2006)—a case directly analogous to Webb’s claims—a Western New Mexico University (WNMU) student-athlete who was allegedly raped by two WNMU football players sued WNMU for breach of contract, alleging WNMU failed to follow WNMU policies and procedures in the student-athlete handbook while investigating the assault. *Id.* WNMU countered that the student-athlete’s scholarship agreement only required WNMU to provide scholarship funds, not to comply with university regulations; the student-athlete alone was required to comply with the regulations. *Id.* at 684.

In affirming dismissal of the student-athlete's claims, the *Ruegsegger* court observed that the scholarship agreement made no reference to any duty on the part of WNMU to comply with university regulations. *Id.* at 686. The court also concluded the only express contract was the scholarship agreement and the student-athlete handbook did not contractually guarantee a right to specific types of investigation, but instead merely provided guidelines for the operation of WNMU. *Id.* at 688. As here, the university was only obligated "to provide [the student-athlete] with scholarship assistance for her education." *Id.* at 686. The WNMU agreement required the student-athlete to maintain acceptable academic performance, play basketball, and "comply with team, athletic department, or university regulations." *Id.* The same analysis applies here. The University met its obligation under the Agreement. In contrast, Webb breached the Agreement in numerous respects.

On August 14, 2017, Webb violated University, Athletic Department and team rules against the use and possession of marijuana. CP 120-150. Two University police officers observed Webb with marijuana in his dorm room and circumstantial evidence, including Webb's own admission, showed he had smoked marijuana there immediately before their arrival. CP 120-126. The OSC found Webb responsible for violating University rules prohibiting possession or use of marijuana. CP 127-150.

And although the OSC did not inform Coach Leach of this incident, he attests he would have dismissed Webb at the time had he known. CP 213; *see also Lewis v. Fisher Serv. Co.*, 495 S.E.2d 440 (1998) (after-acquired evidence allowed in defense of termination claimed to be violation of employee handbook policy). Regardless, Webb's misconduct bars his breach of contract claim and discharges the University from the Agreement. *Skyline Contractors, Inc. v. Spokane Hous. Auth.*, 172 Wn. App. 193, 202-03, 289 P.3d 690 (2012) ("one party's material breach or failure of a condition precedent will discharge the duty of the other party") (citing *Jacks v. Blazer*, 39 Wn.2d 277, 235 P.2d 187 (1951)); *accord O'Day v. McDonnell Douglas Helicopter Co.*, , 959 P.2d 792 (1998) (after-acquired evidence of employee misconduct is defense to breach of contract action for wages and benefits lost as result of discharge if employer can demonstrate that it would have fired employee had it known of misconduct.)

Finally, on October 4, 2017, Pullman police arrested Webb for theft of home drug tests and other items based on the observation and report of Walmart Asset Protection Associate, Zane Casper. CP 178-191, 151-160. Webb's actions violated a team rule prohibiting theft, prompting his dismissal. CP 211, 204, 259-260. Webb's mere denial he engaged in theft does not create an issue of fact because it merely challenges the wisdom of Coach Leach's decision, not the basis for it. *Accord Domingo v. Boeing*

Employees' Credit Union, 124 Wn. App. 71, 98 P.3d 1222 (2004) (employee does not create a jury question on pretext for dismissal based on denial she engaged in behavior, which merely questions soundness of employer's decision to terminate employment) (abrogated on other grounds by *Mikkelsen v. Pub. Util. Dist. No. 1 of Kittitas Cty.*, 189 Wn.2d 516, 404 P.3d 464 (2017)). Webb acknowledges Coach Leach believed he had engaged in theft, noting Coach Leach received a copy of the police report. CP 187-191, 301.

Moreover, the Agreement does not state a burden of proof, require a criminal charge or conviction, or require an OSC finding before Coach Leach can determine Webb violated a team rule. CP 321. The Agreement simply states the financial aid recipient will not violate a documented team rule or policy. Implicit is Coach Leach's discretion to determine whether the violation of a team rule has occurred; subject to the player's due process right to contest that conclusion if it leads to the University's cancellation of athletic financial aid. *Accord Austin*, 205 F. Supp. 3d 1214 (basketball players dismissed from University based on alleged rape despite Lane County District Attorney declining to press charges); *see also* CP 152 (the "Whitman County Prosecuting Attorney's Office did not seek information from" Casper).

