

# RHODE ISLAND CIVIL LIBERTIES

A BI-MONTHLY PUBLICATION OF THE AMERICAN CIVIL LIBERTIES UNION FOUNDATION OF RI

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## POSTPONED HIGH SCHOOL DIPLOMA REQUIREMENTS LIKELY TO CREATE A “CASTE SYSTEM” AND STIGMATIZE 90% OF AT-RISK STUDENTS



Community groups participated in a well-attended news conference to explain the impact of high stakes graduation requirements on at-risk students.

On the eve of a final public hearing on proposed new high stakes testing school graduation requirements for students in Rhode Island, a diverse group of organizations highlighted startling statistics that document the devastating impact that the proposed requirements would have on at-risk students in the state. The groups – the RI ACLU, RI Disability Law Center, the Autism Project of RI, RI Legal Services, Urban League of RI, Progreso Latino, Parent Support Network of RI, the Center for Hispanic Policy and Advocacy, Young Voices and the George Wiley Center – assert that the policy would essentially institutionalize a caste system in Rhode Island’s public schools.

A week after the groups held a news conference to publicize the statistics, State Commissioner of Education Deborah Gist announced that she had decided to push back by two years the timeline for the proposed


high school graduation requirements. The decision was an important, albeit temporary, victory for the ACLU and the numerous civil rights, community and advocacy groups that had been extremely critical of the proposal ever since it was raised last fall.

Under the proposed regulations, students’ scores on a high-stakes standardized test, known as NECAP, would help determine whether they qualify for a diploma, and if they do, what kind of diploma they would receive. The groups participating in the news conference said that, extrapolating from recently-released test scores for the Class of 2011, close to 90% or more of special education, limited English proficient, economically disadvantaged, Latino and African-American students would be at risk of either receiving no diploma at all or one designating them only as “partially proficient,” effectively announcing their lack of proficiency to all potential employers and colleges.

The proposed Board of Regents’ regulations also would have created a multi-tier diploma system, based on students’ 11th grade performance on the NECAP test (although the Commissioner’s recent announcement suggests that there would be only two types of diplomas issued). Those students who performed “substantially below proficient” on the NECAP test would either not receive a diploma or would have to retake the state assessment and show “growth” in order to qualify for the lowest-tier diploma. But how much and what kind of growth they would have to show to earn a diploma was left completely undefined in the regulations. (Separately, students must also obtain passing grades in their coursework and in performance-based assessments.)

Because many more students did poorly on math than on language arts assessments, the math scores are the ones that tend to decide which students, and how many, would be at risk of either not graduating or at best receiving the lowest tier diploma.

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## ACLU

AMERICAN CIVIL LIBERTIES UNION  
of RHODE ISLAND

FOUNDATION

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## FROM THE DESK OF THE EXECUTIVE DIRECTOR

By the time you receive this newsletter, a Cranston school subcommittee should have finally recommended what to do with the 50-year-old prayer mural displayed in Cranston High School West's auditorium. If the decision is to maintain it, the ACLU will be promptly going to court to have it removed.

This dispute offers a good opportunity to emphasize two basic points about the ACLU's work. First, it fully confirms ACLU founder Roger Baldwin's axiom that "No battle for civil liberties ever stays won." It has been clear for almost as long as the mural has been displayed that this school prayer is blatantly unconstitutional. Only "eternal vigilance" prevents hard-fought civil liberties victories from being undermined and ignored.

But this dispute also belies one of the false criticisms regularly lodged against the ACLU: that we are too eager to rush into court instead of trying to resolve disputes amicably.

It has been *seven months* since we contacted school officials about removing the prayer after receiving a parent's complaint. Despite its clear illegality, we held off rushing to court in order to give school officials time to decide for themselves, as they asked, how to extricate themselves from this. Yet their efforts have been nothing but lackadaisical. Whether or not we end up having to sue, nobody can argue we didn't try to avoid that route.

-Steven Brown



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## ACLU COMPLAINT AGAINST DEPARTMENT OF HUMAN SERVICES FOR LACK OF ADEQUATE INTERPRETER SERVICES IS FAVORABLY RESOLVED

In response to a civil rights complaint filed by the Rhode Island ACLU against the state's Department of Human Services (DHS), a detailed 24-page resolution agreement has been entered between DHS and the Office of Civil Rights (OCR) of the U.S. Department of Health and Human Services, requiring the agency to provide appropriate language interpreter services. The agreement establishes specific timeframes for DHS to follow in order to ensure that clients who have limited English proficiency (LEP) have access to the services and programs provided by the agency.

