

**ACLU Foundation of Massachusetts  
LEGAL DOCKET (August 2006 – September 2007)**

\* - new case

† - closed

**FREEDOM OF SPEECH, PRESS, ASSEMBLY AND ASSOCIATION**  
**ACCESS TO INFORMATION/FREEDOM TO TRAVEL**

*Commonwealth v. Abramms.* Responding to an anti-war demonstration in Northampton, police invoked the Riot Act, G.L. c. 269, § 1, and ordered the demonstrators to disperse. Abramms and several others refused and were arrested. The statute allows police to order the dispersal of any group of 10 or more persons which is unlawfully, riotously or tumultuously assembled and has been used frequently in Massachusetts to break up political demonstrations. The defendant argued at trial that he and the others should be acquitted because they were not rioters and because the statute was vague and overbroad. The trial judge, however, denied the motion to dismiss, and the defendants were convicted. On appeal, a divided panel of the Massachusetts Appeals Court affirmed the conviction, holding that the statute could constitutionally be applied to unlawful assembly where there was the intent to commit violence. A request for rehearing and a petition for further appellate review were denied. We are preparing a motion for a new trial. Attorneys: Harry Miles (Green, Miles, Lipton and Fitz-Gibbon); John Reinstein (ACLUM).

*Commonwealth v. Baran.* Bernard Baran spent years in prison after being convicted of sexual abuse of children at a day care center where he worked, a crime which he has steadfastly maintained that he did not commit. Over the course of the past several years, the attorneys who have taken up his cause have sought a new trial and have publicly asserted Baran's claim that he is innocent. After a Superior Court judge vacated Baran's conviction and ordered a new trial in a 70 page opinion documenting the unfairness of the original trial, the district attorney filed a motion asking the court to issue a gag order prohibiting Baran's attorneys from making any public statements about the case. ACLUM is representing the attorneys in opposing the request for a gag order. A hearing was held on the motion in October 2006, but the court has not yet acted. Attorneys: Joe Kociubes and Carol Head (Bingham McCutchen); John Reinstein (ACLUM).\*

*Commonwealth v. Peterson.* A number of students at Holyoke Community College were threatened with disciplinary action and criminal prosecution as a result of an anti-war demonstration on campus. All of the matters involving these students have been resolved successfully (no disciplinary sanctions and no criminal complaints issued) with the exception of one student who has now graduated. He was charged with assault and battery on a public employee and disorderly conduct. (A third charge sought by the Commonwealth never issued). After the Motion to Dismiss was denied, on the day of trial, the defendant admitted to sufficient facts, and the case was continued without a finding for six months for dismissal at that time. Attorneys: Bonnie Allen; Bill Newman (ACLUM Western Mass Office).\*†

*Commonwealth v. Zanis.* After ACLUM succeeded in the mid-1990's in having the state anti-begging law struck down as an unconstitutional restriction on freedom of speech, the City of Boston adopted an ordinance prohibiting "aggressive solicitation." Recently Boston police officers began issuing criminal citations for violation of this ordinance to people who are not aggressive but are peacefully begging. We represented a man charged with violating the city ordinance because, the police officer alleged, passersby walked around him on the sidewalk. A clerk-magistrate in the Boston Municipal Court refused our request that a criminal complaint not be issued. We then asked a judge of the Court to dismiss the case on constitutional grounds. Prior to a ruling on our motion, on September 12, 2007, the District Attorney's Office agreed to the dismissal of the charges. Attorneys: Kari Tannenbaum (Committee for Public Counsel Services); Sarah Wunsch (ACLUM).\*†

*Curley v. NAMBLA.* The plaintiffs are seeking money damages from members of the North American Man Boy Love Association (NAMBLA), a controversial group organized to bring about change in public opinion and the laws governing the age of consent for sexual relations. The suit, an action for wrongful death and for civil rights violations, claims that the defendants are responsible for the kidnapping, rape and murder of a 10 year old boy because NAMBLA publications and the material which appeared on its internet site, by advocating permissive norms of consensual sex, allegedly "urged the general public to illegally rape male children." The plaintiffs claim that one of the convicted murderers had become a member of NAMBLA approximately one year prior to the murder and that, as a result of reading its publications and the material on its web site, he changed his sexual orientation and "became obsessed with having sex with and raping young male children" and ultimately tortured, murdered and mutilated their son. ACLUM's motion to dismiss the suit on the grounds that the claims were barred by the First Amendment was denied by the court, which noted that the complaint could be read to suggest that the defendants did more than make available the material contained in their publications and on their website. ACLUM has filed a motion for summary judgment based on affidavits showing that the murderer's only contact with the organization was through publicly available information. The plaintiffs' lawyers, who have publicly acknowledged that the purpose of the suit is to destroy the organization, have obtained an order from the court requiring the disclosure of the identity of all NAMBLA members who attended meetings anywhere in the country over the course of a five-year period, subject to a protective order which supposedly prohibits the plaintiffs' lawyers from releasing that information. We are attempting to appeal this order on the grounds that it violates the First Amendment right of associational privacy. Because the Court of Appeals will not ordinarily review an order requiring disclosure of information in pre-trial discovery, even when privileged information is involved, it was necessary to refuse to obey the order and to have the district court hold us in contempt. The district court, however, declined to make the finding of contempt and instead imposed an evidentiary sanction, limiting what we could present at trial. The appeal is pending, but discovery on other issues is in progress. Attorneys: John Reinstein and Sarah Wunsch (ACLUM).

*Doe v. City of Worcester.* The Worcester Public Library limits residents of homeless shelters, transitional housing programs and adolescent programs to borrowing a maximum of two items.

After borrowing for the first time, other library patrons including individuals who reside outside of Worcester are not limited to borrowing only two items. The library keeps a list of the names and addresses of the shelters and programs whose residents are limited in their borrowing privileges. As a result of the library's policy, the plaintiffs were unable to borrow books they needed for themselves and their children. In cooperation with Legal Assistance in Worcester, ACLUM brought suit in federal court in Worcester challenging the Library's policy. The suit was settled. Under the terms of the settlement, which was approved by Judge F. Dennis Saylor IV on December 19, 2006, the library no longer will restrict the borrowing privileges of residents of shelters, transitional housing programs and adolescent programs. Attorneys: Jonathan Manninai and Kate Fitzpatrick (LACCM); John Reinstein (ACLUM).†

*Herman v. Duarte.* Long-time Boston public schools substitute teacher Jeffrey Herman testified, as a citizen, at a Boston City Council hearing in opposition to the city spending over one million dollars to fund Junior ROTC programs in the Boston Public Schools. After the headmaster of Boston's English High School heard about the testimony, he placed Herman's name on a "do not call" list for substitute teachers. ACLUM challenged the action in a federal court lawsuit brought jointly with attorneys for the Boston Teachers Union. The City of Boston agreed to settle the case by making a monetary payment to Herman and attorneys fees to ACLUM. Attorneys: Matthew Dwyer & Brian Fox (Dwyer, Duddy & Facklam); Sarah Wunsch (ACLUM).\*†

*Jean v. Massachusetts State Police.* After a "nanny cam" captured on videotape the arrest of the homeowner and what appeared to be the direction to conduct an unlawful search of the house, the tape, containing both video and sound recording, was turned over to Mary Jean, the operator of a website opposing the re-election of the incumbent district attorney in Worcester County. Jean posted the recording on her website. She subsequently received a letter from the attorney for the State Police, demanding that the recording be removed from the website and threatening her with criminal prosecution under Massachusetts anti-eavesdropping statutes if she did not. Jean brought suit in federal court in Worcester, seeking an injunction against interference with the webcast of the videotape. Based on the fact that Jean had not participated in the allegedly unlawful recording, the court entered a preliminary injunction. The State Police appealed, and ACLUM represented the plaintiff on appeal. The Court of Appeals affirmed the injunction entered by the district court, rejecting the state's argument that the posting of the video was not protected because Jean knew or should have known that it was illegally recorded. Attorneys: Eric Hermanson and Sara Solfanelli (Choate, Hall & Stewart); John Reinstein (ACLUM).

