
Applicability of the ADA to “Ticket To Work” Employment Networks

Peter Blanck, Ph.D., J.D.*, Lisa Clay, J.D.,
James Schmeling, J.D., Michael Morris, J.D.
and Heather Ritchie, M.S.W.

This article examines the applicability of the antidiscrimination provisions of the Americans with Disabilities Act (ADA) of 1990 to The Ticket to Work and Work Incentives Improvement Act (TWWIIA) passed in 1999. Among other policy changes, under the Ticket to Work program, eligible recipients of disability insurance (SSDI) and supplemental income (SSI) receive a voucher or “ticket” to obtain services from qualified employment networks (ENs). ENs provide employment services and supports to designated beneficiaries and must meet certain qualification requirements. The ADA is applicable to ENs in several ways: primarily, in the EN’s responsibility to provide appropriate access and services to program participants. This article discusses application of the ADA to the Ticket Program as ENs begin to serve program beneficiaries. Copyright © 2002 John Wiley & Sons, Ltd.

*Correspondence to: Peter Blanck, Ph.D., J.D., University of Iowa College of Law, 431 Boyd Law Building, Iowa City, IA 52242-1113, U.S.A. E-mail: peter-blanck@uiowa.edu

Dr. Blanck is Charles M. and Marion Kierscht Professor of Law, Professor of Public Health and Psychology, and Director of the Law, Health Policy, and Disability Center (LHPDC). Lisa Clay, J.D., is a Research Associate at the LHPDC. James Schmeling, J.D., is an Associate Director of the LHPDC. Michael Morris, J.D., is an Associate Director of the LHPDC. Heather Ritchie, M.S.W., is a Research Associate of the LHPDC.

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INTRODUCTION

Disability policy in the U.S. has shifted from a model of charity and compensation to medical oversight, and now to civil rights.¹ Contemporary employment policies focus on increasing the labor force participation of qualified persons with disabilities and reducing dependence on governmental entitlement programs. Federal initiatives such as the Workforce Investment Act of 1998 (WIA),² the Ticket to Work and Work Incentives Improvement Act of 1999 (TWWIIA),³ and the Americans with Disabilities Act of 1990 (ADA)⁴ illustrate public support for enhancing employment opportunities for working age adults with disabilities and preventing discrimination in the workplace.

The unprecedented changes in federal policy recognize “disability as a natural part of life experience,” not defined in a medical context but explained by social and environmental barriers and facilitators.⁵ The prior paradigm of disability viewed people with disabilities as “defective and in need of fixing.”⁶ The new paradigm embodies a “disability policy framework,”⁷ articulated in the ADA, setting out the goals of “equality of opportunity, individualization, full participation, independent living and economic self sufficiency.”⁸ The ADA and subsequent Congressional actions have raised expectations about the abilities of persons with disabilities to learn, work, be productive, and be included in the mainstream of American life.⁹

This article examines the intersection of two cornerstones of the disability policy framework: specifically, the applicability of the nondiscrimination provisions of the ADA to TWWIIA’s Ticket to Work Program. The ADA established national goals for preventing discrimination and assuring equality of opportunity for individuals with disabilities.¹⁰ The complementary but different policy purposes of TWWIIA, as administered by the Social Security Administration (SSA) and the U.S. Department of Health and Human Services, are to provide benefits to eligible participants

¹See generally Peter Blanck, *Civil War Pensions and Disability*, 62 OHIO ST. L.J. 109, 112–116 (2001); Peter Blanck & Chen Song, *Civil War Pension Attorneys and Disability Politics*, 35 U. MICH. J. L. REF. 137–217 (2002); Peter Blanck & Michael Millender, *Before Disability Civil Rights: Civil War Pensions and the Politics of Disability in America*, 52 ALA. L. REV. 1, 1–50 (2000).

²Workforce Investment Act (1998), Pub. L. 105–220 (codified as 29 U.S.C. §794(d) (2000)).

³Ticket to Work and Work Incentives Improvement Act (1999), Public Law 106–170.

⁴Pub. L. 101–336, 104 Stat. 327 (1990).

⁵Correction Notice for the final long-range plan for fiscal years 1999–2003, 64 Fed. Reg. 68608 (Dec. 7, 1999) [hereinafter NIDRR Long Range Plan]. See also Peter Blanck & Helen Schartz, *Towards Researching a National Employment Policy for Persons with Disabilities*, in SWITZER MONOGRAPH SERIES (L.R. McConnell, ed. July 2001); Harlan Hahn, *Disability Policy and the Problem of Discrimination*, 28 AM. BEHAV. SCI. 293, 294 (1985).

⁶Blanck, *supra* note 1, at 200–203; Blanck & Millender, *supra* note 1, at 2–3.

⁷See Robert Silverstein, *Emerging Disability Policy Framework: A Guidepost for Analyzing Public Policy*, 85 IOWA L. REV. 1691 (2000).

⁸NIDRR Long Range Plan, *supra* note 5, at 64 Fed. Reg. 68578.

