



Education Department Resource

The Equal Access Act

What Does it Mean?

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I.What Does the EAA Prohibit?

Under certain circumstances, schools cannot deny equal access to students who wish to conduct a meeting if the basis for the denial is the content of the speech at such meetings. 20 U.S.C. ' 4071(a).

2) receives Federal financial assistance; and

3) has a "limited open forum."

20 U.S.C. ' 4071(a).

II.What Triggers the EAA?

Three characteristics of a school trigger the EAA:

1) if a school is a public secondary school;

III.What is a Limited Open Forum?

A school creates a "limited open forum" whenever it provides access to any (even just one) "noncurriculum related student group to meet on school premises during noninstructional time." 20 U.S.C. ' 4071(b).

IV. "Non-Curriculum Related"

Id. at 239.

**A. DEFINITION OF A
"NONCURRICULUM-RELATED
STUDENT GROUP"**

The Equal Access Act (EAA) does not define a noncurriculum-related student group. In order to fashion a definition, the Supreme Court in *Mergens* found that Congress intended a "broad reading of the Act" and a "low threshold for triggering the Act's requirements." *Board of Educ. of Westside Community School v. Mergens*, 496 U.S. 226, 239-240 (1990). Accordingly, the Court found as follows:

In light of this legislative purpose, we think that the term "noncurriculum related student group" is best interpreted broadly to mean any student group that does not directly relate to the body of courses offered by the school.

Id. at 239.

**B. THE FOUR FACTORS THAT DEFINE
THE PHRASE "DIRECTLY RELATE"**

The *Mergens* Court found four grounds on which a group would be directly related to a school's curriculum:

- 1) if the subject matter of the group is actually taught, or will soon be taught, in a regularly offered course;
- 2) if the subject matter of the group concerns the body of courses as a whole;
- 3) if participation in the group is required for a particular course; or
- 4) if participation in the group results in academic credit.

**C. EVALUATING UNDER THE FOUR
FACTORS**

The *Mergens* Court reasoned that the connection to the curriculum must be strong, stating a "direct relation" to the curriculum:

- 1) does not mean "anything remotely related to abstract educational goals;"
- 2) can not mean that schools "can evade the Act by strategically describing existing student groups," rendering the Act meaningless; and
- 3) does not depend on what a school says, but rather on what a school actually does.

Id. at 244. At another point the Court reaffirmed that its definition of noncurriculum-related clubs "looks to a school's actual practice rather than its stated policy" Id. at 246.

**D. CURRICULUM-RELATED CLUBS THAT
HAVE NOT TRIGGERED THE EAA**

Whether or not a club is curriculum-related depends on each individual case, because the subject matter of a club in one school may differ from the subject matter of a club in another school. The same would be true for courses. For that reason, the lists of clubs here should not be taken as checklists that apply in all cases. However, by way of example, the *Mergens* Court observed that the first three of the following types of clubs would likely be curriculum-related. In addition, in a federal district court in Washington State, the parties agreed without explanation that the fourth type of club, vocational clubs, were curriculum-related.

1. French Club

The Mergens Court found that a French club "would directly relate to the curriculum if a school taught French in a regularly offered course or planned to teach the subject in the near future." Mergens, 496 U.S. at 240.

(9th Cir. 1993), cert. denied 114 S.Ct. 72 (1993), appealed 21 F.3d 1113 (9th Cir. 1994), remanded No. CV-87-1294-WTM, 1994 WL 555397 (W.D. Wash., Sept. 15, 1994).

2. Student Government

The Mergens Court found that student government "would generally relate directly to the curriculum to the extent that it addresses concerns, solicits opinions, and formulates proposals pertaining to the body of courses offered by the school." Id.

F. NONCURRICULUM-RELATED CLUBS THAT HAVE TRIGGERED THE EAA

Courts have determined the following clubs to be noncurriculum-related clubs.

3. School Band

The Mergens Court found that if "participation in a school's band or orchestra were required for the band or orchestra classes, or resulted in academic credit, then those groups would also directly relate to the curriculum." Id.