*Kohn v. Barker.* Alfie Kohn is an outspoken critic of high-stakes high school graduation tests who was invited to speak at an education conference in Western Massachusetts. The conference organizers requested that Kohn deliver the keynote address on the topic of standardized testing. When senior officials in the Massachusetts Department of Education (DOE) learned that Kohn would be speaking, they threatened to rescind a grant for partial funding of the conference because his views on standardized testing were "diametrically opposed to the state's and the board of education's legislative and policy agenda." In response to this coercion, the organizers notified Kohn that the keynote address had been cancelled. ACLUM brought suit in Middlesex Superior Court against the DOE officials for violation of the First Amendment rights of Kohn and three conference attendees who had wanted to hear him speak. After years of delay, the

Superior Court found in favor of the plaintiffs, ruling that DOE officials had violated their rights to speak and to receive information and awarding some of our attorneys fees. The DOE filed a notice of appeal, and ACLUM cross-appealed on the fees issue, after which we reached a settlement with the defendants, based on which the Superior Court entered a final judgment for the plaintiffs. Attorneys: Michael Rader and Michael Albert (Wolf, Greenfield & Sacks), Sarah Wunsch and William C. Newman (ACLUM).†

*Matthews v. Dubois.* The Plaintiff in this case is a prisoner who filed a pro se appeal from an adverse judgment in the Superior Court and sought to file a handwritten brief in the Massachusetts Appeals Court. The rules of appellate procedure require that all briefs be typed and do not provide for any exceptions. The court, after receiving a submission from the Department of Correction stating that a typewriter could be made available, declined to waive the requirements of the rule. In an amicus brief in the Supreme Judicial Court, filed jointly with Massachusetts Correctional Legal Services and the Committee for Public Counsel Services, the ACLU of Massachusetts urged the court to adopt a permissive standard allowing handwritten briefs to be filed by indigent prisoners so long as the brief is legible and otherwise conforms to the requirements of the rules. Noting that inmates have a federal constitutional right of access to the courts, at least to pursue nonfrivolous claims challenging their convictions or the conditions of their confinement, the court held that the initial question is whether the inmate is *able* to submit a typewritten brief and that a single justice may treat as sufficient an affidavit from an inmate explaining in detail why he or she is unable to submit a typewritten brief. The court went on to say, however, that the single justice may consider the legibility of a litigant's penmanship and whether a self-represented inmate has a history of filing frivolous appeals. Attorneys: James Pingeon (MCLS); Beth Eisenberg (CPCS); John Reinstein (ACLUM).\*†

*Moran v. Thompson.* Following a series of adverse decisions in a disputed child custody case, the child's father (Thompson) wrote a book entitled *Exposing the Corruption in the Massachusetts Family Courts*. The book, which takes the position that fathers are unfairly treated in the courts, contained an extensive discussion of the evidence presented at trial, his commentary on the evidence and his criticisms of various rulings by the courts at the trial and appellate level. After the book was published, the child's mother, asserting privacy claims, obtained an ex parte restraining order enjoining not only publication of portions of the book but any statements by the father about particular material. The order was subsequently extended indefinitely. ACLUM represented the father on appeal to the Massachusetts Appeals Court, where the order was challenged as a prior restraint on speech and publication. A single justice of the Appeals Court vacated the gag order and remanded the case to the Probate and Family Court for further proceedings. Attorneys: John Henn and Jeremy Evans (Foley Hoag); John Reinstein (ACLUM).

## NON-LITIGATION ADVOCACY

*Freedom of Speech and Assembly.* Year in and year out, the ACLUM engages in a struggle to insure the rights of speech and assembly are not restricted. More often than not, these efforts take place outside the courtroom and have resulted in scores of small victories for freedom of speech and assembly.

*Andover High School/Wheels of Justice.* Censorship in the U.S. of views critical of Israeli government policy has become one of the major areas of concern for free speech advocates. In Massachusetts recently, Brandeis University closed down an art exhibit by Palestinian youth, after it was accused of lacking “balance.” In October of 2006, the Andover High School principal informed teachers that two speakers from an organization, Wheels of Justice, would not be allowed to speak the next day to eight classes as had been planned by six teachers. The reason the principal initially gave was that he was getting complaints from some members of the community about the speakers. Wheels of Justice describes itself as a rolling bus tour whose speakers give talks based on their first hand experience with the War in Iraq and the Israeli/Palestinian conflict. The teachers contacted ACLUM seeking help. Through our advocacy with the school system’s lawyer, the principal agreed that the speakers could speak to the classes as originally planned and the school would pay their expenses to return to Andover. The principal also decided he would hold two other forums, one on the First Amendment itself, and the other which would provide “other views” than those presumably to be expressed by Wheels of Justice speakers. Attorneys: Leonard Singer; Sarah Wunsch (ACLUM).

*Palestinian Cultural Festival.* ACLUM assisted a group that sought a permit from the City of Cambridge to hold a Palestinian cultural festival in a local park. The City’s Special Events Committee was placing various demands on the group, including requiring payment for a large number of police officers because of the possibility that those opposed to the festival might disrupt the event. The police department ultimately agreed with our view that the event sponsors should not have to pay police costs to deal with those critical of the views of the group.

*Tufts University and “Primary Source” Journal.* In the spring, 2007, a Tufts University disciplinary committee ruled that a conservative journal, *The Primary Source*, had violated the university’s harassment code by publishing two anonymous articles which mocked African-Americans and Muslims. Because of our concerns for freedom of speech and academic freedom, we wrote to the President of Tufts University and the Dean of Undergraduate Education, urging that they reverse the decision of the disciplinary committee. In ruling on the journal’s appeal, the Dean vacated the only punishment that had been imposed, a ban on anonymous articles, and the President issued a strong statement in support of freedom of speech on campus. He also called for a revision of Tufts rules to ensure protection for these rights. Since Tufts is a private university not subject to constitutional guarantees of freedom of speech, the President’s affirmation that free speech principles will be respected on campus has considerable importance.

*UMass Commencement.* After the University of Massachusetts, Amherst announced that Andrew Card was to receive an honorary degree at the graduate student commencement, students and faculty members made it known that they intended to stage a peaceful, non-disruptive protest both inside as well as outside the site of the commencement. We negotiated with university officials to insure that the campus police would not prohibit the demonstration, interfere with distribution of literature, nor prohibit or try to confiscate paper signs from persons attending the commencement. The demonstration went forward without any incident or arrest. When Andrew Card was called forward to receive his honorary degree, there was a sea of yellow signs which said HONOR GRADS; DIS-CARD.

The *Prison Book Program (PBP)* has been providing free books to prisoners across the country for over thirty years. Recently, the Massachusetts Department of Correction (DOC) barred further shipments from PBP on the grounds that it was not an “approved vendor” for DOC purposes. Following negotiations with the Department of Correction, an agreement was reached which allows Prison Book to resume its assistance to Massachusetts prisoners.

*Cuba Travel.* We have continued to advise people who seek to travel to Cuba, in light of U.S. government regulations which have been tightened in the past few years by the Bush Administration, including further restrictions on fully hosted travel and family visits.

*Military Recruiting/Viewpoint Discrimination in the Schools.* We continue to assist Berkshire Citizens for Peace and Justice to obtain access to students to provide information on alternatives to military recruitment information presented in area high schools. These efforts have generally been successful in most school districts in Western Massachusetts.

*Rosenthal/Little Brother is Watching Billboard.* With Bingham McCutchen, we are representing John Rosenthal who was warned by the state's Outdoor Advertising Board to take down a billboard ad containing the message, "Little Brother is Watching" and a graphic showing the eyes of President George W. Bush. The billboard sat atop a building owned by Rosenthal. It appears that under state policy, if the ad related to a business located in the building, it would not require a permit, thus treating commercial speech better than noncommercial expression. Through both meetings and memoranda, we have argued to Outdoor Advertising Board officials that the billboard ad is not in violation of the law. Subsequently, Rosenthal, of his own accord, took down the billboard and put up one with a commercial message. Still, the issue of the rules pertaining to that billboard awaits resolution so Rosenthal knows what his rights are in the future. Attorneys: Mark Robinson, Jon Albano and Nikki Fisher (Bingham McCutchen); Sarah Wunsch (ACLUM).

*Sidewalk Art Sales in Northampton.* After extensive discussions with ACLUM, the Board of Public Works in Northampton adopted a policy that permits artists to display and sell their works in designated areas of public streets and parks. Attorney: Bill Newman (ACLUM Western Mass Office).

*MBTA Photography Ban.* At the request of a number of photographers, ACLUM contacted the MBTA to object to its policy which prohibited members of the public from photographing MBTA vehicles and facilities which are visible from public sidewalks and streets and from taking any photographs while on MBTA property. We noted that photography is fully protected by the First Amendment and that concerns for security could not justify the restriction where the photographs of MBTA vehicles and facilities are widely available. After initially denouncing the ACLUM request, the MBTA subsequently abandoned the no photography rule. Attorney: John Reinstein (ACLUM).