⁹*Id.*

¹⁰See Testimony of Peter Blanck, before the U.S. House of Representatives, Subcommittee on Social Security, Testimony on the definition of disability under Social Security and the ADA (July 11, 2002) (on file with author). The Supreme Court has contrasted the goals of the ADA and SSA programs in *Cleveland v. Policy Mgmt. Sys. Corp.*, 526 U.S. 795 (1999) (finding the differences in the policies reflect that the SSA receives millions of claims for disability benefits each year, and that the determination of ADA reasonable accommodation turns on workplace-specific matters).

with a disability who want to and are capable of working or performing substantial gainful activity (SGA).¹¹ TWWIIA seeks to accomplish this objective by allowing working individuals with disabilities the option of maintaining Medicaid and Medicare health insurance coverage and creating greater choice in employment services.

Title I of TWWIIA establishes a national program entitled the Ticket to Work and Self-Sufficiency Program. This voluntary program for SSI and SSDI beneficiaries is being implemented nationally over a three-year period. Under the Ticket Program, recipients of disability insurance receive a voucher or “ticket” to purchase services from qualified employment networks (ENs). During the first year of the program in 2002, tickets are to be issued to 2.4 million beneficiaries residing in the 13 states initially implementing the program.¹² ENs provide employment, vocational rehabilitation services, and other supports to designated beneficiaries. An EN must meet qualification requirements set out by the SSA.

The ADA is applicable to ENs in several ways, primarily in that an EN is to provide adequate and appropriate access and services to program participants. The applicability of the ADA to the Ticket Program is emerging as ENs begin to serve program beneficiaries. The first part of this article provides an overview of applicable provisions of the ADA and the next part reviews the Ticket Program. The article then examines the applicability of the ADA to the Ticket Program, in terms of implications for policy and future research questions.

ADA OVERVIEW

The ADA is the first comprehensive federal law designed to prevent irrational discrimination against persons with disabilities.¹³ One aspect of the ADA is to improve the employment prospects and lives of qualified persons with disabilities.¹⁴ The ADA establishes rights, obligations, and protections for individuals with disabilities in a range of areas.¹⁵ ADA Title I addresses employment discrimination on the basis of disability. Title II governs discrimination in the provision of programs and services by state and local governments. Title III prohibits discrimination in accommodations and services offered by private entities that affect commerce.¹⁶

In a line of cases, the U.S. Supreme Court has interpreted the ADA in regard to the Act’s definition of disability, responsibility of state and local entities toward persons with disabilities in their services and programs, and the scope of the Act’s

¹¹See 20 C.F.R. §404.1505; 20 C.F.R. §416.905.

¹²TICKET TO WORK AND WORK INCENTIVES ADVISORY PANEL [hereinafter PANEL REPORT]. SOCIAL SECURITY ADMINISTRATION. ANNUAL REPORT TO THE PRESIDENT AND THE CONGRESS: YEAR TWO at 15 (2002).

¹³Blanck & Scharz, *supra* note 5, at 1–5.

¹⁴42 U.S.C. §12101 *et seq.* (2000).

¹⁵Disability advocates describe the ADA as an inclusive statute: “[The ADA] does not say ‘unless you happen to have a severe disability or unless you happen to be expensive’; those are the goals for everyone.” Ticket to Work and Work Incentives Advisory Panel Testimony (May 3, 2002) (statement of Andrew Imparto, President of the American Association of People with Disabilities) [hereinafter Panel Testimony] (transcript on file with the author).

¹⁶An illustrative list of private entities considered public accommodations appears in the statute. 42 U.S.C. §12181 (7) (1994).

public accommodation provisions.¹⁷ These cases identify the scope of the ADA's provisions and responsibilities for entities covered by the law.

Disability under the ADA is defined as a "physical or mental impairment that substantially limits one or more of the major life activities of such individual."¹⁸ A person also may be "disabled" if he has a "record of such impairment"¹⁹ or is "regarded as having such an impairment."²⁰ The first case that the Supreme Court decided under the ADA, *Bragdon v. Abbott*,²¹ involved a claim under Title III against a dentist who refused to perform a standard in-office procedure on a patient with HIV. In *Bragdon*, the Court endorsed a broad reading of the ADA definition of disability as well as of its public accommodation antidiscrimination provisions.

In 1999, the Court further refined the ADA definition of disability in a trilogy of Title I employment cases concluding that an individual's "mitigating measures" (e.g. the use of eye glasses and blood pressure medication) must be considered in the determination of an ADA disability.²² The Supreme Court concluded that although the ADA definition of disability requires an individualized inquiry, a court must consider the effect of corrective devices or medications. In cases where an individual effectively mitigates the impact of her impairment, she is not substantially limited in a major life activity and therefore not covered by the law.

In 1999, the Court also reviewed the responsibility of state and local public services under ADA Title II. Title II provides that a qualified individual with a disability shall not be denied equal access to the programs and services of a covered public entity. In *Olmstead v. L.C.*, Title II's antidiscrimination provisions require the placement of qualified persons with mental disabilities residing in state institutions into community settings.²³

The *Olmstead* Court endorsed the U.S. Department of Justice's regulations interpreting the broad reach of Title II, which reads

A public entity shall administer services, programs, and activities in the most integrated setting appropriate to the needs of qualified individuals with disabilities.²⁴

Olmstead supports the ADA's goal to prevent unjustified exclusion of persons with disabilities from integrated programs and services provided by Title II entities.²⁵

¹⁷Q1 For a review, see Peter Blanck & James Schmeling, *Americans with Disabilities Act: Recent and Pending U.S. Supreme Court Decisions and Implications for Spine Professionals*, 27(4) SPINE 439–443 (2002). Others cases have involved the issue of what types of entity are covered under the statute. See, e.g., Nathan Odem & Peter Blanck, *Physician–Shareholder Practice Groups and ADA Compliance*, SPINE (2003, forthcoming).