1. Subsurfers Club

In Mergens, the school described the "Subsurfers Club" as follows:

4. Vocational Clubs

In an EAA case in the United States District Court of the Western District of Washington, the parties stipulated, with no explanation provided in the court's opinion, that the following four clubs were curriculum-related:

a. Distributive Education Club of America (DECA);

b. Diversified Occupation Club of America (DOCA);

c. Vocational Industrial Club of America (VICA); and

d. Computer Club (LIMITS). Garnett v. Renton School District, 772 F. Supp. 531 (W.D. Wash. 1991), rev'd on other grounds 987 F.2d 641

SUBSURFERS -- Is a club designed for students interested in learning about skin and scuba diving and other practical applications of that sport. Opportunities in the classroom and in our pool are made available for students involved in this activity. Membership is solicited in the fall and spring of each year.

Mergens, 496 U.S. at 258. The school contended that the club was curriculum-related because it furthers "one of the essential goals of the Physical Education Department -- enabling students to develop lifelong recreational interests." Id. at 244. Reviewing the club under the four factors it identified for a direct relation to the curriculum, the Court held that the Subsurfers Club was a noncurriculum-related club because:

1) the specific subject matter of the Subsurfers club, scuba diving, was "not taught in any regularly offered course at the school," even though overlap was evident with the swimming course;

2) the Subsurfers club did not "directly relate to the curriculum as a whole in the same way that a student government or similar group might," despite the school's curricular

goal for promoting "lifelong recreational interests";

3) participation in the Subsurfers club "is not required by any course at the school"; and

4) participation in the Subsurfers club "does not result in extra academic credit."

Id. at 245.

2. Chess Club

The Mergens Court made the same findings for a Chess club as it did for a Subsurfers club, adding that it made no difference that math teachers at the school encouraged their students to play chess. Id.

3. Peer Advocates

In the Mergens case, the Peer Advocates club was a "service group that works with special education classes." Mergens, 496 U.S. at 246. The Court found the club to be noncurriculum-related for the same reasons as those set forth above for the Subsurfers club. Id.

4. Key Club

In the Pope case, the Third Circuit Court of Appeals encountered a school seeking to evade the EAA, in part by claiming that its "Key Club" was a curriculum-related club. *Pope v. East Brunswick Bd. of Education*, 12 F.3d 1244 (3d Cir. 1993). The Key Club was a student service organization that sought to develop civic responsibility and do fund-raising to donate funds to local charities. Id. at 1251-1252. The Key Club put the Mergens criteria to the test, in particular because one teacher in the school required participation in the club as part of a course.

In Pope, the school argued three of the four factors for a direct relation to the curriculum, beginning with the argument that the club's subject matter "concerns the body of courses as a whole." Id. at 1252.

However, the Court looked to the Mergens criteria and reasoned as follows:

In discussing groups whose subject matter "concerns the body of courses as a whole," the Mergens Court offered as its sole example a student government group, on the rationale that it might involve itself in proposals relating to current and future course offerings. The Court did not suggest that student government would be curriculum-related because its activities related in some way to subjects taught across a high school curriculum; indeed, such a statement would be at odds with its earlier statement that the group-curriculum relationship must be more than "tangential or attenuated." We doubt, in fact, whether this principle in Mergens extends much further than the student government organization mentioned by the Court.

Id. (citations omitted). Therefore, according to the Third Circuit a club is noncurriculum-related even though it may relate to the subject matter of many courses.

The school also asserted a direct relation to the curriculum because a teacher required participation in the Key Club for a particular course. Id. at 1252. "Significantly, the Mergens Court did not indicate that participation in one or more of the group's activities would be sufficient to make the group curriculum related, but instead focused on participation in the group." Id. Were it to be otherwise, schools could easily evade that Act, and "[s]uch a result would not be consistent with the low threshold for triggering the Act and would indeed render it 'merely hortatory.'" Id. (citation omitted). Therefore, according to the Third Circuit, a club is noncurriculum-related even though a teacher requires the participation of students in some of the club's activities.

Lastly, the school asserted that the Key Club's subject matter is taught in the Humanities class, which has a unit devoted to homelessness and poverty. Id. at 1253. The Court reasoned as follows:

Here, the nexus between the service club and the curriculum is stronger than it was in *Mergens*. . . . [because] it is tied directly to a specific instructional unit of a specific course. . . . *Mergens* did not hold that the activities of a student organization need only relate in some marginal way to something taught in class. Rather, the Court said that the subject matter of the student group must be taught in a class. . . . The subject matter of the Key Club is not poverty and homelessness, but community-related service and fund-raising activities. The history course and the Key Club accordingly have different subject matter.