*Vanity License Plates.* We assisted a woman who was notified by the Registry of Motor Vehicles that there was a complaint about her license plate which reads, “ITMFA.” After the

plate holder refused to tell the Registry exactly what those initials meant to her, the Registry notified her that the plate was being revoked. ACLUM requested a hearing on her behalf and before that hearing took place, the Registry agreed that the woman could keep the plate. Attorneys: Elizabeth Duffy (Prince Lobel Glovsky & Tye); Sarah Wunsch (ACLUM).

*Northampton City Council.* After lengthy public discussions which ACLUM instigated at the request of a local citizen, the Northampton City Council revoked its previously adopted rule that governs public speaking time before the Council and adopted a new rule. The previous rule was, in our judgment, void for vagueness and overbroad. The new rule greatly restricts the right of the presiding officer to rule a speaker or comment out of order. Attorney: Bill Newman (ACLUM Western Mass Office).

*Pittsfield Courthouse.* After receiving a complaint from a Pittsfield resident about the use of the courthouse lawn for religious events, we ascertained from counsel for the Trial Court that the Court House lawn in Pittsfield is available to all citizens and groups for public events upon request. While issues still remain, to date, no such request has been denied. Attorney: Bill Newman (ACLUM Western Mass Office).

*Demonstration in Greenfield.* We provided legal advice and assistance to the organizers of a demonstration in Greenfield that was planned to take place when the Massachusetts Conference of Mayors met there in September, 2006. The demonstration went forward as planned. Attorney: Bill Newman (ACLUM Western Mass Office).

*City of Brockton Internet Access.* [www.InBrockton.com](http://www.InBrockton.com) is a web site where comments critical of city government are often posted. Soon after a blog condemned the City for spending thousands of dollars on a new tax office kitchen while the fire station kitchen was allegedly rotting away, city employees complained that they could no longer access the site from their work computers and that the site was also blocked from the City Hall wireless Internet access. The InBrockton web site administrator was quoted as saying he was thinking of renaming the site "BannedInBrockton.com" ACLUM made a public records request to the City of Brockton for documents related to the City's policy and actual practice in regard to blocking of Internet sites. The City provided only a few documents in response but, within a period of weeks, InBrockton was no longer blocked on City employee computers or on the wireless Internet access at City Hall.

## **POST 9/11 CIVIL LIBERTIES ISSUES**

*Cohen v. AT&T.* Following reports that a number of telephone companies had disclosed customer long distance records to the National Security Agency (NSA) without a warrant, ACLUM filed a complaint with the Massachusetts Department of Telecommunications and Energy (DTE) against AT&T and Verizon on behalf of the mayors of Newton, Somerville, Chicopee and Northampton. The media reports suggested that a database, including billions of phone records from over 200 million customers, is being held by the NSA. *USA Today* on May 11, 2006, called the database the "largest...ever assembled in the world." According to the *New York Times* on May 12 and 13, 2006, the database includes dozens of fields of information,

including numbers called, the time, date and direction of the calls, as well as other details. It would be very easy for the NSA to determine the names and addresses associated with these calls by cross-referencing them with other, readily-available databases. The CIA, FBI, and DEA all have access to the NSA database. The complaint alleges that the disclosure of the customer records violates both state and federal law, and seeks an order by DTE prohibiting companies from disclosing records to NSA without a warrant or other lawful demand by NSA. Attorney: John Reinstein (ACLUM).

*Petition of the ACLU of Massachusetts for Rulemaking.* Along with the filing of the mayors' complaint against AT&T and Verizon, ACLUM filed a separate petition on behalf of its 22,000 members asking the DTE to adopt regulations that would require telephone companies in Massachusetts to treat customer call records as confidential and would prohibit the disclosure of such records in the absence of specific legal authority and notice to the consumer. Attorney: John Reinstein (ACLUM).

*Downing v. Massport.* Behavioral profiling has been used as the basis for stopping individuals at Logan Airport since 2002 when Massport announced that State Police troopers were being trained by an outside security consultant. The procedures were subsequently incorporated into the state police "Behavior Assessment Screening System" used at Logan and other locations, and allow officers to detain anyone who they believe is exhibiting "unusual" or "anxious" behavior without regard to whether they are boarding an aircraft. ACLUM filed suit challenging the constitutionality of this on behalf of King Downing, who was stopped by Massachusetts State Police troopers after arriving at Logan Airport. Downing, an African-American and national ACLU staff person, had left the gate area and was making a phone call in the public terminal when a state police trooper demanded that he produce some identification and subsequently detained him until he produced a driver's license and evidence of having been a passenger. The defendants moved for summary judgment, arguing, among other things, that the police did not use behavioral screening. In opposition, we argued that Downing's treatment followed closely the behavioral assessment training which the police had received. Attorneys: Peter Krupp (Lurie & Krupp), John Reinstein (ACLUM).

*Gray v. Transportation Security Administration* (U.S. District Court)

*Gray v. Transportation Security Administration* (1st Circuit Court of Appeals)

In August, 2006, we settled these companion federal court actions involving due process claims on behalf of a longtime U.S. permanent resident, born and raised in Northern Ireland, who lost a new pilot's job because the Transportation Security Administration (TSA) denied his request for permission to obtain additional training on the grounds that he was allegedly a threat to national security or aviation. The TSA refused to provide any information on which this accusation was based, preventing our client from being able to defend himself or correct any errors made by the government. In the midst of litigation, the government added our client to the No Fly list, making him unable to board an airplane as a passenger, let alone as a pilot. The government eventually removed his name from the No Fly List and, in settling the cases, the TSA agreed to state that Gray was not a threat to national security or aviation and provided the names of several government attorneys who will be responsible for clearing up any future problems Gray might

have as a result of the initial designation. Attorneys: Paul Holtzman and Hugh Rappaport (Krokidas and Bluestein); Sarah Wunsch (ACLUM).†

*Rahman v. Chertoff.* This federal lawsuit is on behalf of ten American citizens who are repeatedly stopped, searched, and detained for hours on end by Customs officials when they reenter the U.S. after travel abroad, whether by air or by car. The case is in the U.S. District Court in Illinois and ACLUM represents one of the plaintiffs, a man who fled Afghanistan many years ago. The lawsuit seeks to force the federal government to implement changes to the Federal Bureau of Investigation's Terrorist Screening Center (TSC) and the policies of Customs and Border Protection (CBP) that will ensure that innocent Americans are not subjected to humiliating and unnecessary detentions and harassment by federal officials when they re-enter the United States. The plaintiffs all report being unnecessarily delayed, while some recite tales of being shackled to a chair for hours and others had their automobiles surrounded by agitated guards with firearms, a frightening sight for their young children. The court granted our motion to certify a nationwide class of people similarly affected by the government's practices. The government is seeking to appeal that ruling to the U.S. Court of Appeals for the Seventh Circuit. The government defendants also filed a motion to dismiss the case, we opposed that motion, and the judge granted it in small part (procedural due process claim) and denied it in other respects. In the discovery process, we have opposed the government's refusal to turn over documents based on an assertion of the state secrets privilege and we are awaiting the judge's ruling on that issue. Attorneys: Roger Pascall, Everett Cygal, Paula Ketcham, and Joshua Lee (of the Chicago law firm Schiff Hardin LLP); Harvey Grossman & Adam Schwartz (ACLU of Illinois); Junaid M. Afeef of Hoffman Estates, Sarah Wunsch (ACLUM), Kary Moss and Michael Steinberg (ACLU Fund of Michigan), Noel Salah of Detroit and Aaron H. Caplan (ACLU of Washington).

## NON-LITIGATION ADVOCACY

*Fusion Center.* In light of recent disclosures about the nature and scope of the efforts to create a domestic intelligence network, which is collecting substantial amounts of personal information from both public and private sources, ACLUM filed a second request for public records concerning the Commonwealth's Fusion Center. The records produced by the State Police disclose that the Fusion Center will be able to access extensive amounts of information about individuals from public and private sources, that it has entered into agreements to share information with a number of police intelligence agencies in other states, that there are few restrictions on sharing this data with other law enforcement agencies and that there are no systems in place to protect individual privacy and civil liberties. Attorney: John Reinstein (ACLUM).