Also implicit in the Agreement is Coach Leach's right to consider Webb's negative behavior and performance challenges. This included, and Webb does not dispute: (a) his ongoing and increasing dishonesty, (b) his disrespect toward academic advisors and coaches, (c) his violation of academic and team requirements, (d) his continued need for multiple personnel to provide oversight and discipline, (e) the drug-testing committee's finding of reasonable suspicion to test him for drugs, and (f) his arrest for shoplifting drug tests and a marijuana masking agent immediately after submitting to a drug test that was, tellingly, too diluted to assess.

B. The Trial Court Correctly Found Webb Cannot Establish Intentional Interference with the Agreement

The tort of intentional interference of a contract requires proof of improper interference in a valid contractual relationship by a third-party intermeddler. *Conard*, 62 Wn. App. at 674-75 (citing *Houser v. City of Redmond*, 91 Wn.2d 36, 39, 586 P.2d 484 (1978)). A party to a contract cannot be held liable in tort for interference with its own contract. *Id.* "Employees of a party are third parties only if they were acting outside the scope of their employment." *Id.* So long as an employee is acting in good faith, then he or she is acting within their authority. *Id.* at 675. Good faith in this context simply means nothing more than the intent to benefit the University. *Conard*, 62 Wn. App. at 675.

Just like at the trial court, Webb fails to point to any evidence establishing a genuine issue of material fact showing Coach Leach acted outside the scope of his employment. Coach Leach's entire involvement in this matter was as the head football coach for the University. The events surrounding recruitment, financial aid, and discipline all stemmed from Webb's involvement with the football program, of which Coach Leach controlled. The very contract at issue was a contract for financial aid to play football. Webb's mere disagreement with Coach Leach's characterization that he was the "worst he's ever had in his coaching experience"⁶ does not create an issue of fact, nor is it evidence Coach Leach acted outside the scope of his employment. In fact, it shows Coach Leach subjectively believed he was benefiting the University by dismissing a player that caused problems. The record is replete with evidence that Webb had behavior problems, academic problems, weight training problems, student conduct problems, and legal problems. CP 112-115, 116-119, 120-122, 123-126, 127-150, 151-160, 161-164, 202-205, 206-209, 210-225, 257, 259-260, 262, 263, 264, 265-267, 270-271, 275, 296, 298-299, 300-301, 465-474, 475-476, 483-484, 485-486. In claiming Coach Leach had a "personal

⁶ Webb's Opening Brief at page 28-29 misinterprets Coach Leach's actual testimony. *See* CP 965-966. In discussing Webb's problems with academic advisors, Coach Leach was asked **Q**: "Worst generally or just worst with academic advisors? **A**: Well, he's the worst with academic advisors, and 'worst generally' is difficult over 25 years. He certainly distinguished himself." CP 965-66.

animus toward Mr. Webb,” (Appellant’s Opening Br., p. 29) Webb fails to mention all of his admitted problems, as well as the fact Anthony White was also dismissed from the team. CP 626; *see also* CP 263 (Webb admits teammates “got on” him “a couple of times” for his lack of effort); CP 113 (Tyson Brown, the Assistant Strength and Conditioning Coach, felt Webb was “unusual and consistent in his lack of effort.”)

Even if Coach Leach was not a party to the Agreement, Webb presents no evidence dismissing him from the team was pursuing an improper objective or using improper means. Washington courts require proof the defendant had a “duty of non-interference.” *Pleas v. City of Seattle*, 112 Wn.2d 794, 804, 774 P.2d 1158 (1989) (citing *Straube v. Larson*, 287 Or. 357, 361, 600 P.2d 371 (1979)) (Washington has adopted “the Oregon formulation of this tort.”) A duty of non-interference requires showing interference was done for an improper purpose or by use of improper means. *Id.* The “improper means” must “violate some objective, identifiable standard, such as a statute or other regulation, or a recognized rule of common law, or, perhaps, an established standard of a trade or profession.” *Id.* Here, the evidence shows that Pullman police informed Coach Leach that Webb was arrested for stealing drug test-kits and other items from Walmart. CP 178-191, 199, 506-507. Coach Leach has long maintained and repeatedly emphasized a team rule that football players who

steal will be dismissed from the team. CP 199, 259-260, 269, 301, 316. Webb admits he has no evidence Coach Leach dismissed him for a reason other than his arrest for theft. CP 301. There was no interference by improper purpose or by use of improper means.