Id. at 1253. The Court found the Key Club to be wanting in much the same way as a Christian religious club would be wanting despite the prevalence of references to the Bible throughout great literature and history. *Id.* Therefore, according to the Third Circuit, a club is noncurriculum-related even if there is overlap in subject matter between the club and a course, as long as the overall subject matter is not the same.

"The burden of showing that a group is directly related to the curriculum rests on the school district." *Id.* at 1252, citing *Mergens*, 496 U.S. at 240. The school "attempted to restructure its existing student groups, striving mightily not to trigger the Act. We conclude, however, that it has indeed triggered it." *Id.* at 1254.

5. Other Clubs

By so-ordered stipulation of the parties, the United States District Court of the Western District of Washington found the following clubs to be noncurriculum-related clubs: Pep Club, Chess Club, Girl's Club, Ski club, Bowling club, SKY (Special Kiwanis Youth) Club, International Club, Varsity Club, Minority Student Union, Dance Squad, and Future Business Leaders of America. *Garnett v. Renton School District*, 1994 WL 555397, *2-3, (W.D.Wash.).

In an earlier opinion, which was reversed on grounds other than the issue of which clubs were noncurriculum-related, the Court provided reasoning for its findings as to those clubs in dispute. *Garnett v. Renton School District*, 772 F. Supp. 531 (W.D. Wash. 1991), rev'd on other grounds 987 F.2d 641 (9th Cir. 1993), cert. denied 114 S.Ct. 72 (1993), appealed 21 F.3d 1113 (9th Cir. 1994), remanded No. CV-87-1294-WTM, 1994 WL 555397 (W.D. Wash., Sept. 15, 1994). At this earlier stage of the litigation, the parties had agreed that the following four clubs were noncurriculum-related:

- a. the Pep Club;
- b. the Chess Club;
- c. the Girls' Club; and
- d. the Ski Club.

Id. at 533 (as reviewed above, the parties also had agreed that the following four clubs were curriculum-related: Distributive Education Club of America (DECA), Diversified Occupation Club of America (DOCA), Vocational Industrial Club of America (VICA), and Computer Club (LIMITS)).

As to those clubs in dispute in the earlier phase of the litigation, the Court found that the *Mergens* criteria were not met for any of the clubs, as follows:

- e. the Bowling Club

The Bowling Club was noncurriculum-related even though members participated in tournaments with other public high schools. *Id.* at 533.

- f. the SKY Club

The SKY (Special Kiwanis Youth) Club was noncurriculum-related even though it "serves to enrich and broaden students'

education" and a "Certificate of Achievement" issues to students for completion of the activities. Id. at 534.

g. the International Club

The International Club was noncurriculum-related even though "all the foreign language teachers participate in the Club and urge their students to participate also," and "a goal shared by the Club and the study of a foreign language is cultural understanding." Id.

h. the Varsity Club

The Court found that the Varsity Club was noncurriculum-related because it was a 'service' group, with no course requiring participation and no academic credit. Id.

i. the Minority Students Union

The Minority Students Union was noncurriculum-related even though it discusses "SAT testing information" and "offers the student body a black history program" and "enhances some things taught in the social studies program." Id.

j. the Dance Squad

The Dance Squad was noncurriculum-related even though students may "petition to substitute Dance Squad participation for one of their physical education credits." Id. The Court reasoned as follows:

Dance Squad's curriculum relationship as presently constituted is too tenuous to meet the Mergens test. Moreover, allowing for petitions to receive academic credit for a student group could provide a convenient pretext to avoid triggering the Equal Access Act. The Mergens criteria require a consideration of substance and not just appearance.

Id.

k. the Future Business Leaders of America

The Future Business Leaders of America (FBLA) was noncurriculum-related even though "District and State guidelines require [the school] to offer FBLA or a similar program to students enrolled in business classes." Id.

V. Other Statutory Construction of the EAA

The courts have also addressed the meaning of many other terms in the EAA. The interpretation of these terms may have significance for any individual case. Below are very brief references to each of the terms that have been adjudicated by the courts.