The ACLU's complaint was filed three years ago, shortly after then-Governor Donald Carcieri made public comments denouncing state-funded interpreters for DHS clients and then laid off all of the agency's Southeast Asian interpreters. The complaint documented a litany of areas where DHS was not complying with a federal law, known as Title VI, requiring agencies receiving federal funds to provide appropriate language interpreter services to clients.

Among other things, the resolution agreement sets obligations and standards for DHS to follow to determine the linguistic needs of affected individuals and provide them appropriate interpreter services, to translate important agency documents into languages spoken by 5% or more of the population affected by DHS programs, to ensure that the language assistance provided to applicants and clients is timely, and to train employees of their obligations under the law.

The Affiliate commended the signing of the comprehensive agreement and believes that, once fully implemented, it will have a significant impact in ensuring that clients are getting the services they are entitled to under federal law. The ACLU will be monitoring the agency's compliance with the agreement.

## RI ACLU APPLAUDS RESCISSION OF EXECUTIVE ORDER ON ILLEGAL IMMIGRATION

Before a packed house at the International Institute of Rhode Island, Governor Lincoln Chafee officially rescinded former Governor Carcieri's executive order on illegal immigration. In addition to lifting a requirement that state agencies use "E-Verify," a flawed federal employment verification system, the Governor's action also ends an agreement, known as 287(g), between state police and immigration officials allowing the police to enforce federal immigration law.

In repealing the Order, the Governor made good on a campaign pledge welcomed by the state's immigrant community. Former Governor Carcieri's issuance of this order in 2008 prompted widespread opposition from the ACLU and local community and immigration groups, and even expressions of concern from a commission appointed by Governor Carcieri himself to examine the "unintended consequences" of the Order. That commission issued a report documenting the widespread fear and mistrust of police in the immigrant community that issuance of the Order had created.

As a result of Governor Chafee's actions, the ACLU will now voluntarily dismiss a lawsuit it filed in 2008, pending on appeal, challenging various aspects of the E-Verify mandate that had been contained in the executive order.

## ACLU ASKS COURT TO OVERTURN PAWTUCKET'S FAVORABLE TREATMENT OF PAROCHIAL SCHOOLS



The Rhode Island ACLU has asked a federal court to rule unconstitutional, without the need for a trial, the City of Pawtucket's long-standing practice of giving preferential treatment to parochial schools over public schools in granting permits for the use of city athletics fields. The ACLU's motion for summary judgment follows months of discovery in the lawsuit filed in October 2009 on behalf of seven Pawtucket parents and their children.

Those parents and other public school officials had complained to the City for years about this problem, all to little avail. For example, O'Brien Field, a public field that was refurbished with tax money in 2001, has since been reserved almost exclusively for use by Saint Raphael Academy, a Catholic school. The suit further alleges that public junior high school teams have been denied the use of other fields which have often been reserved for the use of private sectarian schools.

Citing another example, the ACLU motion states: "In 2010, a request by the public school athletic directors for the use of the McKinnon/Alves soccer field permitted to St. Raphael Academy was simply denied, despite the fact

that the denial of this request has resulted in the canceling of public school games and practices as a result of insufficient field space."

In its filing, RI ACLU volunteer attorney Sandra Lanni notes that until last year, the Office of Parks and Recreation had no written policies governing the issuance of permits for city owned athletic fields. Even the new policy, which the ACLU claims is still deficient, is ignored anyway, leaving the Parks Superintendent with total discretion in deciding what schools get to use the fields.

The ACLU's brief concludes: "There is no dispute that the City has and continues to empower the Superintendent of Parks and Recreation to issue permits for the use of its fields and related facilities in his complete and absolute discretion, in violation of the First and Fourteenth Amendments of the United States Constitution.

"Further, the Superintendent has exercised his authority in such a way as to benefit private, sectarian schools operated by the Roman Catholic Diocese of Providence. By so doing, the City has failed to abide by the neutrality towards religion required by the Establishment Clause."

A decision in the case is expected in a few months.