C. The Trial Court Correctly Held Respondents Did not Owe A Duty of Care

The existence of a legal duty is an essential element of any negligence claim. *Peterson v. State*, 100 Wn.2d 421, 425-26, 671 P.2d 230 (1983). Whether the defendant owed the plaintiff a duty of care is a question of law. *Terrell C. v. Dep't of Soc. & Health Servs.*, 120 Wn. App. 20, 84 P.3d 899 (2004); *Schooley v. Pinch's Deli Mkt., Inc.*, 134 Wn.2d 468, 951 P.2d 749, 752 (1998).

In cases arising out of a contractual relationship, duties in tort are barred by the independent duty doctrine unless the injury alleged is traceable to a tort-law duty of care arising independently from the contract. *Eastwood v. Horse Harbor Found, Inc.*, 170 Wn.2d 380, 394, 241 P.3d 1256 (2010). Here, Webb claims the University owed him a duty to conduct his appeal hearing in a competent manner and in accordance with due process procedural protections. Appellant's Opening Br., p. 29. The duty alleged is directly dependent upon the contractual Agreement and it is not traceable to any recognized tort-law duty of care.

Webb's right to the athletic financial aid appeal hearing exists solely because of the Agreement. If the Agreement did not exist, Webb would not be entitled to financial aid, and he would thus not be entitled to due process protections for revoking the aid. Therefore, according to Webb's theory, no duty would exist. *See Conard v. Univ. of Wash.*, 119 Wn.2d 519, 529-30, 834 P.2d 17 (1992). The duty is barred because it does not arise independent from the contract.

Even if the claim is not barred, Respondents/Cross-Appellants can find no precedent—whether in the state of Washington or elsewhere—that supports the existence of a tort duty to comply with due process. Webb cites none. The argument confounds two independent causes of action, and it simply is a veiled attempt to re-argue the due process claim. Conducting a hearing in a competent manner with certain protections is a due process requirement, not a duty in tort. Recognizing such a duty would significantly expand tort liability. For example, imagine a scenario where a defendant was immune from suit in negligence for reporting child abuse (RCW 26.44.060); however, because the kids were taken from the home, the parents also have a due process claim. Based on Webb's reasoning, the negligence claim would still exist, contrary to legislative intent, because due process required certain procedural requirements. In this scenario, anytime procedural due process was implicated, plaintiffs would automatically have

a negligence claim. This is not the law—the two concepts require separate elements, separate remedies, and an alleged violation of one does not give rise to a duty in the other.

Finally, even if due process somehow created an independent duty in tort, the duty would be a duty owed to everyone, not just Webb. It is difficult to comprehend how Webb claims “the duty to conduct the financial aid appeal hearing in a competent manner, in accordance with due process procedural protections and according to Washington Administrative Code and Revised Code of Washington,” is a duty only owed to him. Appellant’s Opening Br., pp. 29-30. In other words, no other student-athlete is entitled to the same due process. That is simply not correct—any alleged due process duty would be a duty owed to the public.

Under the public duty doctrine, governmental agencies are not liable for alleged breaches of a duty owed to the public at large. *Bailey v. Town of Forks*, 108 Wn.2d 262, 265, 737 P.2d 1257 (1987). To establish liability under the public duty doctrine, a plaintiff must show the duty breached was owed to him or her in particular, and was not a breach of an obligation owed to the public in general. *See Munich v. Skagit Emergency Comm’n Ctr.*, 175 Wn.2d 871, 878, 288 P.3d 328 (2012). Exceptions to the public duty doctrine show whether a duty may exist to an individual as opposed to the

public in general. *Osborn v. Mason County*, 157 Wn.2d 18, 28-29, 134 P.3d 197 (2006)

Webb’s argument that he somehow falls under the special relationship exception to the public duty doctrine fails. “Since the late 1970s, the general rule is that no special relationship exists between a college and its own students.” *Johnson v. State*, 77 Wn. App. 934, 939, 894 P.2d 1366 (1995); *Freeman v. Busch*, 349 F.3d 582 (8th Cir. 2003); *see also Austin*, 205 F. Supp. 3d at 1229 (“There exists no precedent in Oregon or the Ninth Circuit recognizing a special relationship between college students or student athletes and the universities they attend.”) Unlike the college/student relationship, the special relationship exception generally arises when there is an express promise to send aid following a 911 emergency call. *Munich*, 175 Wn.2d at 874-75; *Cummins v. Lewis County*, 156 Wn.2d 844, 133 P.3d 458 (2006). The exception requires proving three elements: (1) direct contact or privity between the public official and the plaintiff that sets the plaintiff apart from the public, (2) an express assurance given by the public official, and (3) justifiable reliance on the assurance by the plaintiff. *Munich*, 175 Wn.2d at 879.

