**UNITED STATES DISTRICT COURT**
**DISTRICT OF CONNECTICUT**

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| AVERY DONINGER, Plaintiff, | : | CIVIL ACTION NO. 3:07CV1129 (MRK) |
| V. | : | |
| KARISSA NIEHOFF and PAULA SCHWARTZ, in their individual and official capacities, Defendants | : | JANUARY 26, 2009 |

**MOTION FOR RECONSIDERATION**

Pursuant to Rule 7(c) of the Local Rules of Civil Procedure, the plaintiff hereby files this Motion for Reconsideration. In granting the defendants' Motion for Consideration to the defendants in their official capacities on the issue of the plaintiff's LiveJournal.com posting, the Court overlooked the rule set forth in Owen v. City of Independence, 445 U.S. 622 (1980), that a governmental agency does not have the defense of qualified immunity available to it.

WHEREFORE, the plaintiff requests that the Court grant this Motion for Reconsideration on this issue.

THE PLAINTIFF –
AVERY DONINGER,

By /s/ Jon L. Schoenhorn

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**CERTIFICATION**

I hereby certify that on the above date, a copy of the foregoing document was filed electronically and served by mail on anyone unable to accept electronic filing. Notice of this filing will be sent by e-mail to all parties by operation of the court's electronic filing system or by mail to anyone unable to accept electronic filing as indicated on the Notice of Electronic Filing. Parties may access this filing through the court's CM/ECF System.

/s/ Jon L. Schoenhorn
Jon L. Schoenhorn

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**MEMORANDUM IN SUPPORT OF**
**MOTION FOR RECONSIDERATION**

Pursuant to Rule 7(a)(1) of the Local Rules for Civil Procedure, the plaintiff submits this memorandum of law in support of her Motion for Reconsideration.

This Court issued its decision on the cross motions for summary judgment on January 15, 2009. As to the defendants' claims for summary judgment, the court granted the motion in part and denied it in part. The court concluded that the evidence presented on the record created an issue of material fact as to whether the defendants' decision to punish the plaintiff was due to the uncivil language in her off campus blog posting that would raise a first amendment violation. Mem of Decision, 12. Nevertheless, the defendants prevailed on their motion for summary judgment on this issue because this Court concluded that the plaintiff's right was not clearly established and therefore the defendants were entitled to qualified immunity. Mem. of Decision, 13.

The standard for granting a motion for consideration is well-established. The movant must be able to "point to controlling decisions or data that the court overlooked – matters, in other words, that might reasonably be expected to alter the conclusion reached by the court." Tweed-New Haven Airport Authority v. Town of East Haven, Conn, 2009 WL 113447 (D. Conn. January 15, 2009), quoting Shrader v. CSX Transp., 70 F.3d 255, 257 (2d Cir. 1995). There are three grounds on which a motion for reconsideration may be granted: (1) an intervening change in controlling law; (2) the availability of newly discovered evidence; and (3) the need to correct clear error or prevent manifest injustice. Id., quoting Virgin Atl. Airways, Ltd. v. Nat'l Mediation Bd., 956 F.2d 1245, 1255 (2d Cir.1992).

The plaintiff submits that the court erred in its overly broad application of the qualified immunity doctrine to the defendants by failing to distinguish between their individual and official capacities. This, of course, constitutes "clear error." The defendants were sued both in their individual and official capacities, and it is well-established that municipalities and other governmental entities may not assert a qualified immunity defense. See, Owen v. City of Independence, 445 U.S. 622 (1980); Goldberg v. Town of Rocky Hill, 973 F.2d 70 (2d Cir. 1992). Therefore, even if the court is correct that the plaintiff's claims against the individual defendants are defeated by qualified immunity, the claims against Regional School District #10 are not.

A qualified immunity determination simply means that a public official is not subject to monetary liability because she did not violate the plaintiff's *clearly established* rights; not that the

plaintiff's federally protected rights were not violated. See, e.g., Doe v. Sullivan County, 956 F.2d 545 (6th Cir.), cert. denied, 506 U.S. 864 (1992); Ricciuti v. New York City Transit Authority, 796 F.Supp. 84 (S.D.N.Y.,1992). If a jury concludes that the plaintiff was indeed punished by the defendants because they disapproved of the words she wrote – in particular the use of the term "douchebags in central office" – instead of any claimed potential for disruption by the internet posting, then the plaintiff has indeed suffered a deprivation of her constitutional rights as this court noted in its opinion, Mem. of Decision 11. Thus, the governmental entity that employs the defendant will be liable for an eventual damage award, and the line of cases beginning with Owen v. City of Independence that the Court initially overlooked materially changes the outcome of the defendants' motion for summary judgment.

Finally, the plaintiff notes that the amended complaint clearly indicated that the defendants were sued in both their individual and official capacities, even after the claim for injunctive relief became moot. The defendants never asserted a defense of qualified immunity for the school district, or attempted to distinguish between their personal and official capacities. The defendants never argued in their motion that they were entitled to summary judgment for any actions performed in their respective official capacities.

WHEREFORE, the plaintiff requests that the Court grant this motion for reconsideration and deny the relevant portion of the defendants' motion for summary judgment as it applies to their official actions on behalf of Regional School District #10.

THE PLAINTIFF –
AVERY DONINGER,

By /s/ Jon L. Schoenhorn

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/s/ Jon L. Schoenhorn
Jon L. Schoenhorn

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