*Rashad/State Police Records Request.* We submitted a state Fair Information Practices Act (FIPA) request to the State Police on behalf of a Muslim man who was working for a communications contractor at the state police headquarters and was told that the state police didn't want him working there, causing him to lose his job. The state police information officer provided highly redacted documents in response to our request and we have filed an administrative appeal with the head of the state police. Attorney: Sarah Wunsch.

*Real ID Act.* This law was enacted by Congress in 2005 as part of an appropriations bill for the military and the Iraq War. It received very little scrutiny. The law requires that starting in 2008, states must conform to a variety of federal requirements if they wish their state-issued drivers licenses to be acceptable identification for federal purposes, such as boarding an airplane and entering federal buildings. If carried out by the states, the law would essentially create a national identity card with serious identity theft problems and other privacy concerns, and would prevent various categories of immigrants from being licensed to drive. ACLUM lawyers, lobbyists, and organizers are working together on a variety of strategies to get Massachusetts to join with other states in opposing the REAL ID Act and getting changes in Congress.

## **FREEDOM OF RELIGION/ SEPARATION OF CHURCH AND STATE**

*Brissot v. Transportation Security Administration.* Post-9/11, the federal government took over the task of airport baggage screening and has claimed to have improved the quality of performance by the screeners. In the case of Josue Brissot, an experienced baggage screener at Logan Airport, the TSA is demonstrating that its judgment on what is needed for airline safety is in need of improvement. After Brissot began to question why he was being denied promotions, the TSA threatened to terminate his employment because he wears his hair in dreadlocks as part of his Rastafarian religion. Josue Brissot has college degrees from his native Haiti and from the University of Massachusetts and has received good job evaluations. He wore his hair in dreadlocks at the time of his hiring and explained then that the dreads were an important part of his religion. In the spring and summer 2005, TSA told Brissot to cut his hair or face firing. We filed an administrative complaint of religious discrimination with the EEO office of the TSA. After an investigation and the failure of mediation, we requested a hearing before an administrative judge of the Equal Employment Opportunity Commission, completed the discovery process, and are waiting for a hearing date. Attorneys: Jonathan Margolis (Rodgers Powers & Schwartz); Sarah Wunsch (ACLUM).

*Parker v. Hurley.* This is a federal court action brought by four parents in Lexington, claiming that their rights to the free exercise of religion and to control the upbringing of their children have been violated because the school system will not agree to give prior notice and the right to opt out of any discussion about or use of books that show gay people or families headed by same sex couples. We disagreed and submitted a friend of the court brief (on behalf of several Lexington parent and religious groups, the Massachusetts and Lexington Teachers Associations, GLAD, and the Human Rights Campaign) in support of the defendants' motion to dismiss the complaint. Our brief argued that courts have uniformly held that mere exposure of children to ideas in public school that parents disagree with does not violate parental constitutional rights. Recognition of such rights would raise concerns about imposition of religious doctrine on what is taught in school, academic freedom, prior restraints on speech, and equality. The District Court agreed and dismissed the case. The plaintiffs appealed to the U.S. Court of Appeals for the First Circuit and we filed another *amicus* brief in that court. Attorneys: Mark Batten and Eben Krim (Proskauer Rose); Ken Choe (ACLU National LGBT Project); Sarah Wunsch (ACLUM).\*

## POLICE PRACTICES

*Van Der Meer v. Lanergan.* This is a civil rights action for damages brought in Suffolk Superior Court on behalf of an African-American professor at the University of Massachusetts at Boston who was arrested by campus police officers when he protested against racist statements made by an Army National Guard recruiter. A student who was standing near the recruiter's table was handing out flyers concerning the anniversary of the assassination of Martin Luther King, Jr. which contained a statement from Dr. King's 1967 speech "Beyond Vietnam" and drew parallels between the wars in Vietnam and Iraq. The student was wearing a shirt bearing the message "Military recruitment off my campus." The recruiter confronted the student and said that he, like Dr. King, should be "shot in the head." When Professor Van Der Meer objected to the recruiter's provocative comment and an argument between them ensued, a campus police officer intervened. Ignoring the recruiter's inflammatory comments and aggressive behavior, the police officer aggressively sought to silence Van Der Meer, knocked him to the ground, used "pain techniques" to subdue him and placed him under arrest. Attorneys: John Pavlos (Pavlos & Vitali); John Reinstein (ACLUM). \*

## NON-LITIGATION ADVOCACY

*Surveillance Camera Project.* Over the last few years, a number of local police departments have obtained funding for and have touted the benefits of placing surveillance cameras in public areas such as streets, sidewalks and parks. Contrary to the claims made about their utility, these closed circuit television cameras do not seem to prevent most types of crime, while other measures could be taken, such as better lighting, genuine community policing, and neighborhood watches, that may be more effective in reducing the problem of crime in our neighborhoods. Given the technological capabilities of modern cameras, combined with the ineffectiveness of the cameras in reducing crime, we are concerned about the storage and sharing of cctv digital files, the ability of the cameras to zoom in and see what someone is reading, and the overall sense that the cameras are part of the "Surveillance Society" which is contrary to American values. In conjunction with the law firm of Foley Hoag and Eliot, we are working on research that will be used for a report to help educate the public on the dangers and drawbacks of police surveillance cameras in public spaces. Attorney: Vincent Canzoneri (Foley Hoag and Eliot).

*MBTA Search Program.* The ACLU of Massachusetts filed two requests for public records pertaining to the MBTA's new program on passenger searches which commenced in October 2006. The program, as described by the transit agency, was to test the outside of passengers' bags and purses for trace elements of explosives using a device called the Itemizer. When the test produces a positive result, the bag was to be searched by MBTA police officers. Because the device is commonly used to test for both explosives and narcotics, ACLUM filed one public records request which confirmed that the MBTA's use of the device will be limited to the detection of explosives. A second request sought documents about how the policy was being carried out, including the security inspection recording logs prepared at each location where the searches took place. The MBTA provided us with copies of those logs, but only after redacting all information concerning the time and place of the searches. As the time and place of the

searches have a significant bearing on the question of whether race or ethnicity was a factor, we are appealing the decision to withhold this information. Attorney: John Reinstein (ACLUM).

*Photographing the Homeless.* In July 2006, the Springfield police began surveillance of the city's homeless population. Police would stop people believed to be homeless, take their photographs and make a record of any identifying information. Police officers also went to a homeless shelter and to a soup kitchen which provides hot meals for the homeless to gather data. ACLUM and Western Mass. Legal Services wrote to the Police Commissioner protesting the practice as a violation of the Fourth Amendment and subsequently met with the Commissioner and his staff to discuss the issue. The practice has been ended. Attorneys: Pat Rae (WMLS) and John Reinstein (ACLUM).

## **PRIVACY RIGHTS**

*Name Change of Jane Doe.* In Suffolk Probate Court, we represented a transgender person seeking a name change who, before she had counsel, had asked the court to waive publication in a newspaper of the notice of the proposed name change because of her privacy interests. The judge denied the request for waiver of publication, finding that Jane Doe had waived any privacy interests she may have had because the judge discovered that Jane Doe had a web site under her proposed name which discussed transgender issues. This ruling ignored the fact that there had been no public linking of Jane Doe's former male name and her new female name. We took on the case with Burns & Levinson, and asked the court to reconsider. The Court waived publication and granted the name change. Attorneys: Laura R. Studen (Burns & Levinson); Sarah Wunsch (ACLUM).\*†

*Smith v. Justices of the Hampden Probate and Family Court.* This suit in the Supreme Judicial Court for Suffolk County challenges the practice in the Hampden Probate and Family Court of obtaining from the Department of Social Services personal records concerning litigants which contain subjective evaluations. The records are released to the court without the knowledge or consent of the parties and are used by the court without notice to the parties and without an opportunity to contest the information they contain. A single justice of the SJC entered an order requiring the Probate Court judges to submit a proposed rule governing the practice to the SJC Rules Committee for its consideration, but left in place a modified interim rule which still limits access of parties to information which may be considered by the court. Attorneys: Pat Rae, Colleen Lippiello, Peter Benjamin, Meredith Morrison (Western Mass. Legal Services) and John Reinstein (ACLUM).

## **NON-LITIGATION ADVOCACY**

*Drug Testing.* ACLUM testified before a committee of the Boston City Council in opposition to a proposal that the City purchase and use "Drug Wipes" which allegedly detects the presence of drugs when swiped on objects like employee desks and student lockers. The proposal has not advanced at the City Council.