A. "STUDENT-INITIATED"

In the Pope case, the Third Circuit Court of Appeals encountered a school seeking to avoid the EAA by adopting a policy that it would sponsor all clubs, meaning that there would be no "student-initiated" clubs. Pope, 12 F.3d 1244. However, the Third Circuit found that the requirement of "student-initiation" is not in that part of the statute that sets forth what causes the Act to apply to a school that is reviewing applications for recognition of a club. Instead, the requirement of 'student-initiation' is in that part of the statute that sets forth the conditions for a school's compliance with the Act, once it is clear that the Act applies to the school. Id. at 1249. The Court stated as follows:

[A] limitation to student-initiated groups defeats the broader purpose of the statute. A school with many faculty-initiated student groups can largely preempt demand for student-initiated groups. The result could be an open forum for mainstream interests and views, all sponsored by the faculty, with minority views excluded because of faculty hostility or indifference.

Id. at 1250-1251, quoting Laycock, *Equal Access and Moments of Silence: The Equal Status of Religious Speech by Private*

Speakers, 81 N.W.L.Rev. 1, 39-40 (1986). The Court then stated: 'We therefore conclude that student initiation of clubs and other groups is not a requirement for triggering the Equal Access Act.' Id. at 1251.

B. "NONINSTRUCTIONAL TIME"

The Ninth Circuit Court of Appeals has held that noninstructional time may include lunch breaks under certain circumstances. If that is the case, a school that provides access to one noncurriculum-related group at lunchtime must provide access to all such groups. *Enciceros v. Board of Trustees of the San Diego Unified Sch. Dist.*, 66 F.3d 1535 (9th Cir. 1995). The Court based its holding on the *Mergens* reasoning with regard to the broad legislative purpose and the low threshold for triggering the EAA. Id. at 1538.

C. "SCHOOL EMPLOYEE"

"Plaintiffs' suggestion that [a group's adult leader] ceases to be a school employee within the meaning of the Act because her role as leader of the Gospel Choir is assumed after school hours, and is outside the scope of her employment as a school secretary, defies logic and flies in the face of the manifest purpose of the Equal Access Act." *Sease v. School Dist. of Philadelphia*, 811 F. Supp. 183, 192 (E.D. Pa. 1993).

D. "MEETING"

One court has found that the EAA does not apply to students' one-time attempt to distribute religious materials to other students, because such an activity does not constitute a "meeting" within the scope of the EAA. *Clark v. Dallas Independent Sch. Dist.*, 806 F.Supp. 116, 120 (N.D. Texas 1992). *Accord Thompson v. Waynesboro Area Sch. Dist.*, 673 F. Supp. 1379, 1383-84 (M.D. Pa. 1987).

E. "NONSCHOOL PERSONS"

The involvement of nonschool persons in a student-initiated activity is protected by the EAA as long as such involvement is encompassed by the school's criteria for a limited open forum and as long as the nonschool persons do not "direct, conduct, control or regularly attend" such activities in violation of the express language of the EAA. *Student Coalition For Peace v. Lower Merion School*, 776 F.2d 431, 442 (3d Cir. 1985).

F. "EQUAL ACCESS"

The Second Circuit Court of Appeals held that a school violated the EAA by denying a religious student group the right to limit its leadership to those of a particular faith. *Hsu v. Roslyn Union Free Sch. Dist.*, 1996 WL 272859, *15 (2d Cir.).

VI. Other General Topics

Other topics may come up in discussions about the EAA. Below are some of the those topics, with some material that may be helpful to discussions. A. THIS IS ABOUT STUDENT SPEECH THAT HAPPENS TO BE ON SCHOOL PREMISES, NOT ABOUT SPEECH ASSOCIATED WITH THE SCHOOL

In an analogous First Amendment context involving a school's denial of access to a student group, one court distinguished the long line of cases affirming schools' extraordinary power to restrict speech that may be perceived as school-sponsored, with a quotation of the *Hazelwood* case, the Supreme Court's leading case in the line:

The question whether the First Amendment requires a school to tolerate particular student speech -- the question that we addressed in *Tinker* -- is different from the question of whether the First Amendment requires a school affirmatively to promote particular student speech. The former question addressed educators' ability to silence a student's personal expression that happens to occur on school premises. The

latter question concerns educators' authority over school-sponsored publications, theatrical productions, and other expressive activities that students, parents, and members of the public might reasonably perceive to bear the imprimatur of the school.