Any alleged privity in this case arises via contract, which exemplifies why the negligence claim should be barred by the independent duty doctrine. Even if privity exists, it is not unique to Webb—his alleged

privity/contact with the University is that of a scholarship student-athlete, the exact same as every other scholarship student-athlete. Under Washington law, this is insufficient to establish privity for the special relationship exception. In *Cummins*, the plaintiff argued privity exists simply by placing a call to 911. 156 Wn.2d at 854-55. The court disagreed, reasoning that the contact or privity must be based on something that sets plaintiff apart from the public. *Id.* Webb does not explain how his direct contact or privity sets him apart from anyone else in a similarly situated position, and therefore, cannot establish the first element of the special relationship exception.

The same is true for the express assurances element. Proving an express assurance requires evidence of an unequivocally given assurance. *Cummins*, 156 Wn.2d at 855. “A government duty cannot arise from implied assurances.” *Id.* Webb does not point to any specific express assurances, other than broadly claiming the promise of “due process protections...provided through WSU’s written policies, the Washington Administrative Code and the Revised Code of Washington.” Appellant’s Opening Br., p. 31. General policies pointed at all members of the student population can hardly be an express assurance for purposes of the public duty doctrine. To claim such policies or manuals create an independent duty is contrary to existing case law. *See Hungerford v. State Dept. of Corr.*, 135

Wn. App 240, 258, 139 P.3d 1131 (2006) (internal agency rules do not create an independent legal duty); *Joyce v. Dep't. of Corr.*, 155 Wn.2d 306, 323 119 P.3d 825 (2005) (internal policy directives do not have the force of law); *Melville v. State*, 115 Wn.2d 34, 38, 793 P.2d 952 (1990) (statutory policy statements do not give rise to enforceable rights and duties). The bottom line is that Webb cannot establish a duty of care, and at best, the referenced policies contain implied assurances, which are insufficient under the special relationship exception. *Cummins*, 156 Wn.2d at 855.

D. Respondents Provided Procedural Due Process for Webb's Athletic Financial Aid Appeal

Webb received due process during his athletic financial aid appeal. 42 U.S.C. § 1983 provides redress for violations of federally protected rights committed by persons acting under the color of state law. *Monell v. Dep't of Soc. Servs.*, 436 U.S. 658 (1978). As a public entity, the University cannot be sued under § 1983, so Webb sued Fischer, Myott-Baker, and Lehr in their individual capacities. *Hafer v. Melo*, 502 U.S. 21, 25 (1991); *Brandon v. Holt*, 469 U.S. 464 (1985) (a § 1983 claim cannot be maintained against a state official in his/her "official capacity" as that would impose liability against the entity s/he represents.) Webb alleges procedural due

process violations under §1983 based on Fischer, Myott-Baker, and Lehr's affirmation of the University's cancellation of the Agreement. CP 240.⁷

To invoke procedural due process guarantees, there must be denial of a right previously recognized and protected by state law. *Paul v. Davis*, 424 U.S. 693, 711 (1976). Here, Fischer, Myott-Baker, and Lehr concede Webb had a property interest in the Agreement, cancellation of which entitled him to notice and opportunity to be heard. The question becomes what process was due. *Morrissey v. Brewer*, 408 U.S. 471 (1972).

The hallmark of procedural due process is notice and the opportunity to be heard. *Grannis v. Ordean*, 234 U.S. 385 (1914). The very nature of due process negates any concept of inflexible procedures mechanically applicable to every situation. *Cafeteria Workers v. McElroy*, 367 U.S. 886, 895 (1961); *Groppi v. Leslie*, 404 U.S. 496, 500 (1972). As the Supreme Court of the United States recently emphasized, “[d]ue process is flexible, we have stressed repeatedly, and it calls for such procedural protections as the particular situation demands.” *Jennings v. Rodriguez*, 138 S. Ct. 830, 852 (2018) (quoting *Morrissey*, 408 U.S. at 481).