*Voice Recordings on Pioneer Valley Transportation Authority Buses.* The sign at the front of the buses says that conversations with the driver may be recorded. The fact is that the system is sensitive enough to record conversations throughout the bus. Our efforts to persuade the transportation authority to remove or modify the recording system have been unsuccessful and we are preparing to file a lawsuit. Attorney: Bill Newman (ACLUM Western Mass Office).

*Springfield School Searches.* Springfield school administrators last year (and perhaps previously) were conducting searches by entering randomly selected classrooms and requiring all students to empty the contents of their book bags, pockets, and pocketbooks. Some students were required to lift their shirts and unbuckle their belts for visual inspection. These searches are not based on suspicion of any wrongdoing, but are conducted for the purposes of preventing (and finding) weapons and drugs in the schools. In light of our objections, the school is reviewing its policies and practices.

*Family Rights and Privacy.* We submitted a memorandum to then-Attorney General Tom Reilly, urging that his office disapprove a Milford by-law that would exclude from the definition of a family that may live together a group of more than three people who are not within the second degree of kinship. This would prevent relatives like aunts and uncles, and nieces and nephews, among others, from living together if the family unit would be more than three people. We also objected to the bylaw because it failed to recognize the many different types of families in which people live and have important relationships. The Attorney General disapproved the by-law in August, 2006.

*Biometric identifiers in the school cafeteria: Lunch Bytes Program in Taunton Schools.* In March 2007, the Taunton School System was about to launch a program in six of its schools in which students would be required to have their fingers scanned and a software program would convert the scan into a numeric identifier. This biometric program was going to be used to speed up the school lunch line and protect the feelings of students receiving free or reduced rate lunch. Parents learned about the program only by reading about it in the newspaper. After ACLUM received complaints from parents, we sent a letter to the school superintendent raising questions about this use of biometric data and the security of the database being created. We also requested documents relating to the contract and other aspects of the Lunch Bytes program. In response, the superintendent did an about-face, declared that the program was not mandatory and gave parents the right to opt their children out of the program. The school committee then reconsidered the entire plan and voted to not go forward with the program at all.

## **REPRODUCTIVE FREEDOM**

*Gordon v. 9 Branch Street LLC.* The right to abortion has been attacked in many ways, some of which include threatening, harassing and sometimes murdering abortion providers. In this context of needing to protect and defend those who help women exercise their constitutional right to terminate a pregnancy, ACLUM represented a gynecologist whose landlord threatened to evict him because he performs abortions as part of his outpatient gynecological surgery practice.

We filed a lawsuit in Norfolk Superior Court in June of 2005, seeking a declaratory judgment that the doctor was not violating the terms of his lease by including abortion in his practice and asserting that the landlord was interfering with the doctor's rights (and those of his patients as well), in violation of the state civil rights act. The defendants removed the case to federal court where we engaged in discovery, after which the landlord agreed to settle the case and dropped his demand that the doctor cease performing abortions. Attorneys: Dorothy Bickford and R. Alan Fryer (Badger, Dolan, Parker & Cohen); Sarah Wunsch (ACLUM).†

## NON-LITIGATION ADVOCACY

In defending the right to reproductive freedom, ACLUM has worked to ensure access to contraceptives, confidential family planning and counseling services, and comprehensive accurate sexuality education in the public schools. Much of our work has involved the reproductive rights of minors who have been an easy target for those who are hostile to these freedoms.

In *Commonwealth v. Abreu*, a young Dominican woman is being prosecuted in state court under an 1840's statute making it a crime to unlawfully procure a miscarriage, because she took misoprostol, a drug used for medical abortion which is readily available in Asia and Latin America. The young woman developed abdominal pain and went to the hospital where she gave birth to an infant that lived only a few days. The Essex D.A. brought criminal charges against Abreu under the miscarriage law. ACLU of Massachusetts worked with Planned Parenthood, the Abortion Access Project, and Massachusetts Pro Choice NARAL in support of this young woman and to address the important underlying issues in response to media inquiries. These include the lack of affordable health care services generally, including access to contraceptives, the lack of comprehensive sex education instead of the abstinence-only programs former governor Romney brought to the Commonwealth, and the cost of abortion services which may be beyond the means of young and poor women. ACLUM human rights fellow Laura Rótolo met with Abreu's family and provided crucial support to the Spanish-speaking relatives. We also provided advice to Abreu's public defender on expert witness resources that are available to the defense if the DA continues with the prosecution. Attorneys: Sarah Wunsch and Laura Rótolo (ACLUM).

## **DUE PROCESS/CRIMINAL JUSTICE**

*Commonwealth v. Becker*. This case at the Massachusetts Appeals Court involves a challenge to a conviction for failure to register with the state's Sex Offender Registry Board based upon a fourteen year old out-of-state conviction for the other state's lowest level misdemeanor. In a joint amicus brief with the Committee for Public Counsel Services filed in mid-April, we argued that the conviction for failure to register abrogates the historic difference between felonies and misdemeanors and expands the registration requirement to include individuals not intended to be covered by the Sex Offender Registry law in Massachusetts. Attorney: Bill Newman (ACLUM Western Mass Office).\*

*Commonwealth v. Dwyer.* In a long-running series of cases, the Supreme Judicial Court of Massachusetts has grappled with setting standards to determine when criminal defendants (or their counsel) have a right to review a complaining witness's records despite a statutory (non-constitutional) privilege to protect the confidentiality of those records. Frequently, the issue has arisen where the defense seeks to review rape counseling records prior to trial to obtain possible exculpatory evidence. ACLUM has been involved as amicus curiae in many of those cases, and while we recognize a privacy interest in statutorily privileged records, we do not believe the privilege can be absolute where a defendant has a constitutionally-based right to a fair trial and to confront accusing witnesses, and faces a loss of liberty if convicted. In conjunction with the Committee for Public Counsel Services and Massachusetts Association of Criminal Defense Attorneys, we have joined in briefs, most recently in *Dwyer*, arguing for a standard and procedures that would respect the criminal defendant's constitutional rights while not ignoring the privacy interests at stake in the privileged records. In *Dwyer*, decided in December, 2006, the SJC responded by rejecting its prior rules which made it almost impossible for defense counsel to review statutorily privileged records and had the effect of hiding exculpatory evidence. The Court announced a new protocol that allows defense counsel to inspect statutorily privileged materials, under strict controls of a protective order. Attorneys: Carol Donovan and Anne Goldbach (Committee for Public Counsel Services); Sarah Wunsch (ACLUM).†

*Commonwealth v. MacDougall.* A state statute permits a pre-trial detainee to be transferred from a county jail to a maximum security state prison prior to trial if the detainee has at any time previously been sentenced to a state correctional facility. Mark MacDougall was transferred from the Norfolk County Jail to the Sousa Baranowski Correctional Center, a maximum security facility. Arguing that the transfer interfered with his meetings with his lawyer, made it difficult for his family to visit him and constituted the imposition of punishment without trial, he requested that he be returned to the Norfolk Jail. The Superior Court denied his request and he filed a pro se petition in the Supreme Judicial Court. ACLUM and the Committee for Public Counsel Services filed an amicus brief arguing that the transfer constituted punishment without trial and the prisoner was entitled in any event to a hearing prior to the transfer. Attorneys: Peter Onek (CPCS); John Reinstein (ACLUM).