## APPEALS COURT UPHOLDS NARRAGANSETT "ORANGE STICKER" ORDINANCE; ACLU PLANS FURTHER ACTION

Rejecting the ACLU's legal arguments, the U.S. Court of Appeals for the First Circuit has upheld Narragansett's "orange sticker" ordinance. However, in upholding the ordinance on its face, the court acknowledged that it could still be subject to constitutional challenge in its application to particular cases, and the ACLU plans to go back to court to pursue those challenges.

The ordinance authorizes police to charge tenants and landlords for allowing "unruly gatherings," and to place orange stickers on houses that have allegedly been the site of such gatherings. Under the ordinance, the orange sticker cannot be removed until the end of the school year without financial penalty, regardless of the presence or absence of the original "unruly" tenants who allegedly engaged in a violation of the law. The lawsuit, filed in 2008 by ACLU volunteer attorney H. Jefferson Melish, was on behalf of the URI Student Senate, as well as four students and three landlords who have been affected by enforcement of the ordinance.

The ACLU argued, among other things, that the ordinance violated the plaintiffs' due process rights by allowing police to affix the large orange stickers to the front door of a rental property with no opportunity for a hearing either before or after the posting. In upholding the ordinance, the appellate court acknowledged that it was "uneasy about the absence of a hearing," but that the "mere possibility of misuse is insufficient to invalidate an ordinance" on its face.

More positively, the court clarified that "the prosecution must prove that a gathering creating a substantial disturbance involving a violation of law occurred both at the time of the initial posting and when the subsequent intervention took place. Police intervention at a residence is not enough, by itself, to establish an Ordinance violation." This, said attorney Melish, should help to limit the number of questionable prosecutions under the law.

## LEGISLATIVE PREVIEW 2011

### A LOOK AT PROACTIVE CIVIL LIBERTIES LEGISLATION

January introduced a new General Assembly session in more ways than one. With over one-quarter of the members being freshmen, the loss of a few key civil liberties allies, significant changes in the makeup of key committees, and a new Independent Governor in the State House, the dynamics of the 2011 Assembly promise to be very different from past years. How this will all play out in terms of civil liberties remains to be seen, although it is certain that many dangerous bills that were left on the table last year will be returning.

In this issue of the newsletter, however, we focus on positive legislation being introduced this year. A few of those bills are summarized below. Major anti-civil liberties legislation will be examined in the next newsletter.

### ANTI-DISCRIMINATION

#### **RACIAL PROFILING**

The Affiliate will once again be pushing for the passage of strengthened racial profiling legislation, sponsored this session by Sen. Rhoda Perry and Rep. Grace Diaz. State-wide traffic stop statistics have consistently shown that blacks and Hispanics are twice as likely as whites to be stopped and searched by police, even though they are actually less likely to be found with contraband. This comprehensive bill — supported by more than two dozen organizations — would prevent police from demanding identification from innocent passengers and from searching minors in the absence of suspicion of criminal activity, requires police to document the grounds for conducting searches, and reestablishes traffic stop data collection procedures.

#### **IMMIGRANTS' RIGHTS**

Expect to see repeat legislation this year from Immigrants United (IU), a coalition of which the RI ACLU is an active member. IU's legislative package consists of immigrant-friendly anti-discrimination bills dealing with everything from housing to workers' rights to college tuition support for children of undocumented parents.

There has already been a committee hearing on one anti-immigrant bill, designed to reinstate by statute former Governor Carcieri's executive order on immigration. (See related story, Page 2.) As a counterbalance, the ACLU has drafted a bill, introduced and sponsored by Rep. Grace Diaz, to prohibit forced employer participation in the E-Verify program. E-Verify is the federal government's faulty work authorization verification program which contains millions of database errors and has been found to increase workplace discrimination on the basis of national origin.

#### **LGBT RIGHTS**

House Judiciary Committee has already held a marathon hearing on legislation, sponsored by Rep. Art Handy, to authorize same-sex marriage in the state. The ACLU testified in strong support of the bill and, with a grant from the National ACLU, has also helped fund a radio ad campaign for its passage. The bill is being sponsored on the Senate

side by Rhoda Perry. Supporters are hopeful for a favorable House vote within the next month.



Activists flooded the State House on February 9th to promote same-sex marriage legislation heard in House Judiciary Committee that day. The hearing lasted until 1:30 in the morning.