¹⁸42 U.S.C. §12102(2)(A) (1994).

¹⁹42 U.S.C. §12102(2)(B) (1994).

²⁰*Id.*

²¹524 U.S. 624 (1998). In defining disability for purposes of the law, the Court held that, even prior to its symptomatic phase, HIV is a covered disability because it substantially limits the plaintiff's major life activity of reproduction. *Id.* at 639.

²²*Sutton v. United Airlines*, 527 U.S. 471 (1999); *Murphy v. United Parcel Service, Inc.*, 527 U.S. 516 (1999); and *Albertson's, Inc v. Kirkingburg*, 527 U.S. 55 (1999).

²³*Olmstead v. L. C. exrel. Zimring*, 527 U.S. 581 (1999).

²⁴28 CFR §35.130(d) (1998).

²⁵See Michael L. Perlin, "What's Good is Bad, You'll Find out When You Reach the Top, You're on the Bottom": *Are the Americans with Disabilities Act (and Olmstead v. L.C.) Anything More Than "Idiot Wind?"*, 35 U. MICH. J. L. REF. 235, 251 (2001–2002) (reviewing the impact of *Olmstead*).

In 2001, the Court examined the scope of the ADA's Title III public accommodation requirements in *PGA Tour v. Martin*.²⁶ In *Martin*, the Court adopted a broad reading of Title III's antidiscrimination provisions. The PGA had refused to permit Casey Martin, a professional golfer with a disability, to use a golf cart in its tournaments. The Court found that Title III required that the PGA allow Martin this accommodation, as it did not fundamentally alter the nature of the golf tournament.

Despite these cases, there is no bright-line rule under the ADA on the rights and responsibilities of people with disabilities and entities covered by the law.²⁷ Moreover, although the ADA requires the removal of discriminatory barriers to employment, public services, and places of accommodation for qualified individuals with disabilities, significant obstacles to employment and inclusion exist in other federal and state programs.

Historically, barriers to the independence and full inclusion of persons with disabilities have included economic disincentives to work, and lack of choice in and early access to rehabilitation services in the Social Security Disability Insurance (SSDI) and Supplemental Security Income (SSI) programs. These barriers were compounded by three main program inadequacies.

The first was a lack of adequate and affordable health insurance for program beneficiaries seeking employment and for the working disabled.²⁸ The second was the lack of choice in and access to employment services, vocational rehabilitation services, and other supports. The third was that attempts by beneficiaries to work and be economically self-sufficient were frustrated by potential termination from benefits programs.²⁹ The Ticket to Work Program was initiated to address these barriers and compounding factors.

THE TICKET TO WORK PROGRAM

The Ticket to Work and Work Incentives Improvement Act (TWWIIA)³⁰ was passed in 1999 with several purposes:

- (i) reduce dependence on government cash benefit programs by providing health care and employment training to individuals with disabilities;
- (ii) encourage states to allow qualified individuals to purchase Medicaid health insurance, thereby allowing them to maintain employment;
- (iii) allow working individuals with disabilities the option of maintaining Medicare coverage; and
- (iv) establish the Ticket to Work and Self-Sufficiency Program to encourage individuals with disabilities to seek employment and rehabilitation services to reduce their dependence on cash benefit programs.³¹

²⁶532 U.S. 661 (2001).

²⁷*U.S. Airways, Inc. v. Barnett*, 122 S.Ct. 1516, 1522–1523 (2002).

²⁸See, e.g., Peter Blanck, Leonard Sandler, James Schmeling, & Helen Schartz, *The Emerging Workforce of Entrepreneurs with Disabilities: Preliminary Study of Entrepreneurship in Iowa*, 85 IOWA L. REV. 1583 (2000).

²⁹Program termination may result from several factors, including earnings levels and SSA medical improvement determinations. TWWIIA prohibits SSA from using work as evidence of medical improvement for active Ticket participants.

³⁰Pub. L. 106–170 (1999).

³¹The Ticket to Work and Self-Sufficiency Program, 66 Fed. Reg. 67370, 67370 (Dec. 28, 2001).