*Gellespie v. City of Northampton:* A disgruntled recipient of a \$15 parking ticket was ordered by a deputy clerk to pay the fine over his objection that the area was not clearly marked. When he sought to appeal, he discovered that he would be required to bring suit in Superior Court and to pay approximately \$300 in fees required to file the appeal. ACLUM has advised plaintiff's counsel and provided a comprehensive argument, for use in a summary judgment motion in the Superior Court, that a fee which is so disproportionate to the underlying dispute is effectively a denial of due process and access to the courts. We also have been instrumental in filing legislation that would move jurisdiction over parking ticket appeals to small claims court. Attorney: Bill Newman (ACLUM Western Mass Office).\*

*In Re a Juvenile.* A Fitchburg Juvenile Court proceeding raising issues about the criminalization of school discipline. A Leominster police officer assigned to a middle school sought a criminal complaint against a boy who shoved another boy who had threatened him. ACLUM provided counsel to the boy and obtained an informal resolution of the matter through the clerk-

magistrate. The referral of this kind of problem to the criminal justice system is being addressed in depth by our new “School to Prison Pipeline” Project which also focuses on what is frequently the disparate racial impact of these practices. Attorney: Robert (Robin) Scott, Law Office of Hector Piñero.\*†

*Kindoki v. Gonzales.* Our participation in this case originated from a call by the U.S. Court of Appeals for the First Circuit for briefs *amici curiae*. Kindoki is a foreign national who was denied asylum in the United States. Because of mandatory detention rules, he was detained pending appeal of his case. He prepared a Notice of Appeal to the Board of Immigration Appeals *pro se* and gave it to prison officials for mailing to the BIA. Despite giving the notice to the prison officials one week before the deadline to file it, the notice of appeal did not arrive at the BIA until three weeks later. Government lawyers then moved for summary dismissal on the grounds that the appeal was untimely and the BIA granted that motion. Kindoki appealed the BIA decision to the First Circuit. The issue is whether the “mailbox rule” applies to *pro se* detained petitioners in BIA filings. In other words, is there an exception for *pro se* detained petitioners to the standard rule that appeals are filed with the BIA when they are received by the BIA? Associates at Skadden, Arps wrote the brief for amici ACLUM, American Immigration Lawyers Association, Massachusetts Law Reform Institute and National Immigration Project of the National Lawyers Guild. Two days before our brief was due, the BIA asked the court to remand the case without a ruling for a reconsideration of factual and legal issues. We believe this is a tactic to moot out the case by dismissing it on other grounds. We filed our brief on January 5, 2006, with a note that we oppose the government’s motion to remand without a ruling. Attorneys: Megan Galaburda and Kurt Hemr (Skadden Arps); John Reinstein and Laura Rótolo (ACLUM).\*

*Tokarski v. Stennett and City of Springfield.* In the summer of 2005, Commerce High School senior Nicholas Tokarski was charged with some property crimes, not in any way related to school. He was a superb basketball player with prospects for a college scholarship, and even though similarly situated students had been allowed to play on high school sports teams and participate in other extra-curricular activities, and there was no rule which advised that a criminal charge could result in a ban, Despite that, Tokarski was banned from playing basketball. The Superior Court issued a TRO and then a preliminary injunction allowing Tokarski to play through the season, his senior year. We participated as amicus in the hearings, pleadings and briefing. Attorney: Bill Newman (ACLUM Western Mass Office).

*United States v. Weikert.* ACLUM filed an *amicus curiae* brief in the U.S. Court of Appeals for the First Circuit in an appeal from a federal district court decision holding that a federal probationer could not constitutionally be required to provide a DNA sample for the federal DNA data base. As amicus, ACLUM argued that the district court ruling should be affirmed because the stated purpose of DNA testing is “to solve crime,” which is a law enforcement activity, and that the special needs exception to the warrant requirement of the Fourth Amendment does not apply where law enforcement officials have access to the fruits of a suspicionless search or where there is excessive entanglement of law enforcement officials in effectuating a search. The brief also argues that the suspicionless DNA testing cannot be justified as a “reasonable search”

under a totality of the circumstances test. Attorneys: Tracey Maclin (Boston University School of Law); John Reinstein (ACLUM).

## NON-LITIGATION ADVOCACY

*Recording of Attorney-Client Conversations.* We learned that the Suffolk County Jail has been monitoring and recording privileged telephone conversations between pre-trial detainees and their attorneys and that it is the policy of the Sheriff to release the recordings of telephone calls placed by prisoners upon request of a law enforcement agency. As a result, the District Attorney's office has been able to obtain without a warrant the recordings of detainees' telephone conversations, including privileged attorney-client communications. The matter came to light after a number of defense attorneys representing individuals held at the Jail on pending Suffolk County charges were provided with discovery materials that included recordings of privileged attorney-client telephone conversations originating from the Jail. ACLUM, together with the Committee for Public Counsel Services and Massachusetts Correctional Legal Services, wrote to the Sheriff and the District Attorney, requesting that the Sheriff end the practice of monitoring and recording prisoners' legal calls and that the DA discontinue requesting and/or listening to the recordings of detainees' telephone conversations until the Sheriff's office can guarantee that no privileged calls will be monitored or recorded. The Sheriff's office agreed to changes in the procedures used at the jail to insure that privileged conversations will not be monitored or recorded. Attorneys: Joseph Savage, David Apfel and Kathryn Alessi (Goodwin Procter).

*Sex Offender Residency Restrictions.* A number of cities and towns in Massachusetts have adopted local measures prohibiting sex offenders from living and/or working within a certain distance of schools, day care centers, parks and playgrounds. The net effect of these restrictions in most cases is to exclude sex offenders from most residential housing, including family residences and much affordable housing. ACLUM has opposed these restrictions on the ground that they restrict personal freedom, impose punitive burdens on sex offenders and actually interfere with the process of reintegration and treatment.

## EQUALITY

*Chen v. Collins.* This is a state court action filed in December, 2006, against the Registry of Motor Vehicles on behalf of seven immigrant women, the Brazilian Immigrant Center, and Massachusetts Immigrant and Refugee Advocacy Coalition. It challenges the unlawful and discriminatory denial of drivers licenses, renewals, learners permits, and Massachusetts identification cards to immigrants who reside in Massachusetts, have appropriate documents to show age, identity, and residence, and are lawfully present in the U.S. The Registry routinely denies the applications of persons whom it believes lack certain kinds of proof of lawful immigration status, even though the Registry lacks authority to enforce federal immigration law and completely misunderstands it in any event. For example, the Registry denied drivers license applications from immigrants who have been granted asylum and from women who are authorized to be in the U.S. under the Violence Against Women Act. After the case was filed, the Registry agreed to issue licenses to most of our individual clients. The case is currently in

discovery. Attorneys: Ken Berman and Shaghayegh Tousi (Nutter McClennen & Fish); Iris Gomez (Mass Law Reform Institute); Jeff Ross; Sarah Wunsch and Anjali Waikar (ACLUM).\*

*Commonwealth v Attia.* ACLUM staff attorney Sarah Wunsch appeared in Quincy District Court on behalf of Dr. Khaled Attia against whom a Randolph police officer had sought the issuance of a criminal complaint relating to Dr. Attia changing license plates from one of his cars to another. Because the police officer appeared to be targeting Dr. Attia and harassing him because of his national origin and religion, we decided to support him at the clerk-magistrate's hearing. The clerk denied the police officer's request for the issuance of a criminal complaint.\*†

*Cook v. Rumsfeld.* ACLUM joined national ACLU in an *amicus* brief in the U.S. Court of Appeals for the First Circuit, arguing that the district court's dismissal of the challenge to the military's "Don't Ask, Don't Tell" policy for gay service members was wrong and should be reversed. The brief argues that the Supreme Court's ruling in *Lawrence v. Texas* in 2003 means that the right of lesbians and gay men to form intimate relationships is protected by the due process clause and that the government's policy interfering with that right should be judged by strict scrutiny, a higher standard than the rational basis review used by the lower court. Attorneys: Matt Coles, Ken Choe, and Rose Saxe (ACLU National LGBT Project); Sarah Wunsch (ACLUM).\*

*Dupont v. Department of Correction.* This case raised an important question about the legal standard by which to judge sex discrimination claims brought by prisoners. Under the Massachusetts Equal Rights Amendment, if the government discriminates on the basis of gender, race or certain other categories, it must demonstrate that the classification is narrowly tailored and is needed to achieve a compelling government interest. A Superior Court judge asked the Appeals Court to answer the question of whether this strict scrutiny is applicable to claims of sex discrimination brought by prisoners. ACLUM and the Women's Bar Association filed an *amicus curiae* brief, arguing that the compelling interest test applies to prisoner sex discrimination claims under the ERA. The Supreme Judicial Court then granted direct appellate review and agreed that strict scrutiny applied even to prisoner claims. Attorneys: Martha Davis, (Northeastern University School of Law); Beth Z. Boland and Rheba Rutkowski (Bingham McCutchen LLP); Ellen Zucker (Dwyer & Collora); Sarah Wunsch (ACLUM).†