⁷ Webb does not and cannot claim a property interest in a position on the University's football team.; *Spath v. Nat'l Collegiate Athletic Ass'n*, 728 F.2d 25 (1st Cir. 1984) (no fundamental right to play intercollegiate ice hockey); *Colorado Seminary (University of Denver) v. NCAA*, 417 F. Supp. 885 (D. Colo. 1976) (“the athlete on scholarship has no more ‘right’ to play than the athlete who ‘walks on’”); RP 96 (At oral argument, Webb's counsel agreed due process allegations were not directed at Coach Leach).

In attempts to define due process, the Supreme Court pointed to three core factors worthy of consideration: (1) the private interests affected by the official action, (2) the risk of an erroneous outcome and the probable value, if any of additional substitute procedural safeguards, and (3) the governmental interest involved, including fiscal and administrative concerns. *Mathews v. Eldridge*, 424 U.S. 319, 334-35 (1976). Basically, some type of hearing is required based on the interest at stake; however, the hearing need not include every procedure possible, nor is one entitled to a hearing of one's own design. *Id.* at 333.

1. Trial Court Erred in Finding a Due Process Violation.

The trial court erred when it found Fischer, Myott-Baker and Lehr violated Webb's due process because Webb did not have the opportunity to respond to the athletic department at the hearing. RP at 95-96. The trial courts holding was exclusively based on *Conard v. Univ. of Wash.*, 62 Wn. App. 664, 814 P.2d 1242 (1991) *rev'd in part*, 119 Wn.2d 519, 834 P.2d 17 (1992). RP at 95-96. The court reasoned:

I find that there were deficiencies in the procedures outlined in *Conard*...[s]o I'm going to rule that due process – the due process procedures as required in *Conard* were not complied with. Maybe they were – the NCAA rules were, but the [sic] *Conard* is a Washington case, and I've got to go with [sic] Washington case on this.

RP at 95-96. Here, the trial court fell into the trap of mechanically applying a rigid test for due process, derived solely from *Conard*, and then ignored

all other sources of authority, including the factors outlined in *Mathews*, 424 U.S. 319. RP at 95-96.

Conard involved the revocation of athletic scholarships for two University of Washington football players. *Conard*, 62 Wn. App. at 666-68. One of the players requested a hearing, which was held before the submission of any documents or evidence. *Id.* at 673-74. Following the hearing, the athletic department submitted written materials, including the players documented problems and team rules. *Id.* The football players did not have the materials before the hearing, nor did they have an opportunity to respond to the written materials after the hearing. *Id.* In addition, a member of the hearing committee was involved in the underlying investigation into the football players' conduct. *Id.* at 672 n.3.

With this backdrop in mind, the court in *Conard* explained players should be provided a written copy of the information on which the nonrenewal was based and time to prepare a response, the opportunity to present and rebut evidence, and a hearing by an objective decision maker. *Id.* at 671-72. The court also stated players had the right to representation by counsel and to make a record of the decision maker's conclusion. *Id.* at 672. Importantly, *Conard's* procedural aspirations are premised on the notion that information is exchanged prior to the hearing, so each side has a chance for rebuttal at the hearing. That is exactly what happened in this

case. Webb received notice, he received the athletic department's statement prior to the hearing, and an opportunity to respond before the hearing and/or during the hearing. *Conard* does not require any particular order for the presentation or rebuttal of evidence, nor does it say there must be an opportunity for rebuttal after one side presents at the hearing. *Id.*

In this case, the trial courts strict adherence to perceived elements outlined in *Conard* ignored the important factual distinctions between the two hearings – Webb had an opportunity to rebut evidence in front of objective decision makers. Even if there was a slight deviation from *Conard*, 62 Wn. App. at 671, which respondents deny, it does not necessarily equate to a due process violation. This is especially true considering the language relied upon by the trial court in *Conard* is dicta.⁸

Webb received due process. He received notice and an opportunity to be heard. He was provided a hearing before a property interest was removed, he was provided a statement of the reasons for his dismissal, he was given an opportunity to present documents or evidence, and he was given the opportunity to be represented by a lawyer. Webb cannot now

⁸ The Washington Supreme Court ultimately found the two football players did not have a due process interest in their athletic scholarships, effectively rendering any discussion about procedure in *Conard*, 62 Wn. App. at 671-72 as dicta. *Conard*, 119 Wn.2d at 529-30.

complain that he did not avail himself of the opportunity of a lawyer, or to present documents, or to present testimony other than his own.