Before the Ticket Program was enacted, SSDI or SSI beneficiaries who could benefit from vocational rehabilitation (VR) were referred to state VR agencies for services.³² VR agencies were reimbursed for services after the beneficiary found work deemed to be “substantial gainful activity” (SGA).³³ With the enactment of the Ticket Program, SSA is no longer required to refer individuals to state VR agencies.³⁴ In addition, SSI and SSDI benefits may continue while a beneficiary receives VR services or is a participant in the Ticket Program.³⁵

Program participants receive a voucher or “ticket” to obtain services from qualified employment networks (ENs)³⁶ to help them return to gainful employment.³⁷ Most SSI and SSDI recipients between the ages of 18 and 64 years are eligible for the Ticket Program.³⁸ Beneficiaries are eligible until their SSDI benefits end, a Social Security disabled widow(er) turns 65, or a blind or disabled SSI participant turns 65 and qualifies for SSI benefits because of age.³⁹

One goal of the Ticket Program is to promote the ability of participants to return to work without the loss of essential benefits. Unlike the prior scheme, in which work activity regularly triggered a “continuing disability review” (CDR) by SSA, medical CDRs are not initiated for participants using a Ticket.⁴⁰ The use of a Ticket and progress toward discontinuance of cash benefits through SGA work for the purpose of CDR suspension is evaluated by program standards.⁴¹

After developing an “individual work plan” (IWP) with the EN, a Ticket participant has up to two years to prepare for employment.⁴² By year three of the program, the Ticket participant is required to work at least three of twelve months (not necessarily consecutively) at SGA, an income level set by SSA.⁴³ By year four of the program, the participant must work six of twelve months at the SGA level, and by year five work six of twelve months at a level high enough to eliminate payment of SSDI or SSI benefits.⁴⁴ If a participant does not meet these requirements, medical

³²Robert Silverstein, *Final Regulations Implementing the Ticket to Work and Self-Sufficiency Program 3 (The Ticket to Work Program)* [hereinafter Policy Brief], Vol. 4 Center on State Systems and Employment Outcomes (RRTC), No. 1 (Jan. 2002), available at <http://www.its.uiowa.edu/law/lhpdc/publications/silversteinpubs.html> (last visited on Aug. 2, 2002).

³³*Id.* (SGA is determined by a time sustained period established by the SSA).

³⁴*Id.* (for those states implementing the Ticket Program; TWWIIA also repeals SSA sanctions against referred beneficiaries who refuse VR services).

³⁵*Id.*, at 4.

³⁶An employment network is “any qualified entity that has entered into an agreement with us [Social Security Administration] to function as an EN under the Ticket to Work program and that assume responsibility for the coordination and delivery of employment services, vocational rehabilitation services, or other support services to beneficiaries who have assigned their tickets to that EN.” 20 C.F.R. §411.300 (2002).

³⁷The Ticket to Work and Self-Sufficiency Program, 66 Fed. Reg. 67370 (Dec. 28, 2001).

³⁸Policy Brief, *supra* note 32, at 5 (exemptions include those whose conditions are expected to improve, beneficiaries under the age of 18, and childhood beneficiaries who have turned 18 but not undergone a redetermination under the adult standard).

³⁹*Id.*, at 12.

⁴⁰20 CFR §411.165 (2002).

⁴¹20 CFR §411.170 (2002). Elimination of cash benefits based on wages for all employed beneficiaries, including Ticket participants, is based upon existing SSA work incentive provisions. CDR suspension is based on progression in the Ticket Program.

⁴²Policy Brief, *supra*, note 32, at 15–16 (participant must complete a 24-month progress review conducted by the program manager). Preparing for employment may include training or work skills development for example.

⁴³The amount was \$780 for non-blind beneficiaries in 2002. Policy Brief, *id.*, at 16.

⁴⁴*Id.*

CDRs may be initiated by SSA; however, individuals may continue participation in the Ticket Program participation during this medical review.⁴⁵

ENs in the Ticket Program provide employment, vocational rehabilitation, or other supports and services to beneficiaries.⁴⁶ Any public or private organization may apply to be an EN,⁴⁷ although organizations must meet qualification requirements.⁴⁸ An EN may be one organization or multiple organizations.⁴⁹

ENs are compensated for their employment results through outcome-based reimbursement (OBR) payments. The payments reflect a portion of the cost savings to the government from the participant transitioning from SSI or SSDI cash benefits to economic independence through employment. ENs are reimbursed under an outcome-based or outcome-milestone payment system.⁵⁰ An EN receives outcome payments for the months (up to 60 months) that the participant does not receive SSI or SSDI benefits.⁵¹ The milestone payment system provides for reimbursement as employment goals are achieved in accordance with the participant's IWP.⁵²

The participant and EN formulate the IWP, which outlines the employment goals⁵³ and services and supports necessary to achieve the goals.⁵⁴ Services include case management, workplace accommodations, peer mentoring and training, and transportation assistance.⁵⁵

The Ticket Program and the ADA reflect the disability policy framework that endorses the *civil right* of qualified individuals with disabilities to work and to be free from discrimination on the basis of disability. These initiatives, along with other policy changes, are designed to assist individuals to obtain and retain employment through the integration of job-related supports, enhancement of work incentives, and access to affordable health care benefits. The next part examines the applicability of the ADA to the implementation of the Ticket Program.

APPLICABILITY OF THE ADA TO ENs

The applicability of the ADA to ENs depends on the classification of the EN. ENs include individuals, cooperatives, community rehabilitation providers, WIA

⁴⁵A medical CDR determining that a beneficiary is medically improved may result in termination from the SSI or SSDI program, and thereby the Ticket Program. *Id.*

⁴⁶*Id.*

⁴⁷EN must be an agency or instrumentality of a state or a private entity. *See also* The Ticket to Work and Self-Sufficiency Program, 66 Fed. Reg. 67370, 67397 (Dec. 28, 2001), indicating that family and friends who meet EN qualifications and are willing to assume this responsibility may be certified and serve as an EN, but a beneficiary may not serve as his own EN. *Id.*

⁴⁸RFP published by Commerce Business Daily, the Federal Government's electronic posting system and the Social Security Administration's website. *See* The Ticket to Work and Self-Sufficiency Program, 66 Fed. Reg. 67370, 67433 (Dec. 28, 2001); SSA-RFP-01-0010A.