*Fitzgerald v. Barnstable School Committee.* With the ACLU Women's Rights Project, ACLUM submitted an *amicus* brief in the U.S. Court of Appeals for the First Circuit in a case raising important issues about the liability of a school system for its inaction after being notified of student-on-student sexual harassment. Joining the ACLU and ACLUM were groups such as Crittenton Women's Union, Equal Rights Advocates, Jane Doe, Inc., Legal Momentum, Mass Society for Prevention of Cruelty to Children, National Women's Law Center and the Women's Bar Association, along with Dr. Nan Stein. Our brief was in response to a ruling by the U.S. District Court which granted summary judgment for the school system, finding as a matter of law that the school could not be liable to the child under Title IX, the federal civil rights law on gender discrimination, because there were no specific incidents of sexual harassment after the school was notified that a kindergarten girl was being harassed by an older boy on the school bus. Our *amicus* brief argued that the district court's ruling was at odds with principles of Title IX and its guarantee that students shall have equal access to school programs regardless of their

gender. Because of the school's failure to take any steps to protect the child after being notified of the harassment that had taken place, the child's parents were forced to remove her from the school bus and from her gym class. We argued it was wrong for the lower court to grant summary judgment for the school and prevent a jury from hearing the facts and deciding if the school showed deliberate indifference and was thereby liable to the child for the effects of the school's own inaction. The appeal was argued in August, 2007. Attorneys: Emily Martin (ACLU WRP); Sarah Wunsch (ACLUM).\*

*Flynn v Johnstone.* This is a state court action in which we represented two municipal clerks who were sued by former Boston Mayor and Vatican Ambassador Ray Flynn. Flynn, an opponent of gay marriage, charged that clerks were violating the law by issuing marriage licenses to non-resident gay couples. Our motion to dismiss the case for lack of standing (Flynn had no legal rights or cognizable interest in the issue any different from the general public) remained on hold while the SJC considered our affirmative case on behalf of the clerks (and GLAD's companion case on behalf of non-resident couples), challenging orders from the Governor and Attorney General that no marriage licenses could be issued to any nonresident same sex couples. After the Supreme Judicial Court ruled that nonresident same sex couples could not marry in Massachusetts if their home states prohibited the marriage, we convinced Flynn's attorney to stipulate to the dismissal of his case. Attorney: Sarah Wunsch (ACLUM).†

*Lowell School Committee v. Vong Oung.* ACLUM joined with other civil rights groups as *amici curiae* in support of an arbitration award in favor of three teachers in the Lowell public schools who challenged their dismissal from their positions as professional-status teachers based on a determination by Lowell school officials that the teachers had failed to meet the standards for English language fluency. The Arbitrator found, as a matter of law, that the procedure used by the school to determine fluency was not in compliance with Massachusetts laws and regulations and amounted to unlawful discrimination. A judge of the Superior Court upheld the finding by the arbitrator, but the ruling has been appealed. Attorneys: Christopher DeMayo and Jeffrey S. Strom (LeBoeuf, Lamb, Greene & MacRae).\*

*Thomka v. Massachusetts Interscholastic Athletic Association.* This case involves a challenge to the MIAA's rule and practice that prohibits girls from participating as individuals in the fall statewide golf tournament. The Hampden County Superior Court ruled that the MIAA's rule violated the state Equal Rights Amendment. In response, the MIAA still has not agreed to allow girls to play in the fall tournament as individual competitors unless they seek a waiver that would allow them to compete. We are awaiting a decision on the motion seeking clarification of the remedies, having participated in the trial and hearings as *amicus*. Attorney: Bill Newman (ACLUM Western Mass Office).

*Thurdin v. SEI Boston.* In August, 2007, we joined an amicus brief in the Massachusetts Appeals Court along with Massachusetts Employment Lawyers Association and Jewish Alliance for Law and Social Action, arguing that the Massachusetts Equal Rights Act (which ACLUM helped to enact) protects against employment discrimination in small workplaces not covered by the state's general anti-discrimination law. Attorney: James Weliky (Messing Rudavsky & Weliky). \*

*Trustees of Health and Hospitals v. Massachusetts Commission Against Discrimination.* In this appeal in the Supreme Judicial Court of Massachusetts, ACLUM joined with six other civil rights organizations in an *amicus* brief urging the court to uphold a finding of unlawful discrimination where five African-American female employees were treated less favorably in the conditions of their layoffs than a similarly-situated white male co-worker. The key issue in the case involves the standard of proof in cases of disparate treatment and whether evidence of difference in treatment of a similarly situated employee must involve an identical comparator. Our brief argued that to be a similarly situated employee does not require identical job descriptions. The SJC agreed with that argument. Attorneys: Patricia Washienko, Rebecca Pontikes.\*†

## NON-LITIGATION ADVOCACY

*Domestic Violence and Housing Discrimination.* With the ACLU's Women's Rights Project, we prepared testimony for ACLUM Board President Nancy Ryan to deliver at a state legislative hearing on proposals to amend state housing discrimination law to protect victims of domestic violence from eviction on the basis of the violence perpetrated against them.

*Somerville High School.* Five African-American students at Somerville High School who allege that they were assaulted by Medford police officers in April of 2005 were arrested and faced felony charges for assaulting the officers. Under a state law, G.L. c.71, §37H½ that allows the suspension of students who have been charged with felonies, the principal of Somerville High School suspended all five students. John Reinstein (ACLUM), along with Rev. William Dickerson (Greater Love Tabernacle), Angela Williams-Mitchell (Mass. Ass'n of Minority Law Enforcement Officers) and Chuck Turner (Boston City Council), wrote to Somerville's Superintendent of Schools urging reinstatement of the students. Noting that the criminal charges in this case grew out of a confrontation with disturbing racial overtones, in which the criminal responsibility of these students was anything but clear, and that the relationship between the charges and the safety and welfare of the school was tenuous at best, we argued that the students should be readmitted to school.

*Weymouth Housing Authority.* ACLUM received a complaint from a non-English speaking, Dominican woman who was being subjected to repeated racial harassment and discrimination by her white neighbors at housing run by the Weymouth Housing Authority. ACLUM advocated on behalf of the woman and her family to ensure that the Weymouth Housing Authority responded appropriately to her allegations of civil rights violations. The WHA evicted the neighbor and issued a criminal no-trespass order against the neighbor and her boyfriend, and provided our client an alternative housing placement. Anjali Waikar (Equal Justice Works Fellow) and Laura Rótolo (Human Rights Fellow) (ACLUM).

## VOTING RIGHTS

*¿Oiste? Inc. v. City of Lawrence.* On the eve of a city-wide election in Lawrence, ACLUM and the Lawyers Committee for Civil Rights brought suit in federal court on behalf of Latino voters and candidates, asking that the election be held open for several weeks to permit participation by

voters who had been relegated to “inactive” status and discouraged from voting. The suit was brought after Lawrence city officials placed more than half of the registered voters within the City (reportedly 18,400 voters, out of a total of 27,198) on an “inactive” voter list. As a result, when people tried to vote in the preliminary city elections on September 27, 2005, there was widespread chaos, long lines, and confusion among previously registered voters who were suddenly listed as “inactive.” It appears that the overwhelming majority of those dropped were Latino voters. A federal district court judge denied the plaintiffs’ request to extend the election, but approved an agreement providing for notices in print and electronic media advising inactive voters of their right to vote. The suit was ultimately settled under an agreement calling for certain reforms in the city’s election office and the appointment of a community oversight committee. Attorneys: J. Anthony Downs (Goodwin Procter LLP); Nadine Cohen (Lawyers’ Committee for Civil Rights); John Reinstein (ACLUM).†

## **ACLUM RACIAL JUSTICE PROJECT**

*Immigration.* ACLUM’s Racial Justice Project has also been working to address immigration issues and problems of immigrant communities. Our position has been that immigration is designated as a federal responsibility under the Constitution, that public safety is impaired when immigrant communities are afraid of state and local law enforcement officers, and that invidious discrimination against the foreign-born or those who look foreign born results from anti-immigrant measures.

One of the most critical issues in Massachusetts has been the use of state and local police to enforce immigration laws. ACLUM publicly opposed Governor Romney’s initiative to involve the state police in immigration enforcement and we encouraged local departments not to follow suit. We responded to several reports of the involvement of MBTA police in immigration matters and worked with immigrant advocacy groups in conducting outreach on this issue and in preparing and distributing a Know Your Rights pamphlet in both English and Spanish. In East Boston, the Project worked with local community organizers, parents and students at East Boston High School in addressing the treatment of immigrant students and responding to the actions taken against students involved in a demonstration in support of immigrant rights.