In fact, Webb admits he was provided the fundamentals of due process: notice and an opportunity to be heard. Appellant's Opening Br., pp. 15-16. Instead, he appears to argue that he was entitled to a hearing of his own design. Appellants Opening Br., pp. 15-16. He argues he was entitled to a full-blown adjudicative hearing similar to student conduct expulsion cases with testimony under oath, cross-examination and rules of evidence. Appellants Opening Br., pp 15-16. Authority does not support this argument.

Due process procedural protections are based in part on the property interest at stake. Therefore, Webb's comparison to student conduct hearings is inapposite – property interest in student conduct hearings is more substantial than athletic financial aid. *See Doe v. Baum*, 903 F.3d 575 (6th Cir. 2018) (“[t]ime and time again, this circuit has reiterated that students have a substantial interest at stake when it comes to school disciplinary hearings for sexual misconduct.”) In student conduct proceedings, the potential interest at stake is the loss of educational opportunities via expulsion. Because the interest is significant, student conduct rules and procedures are governed by their own separate administrative code. *See* WAC 504-04-010(1). WAC 504-04-010(1) explicitly states that all student

conduct proceedings are governed by procedural rules found in 504-26 WAC. No similar requirements exist for student-athlete financial aid appeals. Webb cites *Heredia v. WSU*, a non-binding Whitman County Superior Court case, in support of the notion Webb should have been entitled to cross-examine witnesses. Appellant’s Opening Br. at 16. *Heredia* involved the “judicial review of a final decision of the Student Conduct Board of Washington State University that expelled a student, Jessie Heredia, based on a finding that Petitioner sexually assaulted a female student.” *Memorandum Decision and Order on Judicial Review*, Whitman County Case No. 16-2-00085-0, filed October 12, 2016. It was a student conduct case involving loss of educational opportunities—a significantly greater interest than athletic financial aid. The comparison between the two is misguided, and Webb fails to cite any case establishing athletic financial aid entitles him to the same procedures as student conduct hearings.

2. Webb Mischaracterizes Coach Leach’s Statements and Points to Irrelevant Third-Party Conduct.

Webb’s allegations that Coach Leach somehow misrepresented facts, or that other student-athletes were treated differently, is a misguided red-herring. *See* Appellant’s Opening Br., pp. 9-13. The conduct of other student-athletes is immaterial to any element of a procedural due process claim. *See Mathews*, 424 U.S. at 321 (Supreme Court provides three part

balancing analysis for procedural due process.) As indicated above, a claim for procedural due process hinges on notice and the opportunity to be heard. *Grannis v. Ordean*, 234 U.S. 385, 394 (1914). What happens to others is not an element of a procedural due process claim, nor is it germane in determining what procedures were followed. In fact, “the very nature of due process negates any concept of inflexible procedures universally applicable to every imaginable situation.” *McElroy*, 367 U.S. 886 at 895.

Even if it were somehow relevant, Webb was not treated differently and he failed to present sufficient factual detail needed to overcome summary judgment. Webb cites *Spokesman Review* and *Seattle Times* newspaper articles in attempts to show disparate treatment. See Appellant’s Opening Br., pp. 9-13. The information contained within the articles is hardly a sufficient factual showing to draw comparisons to this case. None of the articles speak about revocation of athletic financial aid. The articles are a snapshot in time and provide basic generalities of what may or may not have happened. The articles do not describe the entire incidents, nor do they establish what facts were available to, or known by, the athletic department, the coaches, the University, or student conduct.

In fact, the most factually analogous comparison to Webb’s conduct is the mention of another player dismissed from the team for stealing headphones from Walmart. CP 643. Nonetheless, the articles do not provide

near the level of factual detail needed to draw comparisons. Case in point, the article at CP 665-667 contains links to numerous follow-up articles about the same incident, which presumptively provide more information about what happened to that student-athlete. *See* CP 666-667.

Unlike the newspaper articles, the factual details in this case fully document Webb's noncompliance issues with University rules, Academic Rules, Athletic Department Rules, and Team Rules all during his freshman year. CP 112-115, 116-119, 120-122, 123-126, 127-150, 151-160, 161-164, 202-205, 206-209, 210-225, 257, 259-260, 262, 263, 264, 265-267, 270-271, 275, 296, 298-299, 300-301, 465-474, 475-476, 483-484, 485-486. Webb was provided due process in accordance with the interest at stake, and he had every opportunity to present and rebut evidence, rights he chose to ignore.