### PRIVACY

#### **SOCIAL SECURITY NUMBER PRIVACY**

Over a decade ago, the General Assembly enacted a law barring most businesses from requiring customers to provide their Social Security Number in order to receive service or cash a check. A new bill, sponsored by Rep. Brian Patrick Kennedy and Sen. Domenic Ruggerio, seeks to close a loophole that some businesses have begun exploiting — demanding that customers provide the last four digits of their SSN. Having just those digits can be the key to inappropriately gaining private information about an individual.

The legislation would explicitly amend the law to bar requests for any part of a person's SSN. The bill has already had a positive hearing in House committee, where well-known national privacy expert Robert Ellis Smith testified on its behalf.

## OPEN GOVERNMENT

### OPEN RECORDS

For the fourth consecutive year, the ACLU is working with open government groups to promote legislation that would strengthen the state's Access to Public Records Act in numerous ways. Among other things, the bill would shorten the timeframe for public bodies to respond to open records requests, increase penalties for violations of the law, and require training of public information officers on the obligations of public bodies under APRA.

The bill passed both Houses in 2008, but was vetoed by former Governor Donald Carcieri. This year, the bill is sponsored on the House side by Rep. Michael Marcello. Need for the bill is greater than ever, as problems with violation of the statute seem to remain virtually unchecked.

## CRIMINAL JUSTICE

### ANTI-SHACKLING

In an effort to address a major human rights and civil liberties concern, Sen. Rhoda Perry and Rep. Donna Walsh are sponsoring legislation with support from the Affiliate, the RI State Nurses Association, RI NOW and numerous other groups to prohibit shackling or otherwise restraining incarcerated pregnant women during labor, delivery and post-recovery. It is current Department of Corrections practice — uncovered only through an ACLU open records lawsuit last year — to shackle women during transportation to the hospital as well as post-delivery. Passage of this bill, which was opposed last year by the DOC, will ensure that the rights and dignity of pregnant women imprisoned at the ACI will not be violated.

### STAY CONNECTED — SIGN UP FOR E-ALERTS

Now that the legislative session is under way, sign up for our E-Alert system. E-Alerts notify you by email when there are important bills that need your opposition or support. Contacting legislators is an incredibly important step you can take! Sign up at [www.riaclu.org](http://www.riaclu.org).

## HUMAN RIGHTS COMMISSION FINDS “PROBABLE CAUSE” THAT CVS APPLICATION FORM IS DISCRIMINATORY

Responding to a complaint filed by RI ACLU cooperating attorney Christopher Corbett in 2009, the R.I. Commission for Human Rights has issued a finding that there is “probable cause” to believe that a job application form used by CVS Pharmacy, Inc. for various customer service positions violates state anti-discrimination laws that bar employers from eliciting information that pertain to job applicants’ mental or physical disabilities.

CVS utilizes an online job application process for many of its positions. One component of that process requires applicants to complete statements about “attitudes and experiences.” Specifically, applicants must indicate whether they “strongly disagree, disagree, agree, or strongly agree” with about 100 “attitudinal” statements. Among the statements applicants must respond to are:

- *“You change from happy to sad without any reason.”*
- *“You get angry more often than nervous.”*
- *“Your moods are steady from day to day.”*
- *“There’s no use having close friends; they always let you down.”*