⁴⁹42 U.S.C. §1320b-19(f)(1)(D) (2001).

⁵⁰20 C.F.R. §411.505 (2002); *see also* 20 C.F.R. §411.515 (2002) (describing how an EN may change payment options).

⁵¹20 C.F.R. §411.500(e) (2002).

⁵²20 C.F.R. §411.500(f) (2002).

⁵³*See* 20 C.F.R. §411.455 (2002).

⁵⁴*See* 20 C.F.R. §411.465 (2002) (outlining components of an IWP); *see also* Panel Testimony, *supra* note 15, at 166, 169 (noting that the relationship between the EN and the beneficiary is voluntary; the beneficiary chooses the EN and the EN chooses who to serve (Statement of Sallie Rhodes, Council of State Administrators of Vocational Rehabilitation)).

⁵⁵RFP, *supra* note 48, at 8.

“One-Stops,” state VR agencies, and private companies. ENs are public entities or private places of accommodation that provide services to Ticket participants seeking employment. Although ADA Title I protects employees of an EN, the relationship between an EN and its Ticket participants is governed by Title II provisions for public entities or Title III provisions for private entities as places of accommodation.

A state VR agency serving as an EN is a public entity governed by ADA Title II. A private community rehabilitation provider approved as an EN is a place of public accommodation under Title III. Public or private service providers that receive federal grants or contracts independently are subject to the antidiscrimination provisions of Section 504 of the Rehabilitation Act of 1973.⁵⁶

As the *Olmstead* Court concluded, ADA Title II is to prevent public entities from excluding qualified individuals with disabilities from enjoying the benefits of its services and activities.⁵⁷ The U.S. Department of Justice has interpreted Title II as requiring covered entities to

make reasonable modification in policies, practices, or procedures when the modifications are necessary to avoid discrimination on the basis of disability, unless the public entity can demonstrate that making the modifications would fundamentally alter the nature of the service, program, or activity.⁵⁸

Under Title II, therefore, a qualified individual covered by the law must meet the eligibility requirements for participation in program activities.⁵⁹ A Ticket participant is a person with a disability for purposes of SSI or SSDI and likely covered under the ADA as an individual with a disability.⁶⁰

ADA Title III requires that places of public accommodation provide equal access to all persons with disabilities, not just those who are “qualified” for a particular program or service.⁶¹ A private social service center certified as an EN is a place of public accommodation covered under Title III.⁶² An individual, family member, or friend of a Ticket participant who owns, leases, or operates a place of public accommodation as an EN is a Title III entity.⁶³ As Title II or III entities, ENs must provide Ticket participants (and applying program participants, their families or members of the public) physical and programmatic access to their facilities and services.

A program participant may assign her Ticket to a public or private EN willing and able to provide appropriate services.⁶⁴ The program encourages a range of service

⁵⁶Nondiscrimination on the Basis of Disability by Public Accommodations and in Commercial Facilities, 56 Fed. Reg. 35544, 35552 (July 26, 1991). Other state and federal funding sources (e.g. Department of Labor, Department of Education) have accommodation mandates similar to those of the ADA and the Rehabilitation Act.

⁵⁷42 U.S.C. §12132 (2000).

⁵⁸28 C.F.R. §35.130(b)(7) (1998).

⁵⁹42 U.S.C. §12131(2) (2000).

⁶⁰See 42 U.S.C. §12102(2). Being “disabled” under SSA regulations does not necessarily mean an individual is disabled under the ADA. See *Cleveland*, *supra* note 10, at 795 (holding there is no *per se* rule that SSDI beneficiary status conflicts with ADA claim).

⁶¹42 U.S.C. §12182 (a) (2000) (“No individual shall be discriminated against on the basis of disability in the full and equal enjoyment of the goods, services, facilities, privileges, advantages, or accommodations of any place of public accommodation by any person who owns, leases (or leases to), or operates a place of public accommodation”). See also Wendy E. Parmet, *Title III—Public Accommodations*, in *IMPLEMENTING THE AMERICANS WITH DISABILITIES ACT 123* (Lawrence Gostin & Henry Beyer, eds., 1993).

⁶²42 U.S.C. §12181(7)(k) (2000).

⁶³*Supra*, note 56, at 35553.