E. The Trial court erred finding Fischer, Myott-Baker and Lehr were not entitled to qualified immunity

Qualified immunity protects government officials from claims in order to shield them “from harassment, distraction, and liability when they perform their duties reasonably.” *Pearson v. Callahan*, 555 U.S. 223, 231 (2009). “When properly applied, it protects all but the plainly incompetent or those who knowingly violate the law.” *Malley v. Briggs*, 475 U.S. 335, 341 (1986); *Ashcroft v. Al-Kidd*, 563 U.S. 731, 741 (2011). To overcome

qualified immunity, a plaintiff must plead facts “showing (1) that the official violated a statutory or constitutional right, and (2) that the right was “clearly established’ at the time of the challenged conduct.” *Ashcroft*, 563 U.S. at 741. “A Government official’s conduct violates clearly established law when, at the time of the challenged conduct, “[t]he contours of [a] right [are] sufficiently clear’ that every ‘reasonable official would have understood that what he is doing violates that right.’” *Id.* at 741 (quoting *Anderson v. Creighton*, 483 U.S. 635, 640 (1987)). In other words, there must be sufficient existing precedent at the time of action, factually similar to plaintiff’s allegations, which put the defendant on notice that the statutory or constitutional question was beyond debate. *Id.* See also *McLaughlin v. Watson*, 271 F.3d 566, 572 (3d Cir. 2001) (court cannot summarily dismiss the qualified immunity argument without determining whether facts alleged by plaintiff violated a clearly established right supported by existing case law.)

Here, no clearly established constitutional right alerted Fischer, Myott-Baker, and Lehr that what they were doing violated a right. The trial court incorrectly focused on *Conard*, 62 Wn. App. 664, and brushed the qualified immunity issue aside. RP 95-98.

The problem with the trial courts focus on *Conard* is the fact the Washington Supreme Court *overturned* that decision, holding two

University of Washington football players did not have a property interest in athletic scholarships that entitled them to due process protections because of the terms of the contract at issue. *Conard v. Univ. of Wash.*, 119 Wn.2d 519, 529-30, 834 P.2d 17 (1992). In other words, no Washington precedent establishes the due process required to revoke athletic financial aid. At most, the procedures outlined by Division I in *Conard*, 62 Wn. App. at 671-72 are merely dicta, which is insufficient precedent to clearly establish a constitutional right to which a reasonable official would have known.

Other jurisdictions have reached similar conclusions. A Federal District Court in Oregon explained “[n]o Supreme Court, Ninth Circuit, or Oregon District Court case” establishes due process rights for the revocation of athletic financial aid. *Austin v. University of Oregon*, 205 F. Supp. 3d 1214, 1221-22 (D. Or. 2016). Webb cites no other binding precedent, nor have respondents located any. There is no way reasonable officials, volunteering their time for a financial aid hearing, would realize that what they were doing violated Webb’s constitutional rights when no precedent recognizes such a right. This is especially true when Webb was provided with more rights than even outlined in the NCAA rules and guidelines. CP 907. To the extent the University’s financial aid appeals process was improper or inadequate, they are entitled to qualified immunity.

F. The Trial Court Correctly Found Quasi-Judicial Immunity Applied to Webb’s Athletic Financial Aid Appeal Hearing

Judicial immunity extends to governmental agencies and executive branch officials performing quasi-judicial functions. *Swift v. California*, 384 F.3d 1184, 1188 (9th Cir. 2004); *Taggart v. State*, 118 Wn.2d 195, 204, 822 P.2d 243 (1992). “An official derives the appropriate degree of immunity not from his or her administrative designation but by the function he or she performs.” *Swift*, 384 F.3d at 1188 (citing *Butz v. Economoy*, 438 U.S. 478, 511-12 (1978)).

The essential question is “whether the challenged actions were functionally similar enough to those performed by a judge to warrant immunity.” *Taggart*, 118 Wn.2d at 204 (citing *Butz*, 438 U.S. at 513). Washington courts look at several factors to help analyze whether a challenged action is functionally similar to that of a judge:

Whether a hearing was held to resolve an issue or controversy, whether objective standards were applied, whether a binding determination of individual rights was made, whether the action is one that historically the courts performed, and whether safeguards exist to protect against errors.