Clark v. Dallas Independent Sch. Dist., 806 F. Supp. 116, 120 (N.D. Texas 1992), quoting Hazelwood Sch. Dist. v. Kuhlmeier, 848 U.S. 260, 270-271 1988). "This case involves suppression of a student's personal expression that happens to occur on school premises." Clark, 806 F. Supp. at 120.

B. THE SCHOOLS' MISSION SUPPORTS RECOGNITION OF CLUBS

The Clark court went on to quote helpful language on the relation of free speech to schools' core mission.

Most importantly, the mission of public education is preparation for citizenship. High school students, [who at virtually every high school] include persons of voting age, must develop the ability to understand and comment on the society in which they live and to develop their own sets of values and beliefs. A school policy completely preventing students from engaging other students in open discourse on issues they deem important cripples them as contributing citizens. Such restrictions do not advance any legitimate governmental interest. On the contrary, such inhibitions on individual development defeat the very purpose of public education in secondary schools.

Id. at 121, quoting Rivera v. East Otero Sch. Dist. R-1, 721 F. Supp. 1189, 1194 (D. Colo. 1989).

C. THE "HECKLER'S VETO" SHOULD NOT JUSTIFY KILLING CLUBS

"If school officials were permitted to prohibit expression to which other students objected, absent any further justification, the

officials would have a license to prohibit virtually every type of expression." Clark v. Dallas Independent Sch. Dist., 806 F. Supp. 116, 120 (N.D. Texas 1992) (First Amendment challenge to infringement of high school students' speech).

On the topic of the "heckler's veto," it is helpful to include here an excerpt from our memorandum on the legislative history of the EAA:

Senator Denton provided helpful comments, which are particularly significant given that he was a co-sponsor of the Equal Access Act. To support his point that all other groups already have the First Amendment protection they need to meet in schools, and that therefore the Equal Access bill does not create any threat of extending protections to new groups other than religious groups, Denton quotes an ACLU publication:

Can students be prohibited from expressing their views if those who hold opposing views become angry and boisterous? No . . . Can school officials keep students from forming an after-school club having a dissident point of view? No . . . Can the school prevent students from inviting a speaker to their club meeting because he or she is too controversial? No . . .

Following enactment of the Equal Access Act, the two sponsors in the House, Reps. Bonker and Goodling, published "Equal Access Guidelines" in the Congressional Record. Cong. Rec. 32315-18 (October 11, 1984). In pertinent part, the guidelines are as follows:

(20) Q. Do school authorities retain disciplinary control? A. Yes. The Act emphasizes the "authority of the school, its agents or employees, to maintain order and discipline on school premises, to protect the well-being of students and faculty, and to assure that attendance of students at meetings is voluntary." Sec. 802(f). Furthermore, the school must provide that "the meeting does not materially and

substantially interfere with the orderly conduct of educational activities within the school." Sec.802(c)(4). These two provisions do not authorize a school to prohibit certain student groups from meeting because of administrative inconvenience or speculative harm. For example, a group cannot be barred at a particular school because a similar group at a different school has generated difficulties.

(21) Q. What about groups which wish to advocate or discuss changes in existing law? A. Students who wish to discuss controversial social and legal issues such as the rights of the unborn, drinking age, the draft and alternative lifestyles may not be barred on the basis of the content of their speech. However, the school must not sanction meetings in which unlawful conduct occurs. Sec.802(d)(5).

(22) Q. What if some students object to other students meeting? A. The rights of the lawful, orderly student group to meet are not dependent upon the fact that other students may object to the ideas expressed. All students enjoy free speech constitutional guarantees. It is the school's responsibility to maintain discipline in order that all student groups be afforded an equal opportunity to meet peacefully without harassment. The school must not allow a "hecklers' veto."

(23) Q. What about so-called "hate" groups? A. Student groups which are unlawful, Sec.802(d)(5), or which materially and substantially interfere with the orderly conduct of educational activities, Sec.802(c)(4), can be excluded. However, a student group cannot be denied equal access because its ideas are unpopular. Freedom of speech includes ideas the majority may find repugnant.

