

## Education Justice Program

Advancing education equity and racial justice for all children

# KNOW YOUR RIGHTS: Controversial Topics in Public Schools

## What is the Role of Parents?

As long as teachers are following the curriculum set by their district, parents do not have a legal right to tell teachers what they can and cannot teach. In Missouri, parents do have a statutory right to **voice their opinions** on curriculum, and school districts should encourage this interaction.<sup>6</sup> Parents can show up at school board meetings to advocate for their preferred curriculum, although the school board will have the final say.

Sometimes, states create **“opt-out” statutes** that allow parents to decide whether to have their students avoid taking certain courses or learning about certain topics. In Missouri, for example, parents have an explicit right to remove their child “from any part of the district’s or school’s human sexuality instruction,” including instruction about HIV/AIDS and sexually transmitted diseases.<sup>7</sup> Other opt-out programs may vary by district. In other states, there are opt-out provisions covering instructional topics like animal dissection or physical education.<sup>8</sup>

## Federal Law

As spaces where the youngest and most impressionable members of society are educated, public schools have frequently been the site of fierce debates over social values, ideologies, and perspectives. This guide explores who has a say in determining curriculum in public schools and provides information for educators to navigate controversial situations in the classroom.

### Who Determines the Curriculum for Public Schools?

The Supreme Court has recognized that the right to determine curriculum for public schools rests with **individual states**, not the federal government, as long as no constitutional rights are violated.<sup>1</sup> In many states, including Missouri, state legislatures have given this power to set the curriculum to **local school boards**.<sup>2</sup> Local school boards have near-absolute control over curriculum in Missouri, and most districts have their own curriculum writing team as well as board policies and regulations about curriculum. Some even have board policies specifically about teaching controversial subjects.

### What Rights Do Teachers Have?

As employees of their school districts, public school teachers are legally bound to follow their district’s board policies, including those related to curriculum. If they do not, teachers risk being disciplined or fired by their employer district. The **First Amendment to the U.S. Constitution** does protect the free speech of a teacher if they are speaking as a **private citizen on a matter of public concern** – something that is of interest politically, socially, or otherwise to the community.<sup>3</sup> But when a teacher is speaking as **part of the duties of their job**, like when they are teaching in the classroom, they are not protected by the First Amendment. This is because public school teachers



## Things to Consider When Teaching a Controversial Topic

- Is your lesson connected to your district's approved curriculum?
- Have you checked your school board's policies and followed the procedures there?

(Some districts require teachers to discuss their approach to teaching obviously controversial topics with their principal, for example.)

- Are you using age-appropriate resources?
- As a last resort, have you considered alternative settings to present the controversial material, such as extracurricular or optional opportunities?

are public employees, so their speech while doing their job is not considered to be the speech of a private citizen.<sup>4</sup> Note: "speech" also includes classroom displays, decorations, and posters, so teachers should exercise caution so it does not appear that they are advocating for a particular religious or political view in the classroom.<sup>5</sup> Teachers can voice their opinions on curriculum to their school boards. For questions specific to employment law, teachers can consult with their school district's attorney and/or union.

## What about religious objections?

Under the First Amendment, everyone in the United States has the right to practice a religion or not practice a religion.<sup>9</sup> The Establishment Clause prohibits the government from encouraging any particular religion. Public schools cannot push specific religious ideas onto students, but they can teach students about all religions and beliefs. Public schools are not required to remove all materials that may offend someone's religious sensibility from their curriculum.<sup>10</sup> But forcing a student to participate in an activity that goes against their religious or nonreligious beliefs could violate the First Amendment.<sup>11</sup>

## What about discussions of race?

Questions about how to talk about race in public schools have come to public attention recently, with bills being proposed in numerous state legislatures attempting to ban instruction related to "critical race theory" or diversity and inclusion efforts more broadly. For example, Missouri's HB 1141 Amendment 23, proposed during the spring 2021 legislative session, would have prohibited school districts and their personnel from teaching, using, or promoting any curriculum implementing critical race theory.<sup>12</sup> While critical race theory is actually a specific academic concept more than 40 years old,<sup>13</sup> this bill uses the term in such a way that it could capture many schools' diversity, equity, and inclusion efforts and discussions about historical events and racial oppression.