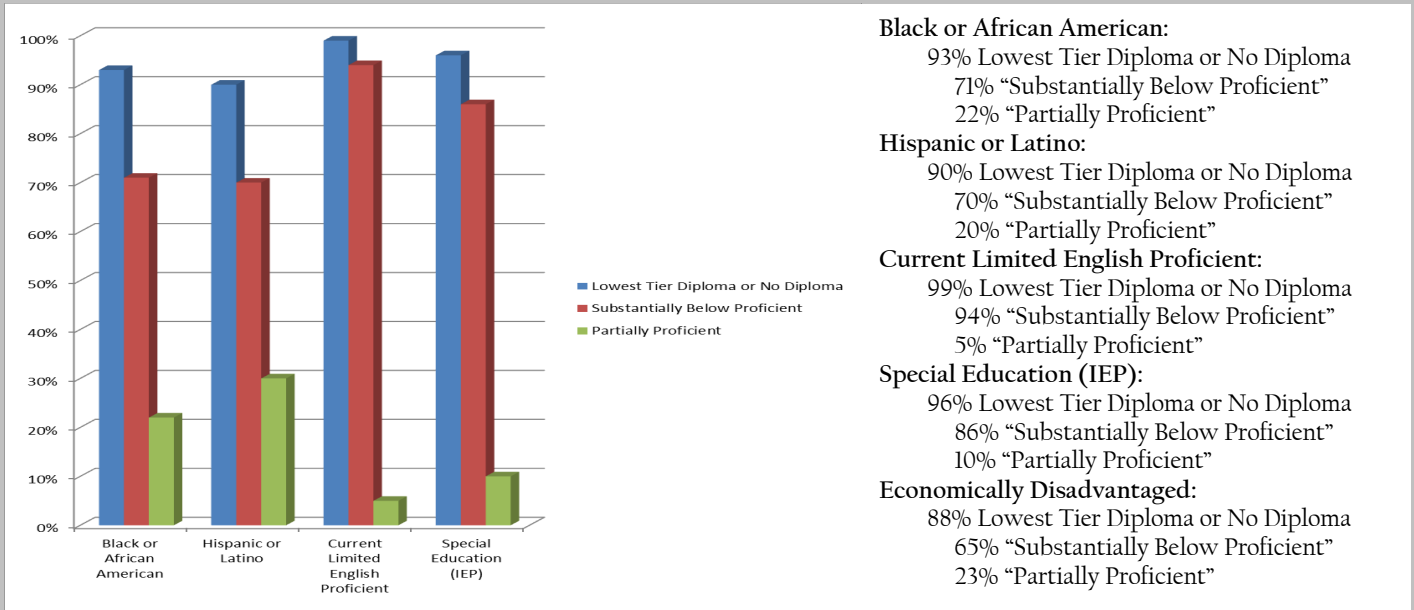
ACLU attorney Corbett said : “This questionnaire can easily serve to discourage qualified applicants from seeking employment with CVS. In today’s job market, the last thing people need is to worry about being screened out of a job because of answers to inappropriately invasive questions.” The parties may now seek a “right to sue” letter from the Commission and proceed to court or elect to have the Commission continue its investigation for a final determination.

### Interested in Hosting a House Party?

House parties offer an opportunity for ACLU members to socialize with each other, and give potential ACLU members an opportunity to learn more about the ACLU’s work. Last year, the Affiliate held successful events in Pawtucket, Woonsocket and Barrington. If you would like to learn more about hosting an ACLU house party in your community, please contact Meg Armstrong at the Affiliate office at 831-7171.

## POSTPONED HIGH SCHOOL DIPLOMA REQUIREMENTS LIKELY TO CREATE A “CASTE SYSTEM” AND STIGMATIZE 90% OF AT-RISK STUDENTS

(Continued from page 1). By overwhelming margins, students in various at-risk subgroups would either receive only the lowest tier of diploma or would be at risk of receiving no diploma (depending on how generously “growth” on NECAP retakes is determined). The chart below outlines the percentage of at-risk students who would either receive no diploma or the lowest-tiered diploma based on Grade 11 NECAP Scores in Math from 2009:



In short, the results show that implementation of the regulations would make the diploma system a state-sanctioned tool for discrimination and stigma. Interestingly, the makers of the NECAP test specifically caution that it should not be used as a high-stakes test. Instead, NECAP was designed to promote *school* accountability by making districts aware of subject areas where students were not showing progress and allowing them to adjust teaching activities accordingly.

Just as troubling is the fact that although the regulations require school districts to provide appropriate support services to students, a RI Department of Education report from only two months ago showed that of ten mandated support criteria, there was not one category where all school districts were in full compliance. In three of the categories, 10 or fewer school districts were deemed to have fully implemented the support criteria. Further, the proposed two-year delay fails to acknowledge that the data show that at-risk students are trailing behind on test scores as early as the sixth grade, when the NECAPs are first administered, making a bridging of that gap in two years virtually unattainable.



In putting the graduation requirements on hold, Gist stated that she took the results of three highly attended public hearings concerning the matter into consideration when coming to her decision. Hundreds of parents, students, concerned citizens and advocates, including the ACLU, showed up at the hearings to voice their concerns over high stakes testing and the proposed three-tiered diploma system.

The battle is far from over, however. The Commissioner plans to have revised regulations available for approval at the Board of Regents’ March meeting, and the ACLU and other groups expect that they will not address many of their core concerns. The ACLU will be continuing to monitor the Commissioner and Board of Regents’ actions on the issue.