D.THE SCHOOLS STILL HAVE THE AUTHORITY THEY NEED

In *Mergens*, the Supreme Court found that the EAA did limit schools' authority to discriminate against students, but stated

that ". . . we think that schools and school districts nevertheless retain a significant measure of authority over the type of officially recognized activities in which their students participate." *Mergens*, 496 U.S. at 240. The Court set forth several grounds for the schools' retention of significant authority:

1) the Act does not abridge the schools' broad authority to "determine appropriate subjects of instruction," in fact, "[t]o the extent that a school chooses to structure its course offerings and existing student groups to avoid the Act's obligations, that result is not prohibited by the Act";

2) the Act expressly preserves the schools' authority to prohibit meetings that would materially and substantially interfere with the orderly conduct of educational activities within the school;

3) the Act expressly preserves the schools' authority to "maintain order and discipline on school premises, to protect the well-being of students and faculty, and to assure that attendance of students at meetings is voluntary";

4) the Act only applies to schools that accept federal assistance, and "Congress clearly sought to prohibit schools from discriminating on the basis of the content of a student group's speech, and that obligation is the price a federally funded school must pay if it open its facilities to noncurriculum-related student groups."

Mergens, 496 U.S. at 241.

Appendix: The Equal Access Act

Sec. 4071. Denial of equal access prohibited

(a) Restriction of limited open forum on basis of religious, political, philosophical, or other speech content prohibited

It shall be unlawful for any public secondary school which receives Federal

financial assistance and which has a limited open forum to deny equal access or a fair opportunity to, or discriminate against, any students who wish to conduct a meeting within that limited open forum on the basis of the religious, political, philosophical, or other content of the speech at such meetings.

(b) "Limited open forum" defined

A public secondary school has a limited open forum whenever such school grants an offering to or opportunity for one or more noncurriculum related student groups to meet on school premises during noninstructional time.

(c) Fair opportunity criteria

Schools shall be deemed to offer a fair opportunity to students who wish to conduct a meeting within its limited open forum if such school uniformly provides that--

- (1) the meeting is voluntary and student-initiated;
- (2) there is no sponsorship of the meeting by the school, the government, or its agents or employees;
- (3) employees or agents of the school or government are present at religious meetings only in a nonparticipatory capacity;
- (4) the meeting does not materially and substantially interfere with the orderly conduct of educational activities within the school; and
- (5) nonschool persons may not direct, conduct, control, or regularly attend activities of student groups.

(d) Construction of subchapter with respect to certain rights

Nothing in this subchapter shall be construed to authorize the United States or any State or political subdivision thereof--

- (1) to influence the form or content of any prayer or other religious activity;
- (2) to require any person to participate in prayer or other religious activity;
- (3) to expend public funds beyond the incidental cost of providing the space for student-initiated meetings;
- (4) to compel any school agent or employee to attend a school meeting if the content of the speech at the meeting is contrary to the beliefs of the agent or employee;
- (5) to sanction meetings that are otherwise unlawful;
- (6) to limit the rights of groups of students which are not of a specified numerical size; or
- (7) to abridge the constitutional rights of any person.

(e) Federal financial assistance to schools unaffected

Notwithstanding the availability of any other remedy under the Constitution or the laws of the United States, nothing in this subchapter shall be construed to authorize the United States to deny or withhold Federal financial assistance to any school.

(f) Authority of schools with respect to order, discipline, well-being, and attendance concerns

Nothing in this subchapter shall be construed to limit the authority of the school, its agents or employees, to maintain order and discipline on school premises, to protect the well-being of students and faculty, and to assure that attendance of students at meetings is voluntary.

4072. Definitions

As used in this subchapter--

(1) the term 'secondary school' means a public school which provides secondary education as determined by State law.

(2) The term 'sponsorship' includes the act of promoting, leading, or participating in a meeting. The assignment of a teacher, administrator, or other school employee to a meeting for custodial purposes does not constitute sponsorship of the meeting.

(3) The term 'meeting' includes those activities of student groups which are permitted under a school's limited open forum and are not directly related to the school curriculum.

(4) The term 'noninstructional time' means time set aside by the school before actual classroom instruction begins or after actual classroom instruction ends.

4073. Severability

If any provision of this subchapter or the application thereof to any person or circumstances is judicially determined to be invalid, the provisions of the remainder of the subchapter and the application to other persons or circumstances shall not be affected thereby.

4074. Construction

The provisions of this subchapter shall supersede all other provisions of Federal law that are inconsistent with the provisions of this subchapter.