⁶⁴20 C.F.R. §411.140 (2002).

choices in which the participant and the EN choose their working partners.⁶⁵ Program and service choice is a central theme in the disability framework:

The Ticket to Work program provides for a voluntary relationship between the beneficiary and the EN. While an EN may not discriminate in the provision of services based on a beneficiary's age, gender, race, color, creed, or national origin, *an EN may select the beneficiaries to whom it will offer services based on factors such as its assessment of the needs of the beneficiary and its ability to help the individual.*⁶⁶

There are programmatic and economic reasons why ENs would specialize in service to particular groups of individuals.⁶⁷ Likewise, a participant is able to choose her EN and deposit the Ticket to receive services from that EN or the state VR agency, and may choose to re-assign the Ticket to another EN.⁶⁸ As mentioned, Title II provides that covered entities not exclude a qualified individual with a disability from its services and programs.⁶⁹ As such, Title II entities must be physically and programmatically accessible.⁷⁰ Although their programs and services must be accessible, Title II entities are not required to modify their existing programs when these services are offered through alternative methods,⁷¹ or where to do so would result in a fundamental alteration in the program, or undue financial and administrative burdens.

Under ADA Title III, places of accommodation likewise must remove barriers or provide services through alternative methods when "readily achievable."⁷² Title II's undue burden defense is more stringent than Title III's because access under Title II is presumed to enable individuals with disabilities to participate in governmental programs.⁷³

Titles II and III require covered entities to ensure effective communication with applicants, participants, and members of the public with disabilities. Covered ENs are required to provide auxiliary aids and services when necessary to allow an individual with a disability equal program access.⁷⁴ Titles II and III also prevent EN entities from adopting program eligibility criteria that screen out people with certain

⁶⁵20 C.F.R. §411.145 (2002); 20 C.F.R. §411.150 (2002).

⁶⁶The Ticket to Work and Self-Sufficiency Program, 66 Fed. Reg. 67370, 67400 (Dec. 28, 2001) (emphasis added).

⁶⁷*Id.* See also 66 Fed. Reg. 67370, 67399 (Dec. 28, 2001) ("RFP for ENs requires applicants to indicate the impairment categories they serve and demonstrate that they have experience and expertise in serving people within those impairment categories. We envision that ENs will serve individuals in different impairment categories and have expertise and experience in serving specific groups... An EN is not required to serve all disability categories but can specialize."). Cf. Panel Testimony, *supra* note 15, at 31 (noting that ENs must be aware of the implications of such specialization... "ENs can choose to specialize with particular groups of individuals... that can vary by socioeconomic status and other stores of demographic factors as well as geographic factors... [A] particular EN could choose to serve, say, persons with mental retardation or persons with brain injury and so forth... that does not mean that anybody who has a primary disability and a secondary impairment could be excluded on the basis of that secondary impairment. That would violate the ADA...") (statement of Peter Blanck).

⁶⁸20 C.F.R. §411.150 (2002) (limitations on Ticket reassignment).

⁶⁹42 U.S.C. §12132 (2000).

⁷⁰Title II regulations follow the concept of program accessibility in the section 504 regulations. 34 U.S.C. §104 (1976).

⁷¹See 28 C.F.R. Pt. 35, App. A (2001).

⁷²42 U.S.C. §12181(9) (2000).

⁷³28 C.F.R. Pt. 35, App. A (2001). See Linda Kilb, *Title III—Public Services, Subtitle A*, in IMPLEMENTING THE AMERICANS WITH DISABILITIES ACT 87, 96 (Lawrence Gostin & Henry Beyer, eds., 1993).

⁷⁴42 U.S.C. §12182(b)(2)(A)(iv) (2000). See also Peter Blanck & Leonard Sandler, *ADA Title III and the Internet: Technology and Civil Rights*, 24(5) MENTAL & PHYSICAL DIS. L. RPT 855–859 (2000).

disabilities (or individuals who have an association with people with disabilities) from programs or services. The blanket use of program criteria that screen out an individual with a disability is prohibited, unless such criteria are necessary to program operation.⁷⁵

The Ticket Program requires that ENs have policies and procedures that protect the confidentiality of participants and those seeking services, and prevent discrimination on the basis of a beneficiary's age, gender, race, color, creed, or national origin.⁷⁶ Nevertheless, where an EN is not qualified to serve a particular individual, the ADA's undue burden provision does not require the EN to serve that Ticket holder. However, where ADA accommodation is possible and reasonable, public or private ENs may not charge an individual to cover the cost of accommodations, barrier removal, or reasonable modifications to its policies or procedures.⁷⁷

When well coordinated, the ADA enhances the ability of ENs to provide appropriate access and services to Ticket Program beneficiaries.⁷⁸ Moreover, EN service specialization to persons with particular disabilities does not invoke the ADA's nondiscrimination requirements.⁷⁹

Still, implementation questions remain. For instance, what is an EN's responsibility under the ADA to serve individuals with multiple disabilities? In the case of, say, a Ticket participant who is deaf and blind, does an EN specializing in serving deaf Ticket holders violate the ADA's nondiscrimination provisions by not providing materials in Braille, effectively excluding the blind and deaf individual from service?

Addressing that issue under the ADA, an EN's core obligation to Ticket holders is nondiscrimination in the provision of program access and services. An EN's decision not to provide service to a Ticket holder with multiple or secondary disabilities must be substantiated by evidence that any such secondary disabilities require a service modification that would either fundamentally alter the program or pose an undue burden that a reasonable modification could not eliminate. Regardless, an EN must insure physical access to potential program participants and their families, for instance, by using alternative means of meeting with clients or their representatives.⁸⁰

⁷⁵42 U.S.C. §12182 ((b)(2)(A)(i) (2000).