## SETTLEMENT REACHED IN SPECIAL EDUCATION COMPLAINT AGAINST PAWTUCKET

In response to a civil rights complaint filed by Rhode Island Legal Services and the Rhode Island ACLU, the Pawtucket School District has entered into a consent agreement to revise its practices governing the evaluation of special education students.

Earlier this year, RILS and the ACLU filed a class-action administrative civil rights complaint challenging the school district's practice of routinely destroying documents related to the evaluations conducted to determine whether a child has a disability, and if so, the nature of the educational services needed by that child. The documents that were being destroyed included the notes and observations of the evaluators, the children's answer sheets, and other raw data on which the school's final written reports were based. As a result, parents never had the opportunity to review or raise questions about the documents that led to determinations regarding a child's special education needs and services.

The complaint, filed with the Office for Civil Rights of the U.S. Department of Education, argued that the policy was a violation of federal regulations and prevented parents from forming an independent judgment about the accuracy of the school evaluations.

The DOE's Office for Civil Rights investigated the matter and entered a resolution agreement designed to remedy the violations of the law alleged in the complaint. Under the settlement agreement, the school district has agreed to

develop a policy to retain all the evaluation documents it had previously been destroying; to notify parents of their right to review those documents; to offer to conduct new special education evaluations of students in those instances where the documents had been destroyed; and to provide training to all staff about the new policies. The agreement also sets a timeframe for meeting all of these requirements, which the Office of Civil Rights "will monitor until fully implemented."

RILS attorney Veronika Kot said: "Parents of children with disabilities are equal participants in decision making about the services their children may need to achieve good educational outcomes. They have the right to full and equal access to the information that forms the basis for such decisions. The resolution of this complaint is a welcome reaffirmation of these rights."

RI ACLU volunteer attorney Amy R. Tabor added: "This resolution sends a message to all school districts in Rhode Island that they cannot adopt document-destruction or document-withholding policies that deprive parents of their right to full access to their child's educational records."

In response to the issues that were raised by this complaint, both RILS and RI ACLU plan to ask the DOE to remind all school districts of their obligations under the federal law to maintain and allow parental access to these records.

## OPEN GOVERNMENT GROUPS DECRY STATE POLICE REGULATIONS LIMITING ACCESS TO PUBLIC RECORDS

Open government groups have expressed deep concern over regulations adopted by the Rhode Island Department of Public Safety (DPS) that would significantly restrict the information publicly available from state police agencies under DPS's jurisdiction, including the State Police (RISP).

The rules allow DPS to withhold from the public information from arrest reports, daily police logs and any other police agency documents and policies even if the information is not deemed exempt from public disclosure under the Access to Public Records Act (APRA). Specifically, the regulations authorize DPS to engage in a "balancing test" to be "applied on a case-by-case basis" as to whether to release information that is otherwise public under APRA; even information from arrest reports, which APRA explicitly provides "shall be public," may be censored.

The objections, from the RI ACLU, Common Cause Rhode Island and ACCESS/RI, also targeted the questionable process by which the regulations were adopted. The "balancing test" language was not even in the proposal submitted by DPS for the public hearing held in December. Only hours before the public hearing, DPS unveiled a revised draft of the regulations that for the first time included some of the "balancing test" language that appears in the final version.

Within the last few years, RISP has been the main opponent of legislation that would strengthen APRA, and the agency convinced former Governor Carcieri to veto such legislation in 2008. The open government groups are considering next steps to take in light of the significant setback to the public's right to know that the new regulations sanction.

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## VOLUNTEER OPPORTUNITY

The Affiliate is currently looking for people who are interested in learning about TV production to help with our cable access program. We are looking for people for all aspects of production starting in March. We film in the evenings on the fourth Tuesday of each month, and volunteers would need to first attend a training to familiarize themselves with the equipment. If this interests you, please call the office, 831-7171, for more details! Our next training session will be taking place the evening of March 3, 2011.

## TUNE INTO THE ACLU'S MONTHLY CABLE ACCESS SHOW

Every month the RI ACLU's cable access show "Rights of a Free People" features a discussion with experts on key civil liberties issues. Check it out!

### *Showtimes:*

Channel 13: Tuesdays 10:00pm & Fridays 3:30pm (Channel 32 on Verizon FIOS)  
Channel 18: (In Providence & N. Providence) Wednesdays 9:00pm (Channel 38 on Verizon FIOS)