Id. at 205. In *Butz*, the Supreme Court held that judicial immunity shields federal administrative agency officials who participate in agency adjudications. *Butz*, 438 U.S. at 513-14. *See also Romano v. Bible*, 189 F.3d 1182, 1186-88 (9th Cir. 1999) (disciplinary review board entitled to

quasi-judicial absolute immunity.) Washington courts have reached similar results. *Taggart*, 118 Wn.2d at 207-08 (parole board entitled to quasi-judicial immunity even though they do not hold a meeting or hearing, and even though no mechanism exists to challenge its decision); *Pleas v. Seattle*, 112 Wn.2d 794, 809-10, 774 P.2d 1158 (1989) (recognizing judicial immunity for city council's rezoning decision); *Layne v. Hyde*, 54 Wn. App. 125, 773 P.2d 1158 (1989) (holding judicial immunity shields administrative law judges); *Rayborn v. Seattle*, 42 Wn. App. 163, 709 P.2d 399 (1985) (granting quasi-judicial immunity to police pension board's decision denying a disability claim.)

Webb does not deny his appeal hearing met the first four *Taggart* factors. He takes issue with the last factor—the existence of safeguards. Webb once again ignores all the safeguards that were provided in this case: (a) he was given the opportunity to provide a written statement and documents in support, (b) he was provided the statement by athletics in advance of a hearing, (c) he was given an opportunity to provide a statement and documents in response to athletics statement, (d) he could have brought evidence with him to the hearing, (e) he could have had an attorney present at the hearing, (f) he could have brought witnesses to the hearing, (g) he attended a hearing and argued his case, (h) to a neutral panel of three volunteers. CP 487-88, 491-98, 499-503, 506-09. These were all safeguards

provided, some of which Webb chose to ignore. As the court held in *Taggart*, some deviations from traditional judicial action is insufficient to deny quasi-judicial immunity. *Taggart*, 118 Wn.2d at 207-08 (parole board entitled to immunity without conducting hearings and without a process for appeal.)

Webb's argument that his hearing was a brief adjudicative hearing under the APA lends credence to the idea Fischer, Myott-Baker, and Lehr are entitled to quasi-judicial immunity. *See Butz*, 438 U.S. at 513 (administrative officials participating in agency adjudications are entitled to quasi-judicial immunity). Webb, however, appears to argue that a brief adjudicative hearing entitled him to even more safeguards – safeguards akin to a full adjudication. Appellant's Opening Br., p. 21-22. In this roundabout reasoning, Webb ignores the fact that brief adjudication under the APA "requires only that the agency inform the party of the agency's view on the matter, give the opportunity to explain his or her view, and give the party a statement of reasons for the agency decision." *Arishi v. Wash. State Univ*, 196 Wn. App. 878, 905, 385 P.3d 251 (2016). Webb received more safeguards than required under *Arishi's* definition of a brief adjudication

under the APA.⁹ The trial court correctly concluded respondents were entitled to quasi-judicial immunity in this case.

VII. CONCLUSION

The trial court erred in its mechanical application of due process based on dicta in *Conard*. Webb received notice, a hearing, and many other procedural safeguards regarding his athletic financial aid appeal. The trial court also improperly ignored the qualified immunity argument when binding precedent establishes student-athletes *are not* entitled to due process protection for revocations of athletic financial aid. The trial court, did however, correctly grant quasi-judicial immunity for participation in the athletic financial aid appeal hearing dismiss. Similarly, Webb's claims for breach of contract, intentional interference with a contract, and negligence were appropriately dismissed. Respondents respectfully request the trial court is overturned with respect to due process and qualified immunity, and affirmed in all other respects.

RESPECTFULLY SUBMITTED this 23rd day of January, 2020.

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⁹ Webb does not allege a violation of Washington's Administrative Procedures Act. CP 3-18.

PROOF OF SERVICE

I certify that I served a copy of the foregoing document on all parties or their counsel of record on the date below as follows:

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I certify under penalty of perjury under the laws of the state of Washington that the foregoing is true and correct.

DATED this 23rd day of January, 2020, at Spokane, Washington.

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DEREK T. TAYLOR

WASHINGTON ATTORNEY GENERAL SPOKANE TORTS

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