⁷⁶RFP, *supra* note 48, at 16–17.

⁷⁷28 C.F.R. Pt. 36, App. B (2001).

⁷⁸See Panel Testimony, *supra* note 15, at 15 (“ADA is . . . meant to enhance consumer access to EN services . . . ADA does not create additional legal requirements or burdens for ENs that they would not otherwise have as public or private service providers. [T]he ADA does provide an important conceptual framework and a national purpose for equal treatment of qualified individuals with disabilities under the Ticket Program.”) (statement of Peter Blanck).

⁷⁹See *id.*, at 18 (“While specialization is acceptable, ENs who do so must not allow ‘specialization’ to equal ‘discrimination’”) (statement of Ray Cebula, Disability Law Center, Boston). See also *id.*, at 54–55 (“creaming can take a lot of different forms and there are some forms that everybody . . . would agree is discriminatory. For example, if an EN decides they are only going to serve white people, they can call that creaming, but we are not going to allow that. Now if an EN decides that they are only going to serve people with mental retardation, and you get somebody who is very capable of working and happens to have HIV disease and gets excluded—I am saying they also have mental retardation—but they get excluded because of the HIV disease; I would say that is discriminatory creaming that should be in violation of the ADA.”) (statement of Andrew Imparato).

⁸⁰See *id.*, at 35–37 (“There are going to be cases . . . where there are dual diagnosis issues . . . And the EN would have the burden of proof . . . to show that they are legitimately serving the population elected [and not] creaming . . . the tougher cases . . .”) (statement of Peter Blanck).

Another prominent question related to Ticket implementation is whether the ADA prevents ENs from choosing to provide services only to the pool of least disabled and so-called “creamed” participants. The economic incentives in the Ticket Program encourage ENs to serve participants who need low cost employment services, workplace accommodations and training, and those who are able to return to work for an extended period of time.

Andrew Imparato, President of the American Association of People with Disabilities (AAPD), comments

I can see a lot of opportunity for discrimination there, where they take one look at a person and say, “you are not getting a job,” and that’s the end of the discussion. That’s one form of discrimination that I think is likely to happen in most ENs, and that Social Security needs to be prepared for; and the Protection and Advocacy agencies need to be prepared for.⁸¹

If there is a provider that has a specialty in serving blind folks; I would want that EN to explain to me what is it that is so unique about blind folks, that it would be a fundamental alteration for them to serve somebody who [also] is bipolar. I think there is this assumption that if you have a specific disability, you have all these unique needs that go along with that disability, and that’s just wrong. I don’t care what the disability is.⁸²

Disability advocates likewise are concerned that state VR agencies will become the EN of “choice” for individuals with more involved disabilities and costly service needs:

For people with significant disabilities, costly disabilities, I don’t think there is choice now anyway. Those people are going to state VR agencies. That’s a product of the nature of the disability, the severity of the disabilities, as well as the payment provisions in the Ticket Program itself . . . [R]eal choice under the Ticket Program is only going to happen if an EN population is expanded.⁸³

Concerns about program implementation expressed by disability advocates reflect the potential emergence of two separate and perhaps unequal markets for EN services, one served by private specialized ENs and another by state VR providers.⁸⁴

To illustrate potential EN market imbalance, as of August 1, 2002, in the 13 states initially implementing the program, 4,154 of 1,969,393, or less than one percent (0.21%), of Ticket holders have been assigned to 374 ENs.⁸⁵ For the same period in Iowa, for instance, 231 of 68,657 (again less than one percent, 0.34%) of Ticket holders have assigned Tickets to 27 ENs serving Iowa beneficiaries.⁸⁶ To date, approximately 85 to 95 percent of program participants have assigned their

⁸¹ See *id.*, at 38 (statement of Andrew Imparato).

⁸² *Id.*

⁸³ See *id.*, at 20–21 (statement of Ray Cebula).

⁸⁴ See *id.*, at 26 (“[State VR agencies] are overwhelmed . . . and the only option for [many] people is the state voc rehab agency; is that really an option? All of that needs to be thought about in the context of full participation.”) (statement of Andrew Imparato).

⁸⁵ For national and Iowa statistics (and other states) as of August 1, 2002, see http://www.ssa.gov/work/Ticket/ticket_info.html (last visited August 2, 2002).

⁸⁶ *Id.*

tickets to state VR agencies.⁸⁷ Thus, the initial trends suggest that virtually all program participants either have not used their Tickets or have remained in the state VR system instead of assigning their ticket to an EN of their choice.⁸⁸

National outreach and education that explains the Ticket Program is vital for beneficiaries and service providers as well as for other stakeholders on the local, state, and federal level.⁸⁹ Ticket participants must be knowledgeable about their rights and responsibilities under the Ticket Program. Particular attention should be given to dispute resolution with ENs and SSA, as well as issues such as CDR protection, timely progress requirements, and overpayment of benefits.