*Aguilar v. Immigration and Customs Enforcement (ICE).* ACLUM and other organizations filed a lawsuit on March 9, 2007, in the U.S. District Court for the District of Massachusetts, alleging constitutional and statutory violations relating to the March 6 immigration raid in New Bedford. The raid, one of the largest in the country, resulted in the detention of over 350 immigrant workers, mostly women, who were employed making military backpacks and vests. The workers were taken away from their families and detained at a converted military base in Devens, Massachusetts, and then within 48 hours were shipped to remote detention centers, mostly in Texas. The suit alleged that ICE transferred the detainees out of state in bad faith with the purpose of evading jurisdiction in Massachusetts and prevented the detainees from speaking with Massachusetts lawyers, and that the agency violated their rights when it took parents away from their children without adequate arrangements. On May 22, 2007, Judge Stearns of the U.S. District Court for the District of Massachusetts dismissed the petitioners’ claims, reasoning that they had not stated claims that were cognizable and that the court had no jurisdiction to hear the

case pursuant to certain provisions of the federal Real ID Act. Petitioners appealed to the First Circuit. We requested that the First Circuit grant a stay of all deportations pending its decision, but the Court refused to do so. Most petitioners were deported, but some remain in Massachusetts and in Texas. Attorneys: John Reinstein, Laura Rótolo, and Anjali Waikar (ACLUM).\*

*Charliston Dos Santos Camargos, Hartford Immigration Court.* ACLU of Massachusetts has joined with the ACLU of Connecticut in representing Charliston Dos Santos Camargos in his immigration deportation proceeding which raises issues about an unconstitutional stop and arrest by the Massachusetts State Police. Attorneys: Renee Redman, Legal Director, ACLU of Connecticut; Anjali Waikar (Equal Justice Works Fellow, ACLUM).\*

## NON-LITIGATION ADVOCACY

*District Court Judges / Probation Officers.* ACLUM has received numerous reports that district court judges and probation officers, particularly in western Massachusetts, may be detaining, without legal authority, people who are suspected of being undocumented immigrants. ACLUM has been working with the Committee for Public Service Counsel (CPCS) and other bar advocates in the state in advocating with judicial officials to end this practice. ACLUM continues to document the extent to which court officers are unlawfully detaining criminal defendants in trial court on non-jailable offenses throughout the Commonwealth. Attorneys: John Reinstein and Anjali Waikar (ACLUM).

*Moroccan Hotel Workers at Fairmont Copley Hotel.* ACLUM has been assisting ten Moroccan hotel employees who have claims that they have been discriminated against by management at the Fairmont Copley Hotel. Most of the workers have been employed at the hotel for over a decade. The workers complain that since 9/11/2001, they have endured such things as being called “Taliban” and “Saddam Hussein’s brothers.” ACLUM is working to determine an appropriate avenue of relief for the workers, particularly in light of the fact that in 2005, a consent decree was entered against the Fairmont chain in New York for discrimination at its hotels there. Attorneys: Jean Musiker (Sugarman, Rogers, Barshak and Cohen); Anjali Waikar (ACLUM).

*Sandwich By-Law.* The ACLU of Massachusetts enjoyed a small victory in helping to prevent the adoption of a local anti-immigrant law. In September 2006, members of the Sandwich Board of Selectmen proposed that a special town meeting adopt a warrant article to petition the state legislature pursuant to the state constitution’s Home Rule Amendment. The petition sought the legislature’s permission for the town to enact local legislation allowing it to deny, revoke or suspend licenses of businesses that hire undocumented immigrants. We wrote to the Selectmen, urging them to reconsider taking this measure to town meeting. Although the Selectmen voted 4-1 to proceed, we continued our advocacy and sent a targeted letter to our 90-some members in Sandwich, encouraging them to go to the special town meeting and vote against the proposal. By a large margin, town meeting voted to postpone the measure indefinitely. Attorneys: Sarah Wunsch and Anjali Waikar (ACLUM).

*U Visa Interim Relief Advocacy.* Our Equal Justice Works Fellow Anjali Waikar advocated on behalf of a foreign national who was the victim of a post 9/11 hate crime. After he was severely beaten, the U.S. government granted him U-visa interim relief that provided him with work authorization based on his status as an immigrant victim of a hate crime and his participation in the ultimate conviction of his abusers. However, U-visa interim relief does not provide authorization to re-enter the United States if the visa holder leaves the country. Because the man's father was terminally ill in India, Anjali contacted Senators Kerry and Kennedy, urging them to assist in obtaining a one-time authorization for the man to re-enter the country and to encourage the government to issue long-delayed U visa regulations.

*Lawrence, Mass. (Latino Outreach).* ACLUM's Equal Justice Works Fellow Anjali Waikar and Community Organizer Brian Corr have been working with community activists in Lawrence to document, analyze, and help deal with a wide array of complaints by various immigrant communities about the conduct of Lawrence police officers.

*State Police and Immigration Enforcement.* Despite Governor Patrick's announcement that state police are not authorized to enforce federal immigration laws pursuant to the agreement entered into by former Governor Romney, it appears that the state police in some parts of Massachusetts may be collaborating with federal immigration officials for the purpose of detaining allegedly undocumented immigrants. Anjali Waikar, ACLUM's Equal Justice Works Fellow, has been spearheading a coalition of groups that have raised and continue to press this issue with state officials. As a credit to our advocacy efforts and public pressure, the State Police "opted out" of assisting federal immigration officials in a raid in Nantucket, and the Executive Office of Public Safety agreed to look at the conduct of state police officers in parts of the state that have been especially problematic.

*Detention Conditions for Immigrants in Massachusetts.* Changes in immigration law and the structure of the federal immigration agency have led to steady increases in the number of persons in detention for immigration offenses. About 60% of immigration detainees are not held in Bureau of Immigration and Customs Enforcement (ICE) facilities, but instead are held in county jails, private prisons and other correctional facilities throughout the country. In Massachusetts, ICE holds detainees in 9 jails and detention centers. We have begun a project to document the conditions at the jails in Massachusetts that house ICE detainees. Laura Rótoló joined our staff in late October, 2006, as a Human Rights Fellow, with primary responsibility for this project. She has interviewed ICE detainees in Massachusetts, and their lawyers and advocates and has requested documents from the federal and state governments through freedom of information statutes. So far, we have identified a number of problems with conditions for immigration detainees. These include lack of access to medical care, lack of access to legal materials; unduly expensive phone call systems; violent treatment by guards and immigration officials; disparate treatment of detainees as compared to criminal inmates; and a lack of proper grievance procedures. The lack of medical care has stood out as an especially difficult problem. In the course of documenting these issues, we have come across a few urgent medical situations and have advocated on behalf of detainees with ICE and jail officials to ensure that they receive the medical care they needed. National attention has recently focused on a string of deaths of detainees in ICE custody in California and New England, and ACLUM called for an investigation into some deaths of immigrants in police custody in Massachusetts. In addition, we

worked with the Human Rights Program at the national ACLU in preparing a report on immigration detention issues in Massachusetts for the United Nations Special Rapporteur on Migration. Attorneys: John Reinstein and Laura Rótolo (ACLUM).

*Immigrant Rights in Western Massachusetts.* ACLUM participated with other legal advocates and community service providers in the Coalition for Immigrants Rights in western Massachusetts. The coalition is exploring how to better provide a broad range of legal services to address issues such as racial profiling and work place rights. In Holyoke, ACLUM took up the cause of students whose had been told that if their first language was Spanish and if they had not passed 10th grade MCAS, they would not be allowed to go on the off-campus field trip to a college fair or to investigate higher education possibilities. When the school's position became public, administrators rescinded the ban. Attorney: Harris Freeman, Western New England College School of Law.

*Juvenile Justice.* Through a grant from the national ACLU office, Anjali Waikar worked on an eight month research project on Disproportionate Minority Contact (DMC) in the state juvenile justice system, a follow-up to the national ACLU's May 2003 report entitled, Disproportionate Minority Confinement in Massachusetts. In addition to highlighting improvements made by the Commonwealth over the past several years after the first DMC report was released, a new report is in the works to examine the use and over-use of pre-adjudication detention, conditions of confinement of pre-adjudication facilities, and the allocation of state and federal monies to fund these facilities. To this end, the ACLUM collected data from various state agencies and conducted meetings and interviews with area-wide juvenile justice advocates. The second report, in collaboration with the national ACLU, is planned for the latter part of 2007.

*School to Prison Pipeline.* With the national ACLU Racial Justice Project and the Charles Hamilton Houston Institute for Race and Justice at Harvard Law School, ACLUM engaged in joint efforts to begin to combat the variety of practices that are referred to as creating a "school to prison pipeline," including analysis of both school and juvenile justice system policies. We recently welcomed attorney Amy Reichbach to our staff as our new Racial Justice Advocate. A former teacher, Amy will be working primarily on addressing the policies and practices which create the School to Prison Pipeline.