The lawfulness of a particular bill can be challenged in court after it is passed. The First Amendment considerations highlighted above apply in this context, as do existing state statutes.<sup>14</sup> A challenge to a ban on equity instruction might also include claims under the due process clause of the Fifth Amendment if the language of the statute is vague enough to provide inadequate notice of the conduct it is trying to prohibit.<sup>15</sup>

<sup>1</sup> Epperson v. State of Arkansas, 393 U.S. 97 (1968).

<sup>2</sup> See RSMo § 160.516.

<sup>3</sup> Loeffelman v. Board of Educ. of Crystal City Sch. Dist., 134 S.W.3d 637 (Mo.App. E.D. 2004) (citing Connick v. Myers, 461 U.S. 138, 146 (1983) and Sparr v. Ward, 306 F.3d 589, 594 (8th Cir. 2002)). Even if a teacher's comments during the classroom unrelated to curriculum are on a matter of public concern, "a school board may still terminate the employment of a teacher if the interests of the school district in promoting the efficiency of the public services it performs through its employees outweigh the interests of the teacher in commenting on the matter." Id. at 646 (citing Pickering v. Bd. Of Educ. 391 U.S.563).

<sup>4</sup> Garcetti v. Ceballos, 547 U.S. 410, 419 (2006). Students may have additional rights under the First Amendment, like a right to receive information. See, e.g. Board of Educ. v. Pico, 457 U.S. 853 (1982).

<sup>5</sup> See Free Speech Rights of Public School Teachers in Washington State, ACLU Washington (Sept. 1, 2016), <https://www.aclu-wa.org/docs/free-speech-rights-public-school-teachers-washington-state>.

<sup>6</sup> RSMo § 167.700.

<sup>7</sup> RSMo § 170.015.5(2).

<sup>8</sup> Tommy Kevin Rogers, Parental Rights: Curriculum Opt-Outs in Public Schools. Doctor of Education (Educational Administration) at University of North Texas, August 2010, [https://digital.library.unt.edu/ark:/67531/metadc30507/m2/1/high\\_res\\_d/dissertation.pdf](https://digital.library.unt.edu/ark:/67531/metadc30507/m2/1/high_res_d/dissertation.pdf).

<sup>9</sup> U.S. Const. amend. I.

<sup>10</sup> Florey v. Sioux Falls Sch. Dist. 49-5, 619 F.2d 1311, 1318 (8th Cir. 1980).

<sup>11</sup> Id. at 1318-1319.

<sup>12</sup> The bill defined this very broadly as any curriculum that either "[i]dentifies people, entities, or institutions as inherently, immutably, or systemically sexist, racist, biased, privileged, or oppressed..." or "[e]mploys immutable, inherited, or objective characteristics such as race, income, appearance, family of origin, or sexual orientation in the service of" defining identity, classifying people into groups, perpetuating stereotypes, or assigning blame to categories of people. Mo. HB 1141, amend. 23, 2440H03.23H (2021).

<sup>13</sup> See Stephen Sawchuck, What Is Critical Race Theory and Why Is It Under Attack, EdWeek (May 18, 2021), <https://www.edweek.org/leadership/what-is-critical-race-theory-and-why-is-it-under-attack/2021/05>. The theory posits that racism is present not only in individual prejudices and beliefs but also in legal systems, policies, and sociopolitical structures.

<sup>14</sup> See, e.g., RSMo § 170.011(2) (mandating that American history courses at the elementary and secondary levels include "specific referrals to the details and events of the racial equality movement that have caused major changes in United States and Missouri laws and attitudes").

<sup>15</sup> See Santa Cruz Lesbian and Gay Community Center v. Trump, 2020 WL 7640460 (N.D. Cal. 2020) (holding that President Trump's Executive Order 13950 violated federal workers' constitutional due process rights by prohibiting the promotion of "divisive concepts" in workplace trainings).