Although the SSA is monitoring outcomes to ensure service choice in the program,⁹⁰ analysis of the Ticket payment structure is needed to assess the incentives and disincentives for employment providers and EN program specialization.⁹¹ The statute requires SSA to design and implement a payment structure that allows individuals with significant disabilities to participate in the Ticket Program. SSA is required to report to Congress on the adequacy of incentives for ENs to serve this population prior to full implementation of the program.⁹²

SSA will need to maintain information on the types of individual with disabilities served, including data on disability type and severity, economic status, ethnicity, and geographical location,⁹³ placement rates, and acceptance and rejection

⁸⁷See Panel Testimony, *supra* note 15, at 72 (“95 percent of the tickets assigned are to VR right now.”) (statement of Sallie Rhodes); *see also id.*, at 227 (“That’s not the right number; it is about 85 percent, 83 percent.”) (statement of Ken McGill, SSA).

⁸⁸See PANEL REPORT, *supra* note 12, at 17 (“The Panel believes that congressional intent was to create the Ticket Program as an *additional tool* that the beneficiary could use to supplement what is already available under current programs. The final rule retains the policy wherein a beneficiary with a ticket who signs an Individual Plan for Employment (IPE) with a VR agency will be considered to have assigned the ticket to that VR agency.”) (emphasis added); *id.*, at 14 (“Panel members have some misgivings that beneficiaries could be required to deposit their tickets with existing Federal and State agencies in order to receive services they are already entitled to by virtue of their disability, economic status, or employment status.”)

⁸⁹See *id.*, at 11 (“Based on public comment, the Panel is convinced that most beneficiaries who will receive the ticket do not know what it is, what to do with it, or why it has been sent to them.”); *id.*, at 2 (“An immediate, coordinated national marketing and public information program explaining the array of programs to the general public, providers, and employers and providing accurate and timely information to beneficiaries about their options is crucial to the success of the projects and programs under the Act, particularly the Ticket Program.”)

⁹⁰See Panel Testimony, *supra* note 15, at 59–60 (“Knowing the information about why services are refused has a proactive benefit . . . [SSA] can then determine what type of ENs they may have to go out and recruit to better serve the public.”) (statement of Reana Sloniger, Chief Administrative Law Judge).

⁹¹See *id.*, at 39 (“If the EN is deciding that the more functional folks are the ones they want to work with, that could result in disability discrimination if you have somebody who doesn’t have high—you know, whatever they define as functioning; but who actually has good credentials and could get a job, and could benefit from the program. . . . this is the bottom line, if you are talking about program access.”) (statement of Andrew Imparato); *id.*, at 47 (“[T]hey have to look at the economics of serving an individual. An individual walks in the door they need \$35,000 worth of assistive technology and five years of successful outcome payments are going to bring in for SSDI—I don’t know, roughly \$17,000—economically that employment network can’t serve that person unless they’re eventually going to go out of business.”) (statement of Sallie Rhodes).

⁹²42 U.S.C. §1320b-19(h)(5)(C).

⁹³See TICKET TO WORK AND WORK INCENTIVES ADVISORY PANEL. SOCIAL SECURITY ADMINISTRATION. ADVICE REPORT TO THE COMMISSIONER OF THE SOCIAL SECURITY ADMINISTRATION: DESIGN ISSUES RELATING TO THE ADEQUACY OF INCENTIVES STUDY, at 6 (2002).

standards.⁹⁴ Placement information is useful on a regional basis by EN type, organizational size, and nature of disability served.⁹⁵

Disability advocates envision the Ticket Program as a means to early employment services and rehabilitation interventions. Because the Ticket Program is not available to individuals between the ages 16 and 17 years (a group transitioning to employment), and to those who have not had a continuing disability review, information needs to be gathered on how this exclusion affects subsequent employment outcomes for these groups.

Information and longitudinal research, using qualitative and quantitative assessments on the Ticket Program, are crucial to address questions in areas such as the following.

- (i) Who is being served in the Ticket Program?
- (ii) Who is being rejected, and for what reasons?
- (iii) What is the quality of service and employment outcomes?
- (iv) What information or supports are needed to facilitate beneficiaries' use of the Ticket to Work Program?
- (v) What are the economic incentives and disincentives to participants and ENs in program implementation?
- (vi) What is the nature of program access and accommodation for beneficiaries with multiple disabilities (and their families or representatives), and what are the associated costs and benefits?
- (vii) What are the characteristics of participating ENs and of service providers not participating in the program?
- (viii) How does the restriction of Ticket eligibility to individuals 18 years or older affect youth with disabilities transitioning from school to employment?
- (ix) Have programs and service alternatives expanded, diminished, or stayed the same for Ticket holders with different types and severity of disabilities?
- (x) How has Ticket implementation enhanced or diminished participants' informed choice and decision making about employment options?
- (xi) What information is gathered and disseminated to Ticket holders and others about EN performance and customer satisfaction?
- (xii) What types of economic, attitudinal, and employment information are necessary to inform policy makers about the successes and challenges of Ticket Program implementation?

⁹⁴See Panel Testimony, *supra* note 15, at 50–51 (“[U]nder 504, given [ENs] are receiving federal funds for compliance, and also for practical sense to deal with these nondisability status discrimination questions; they probably should be keeping, not only how they’re doing, but who they’re turning away. Who is coming to them; what sort of applications they’re seeing, and who they’re accepting; and then we can understand and address the specific question of socioeconomic status discrimination, gender discrimination, race discrimination . . .”) (statement of Peter Blanck); *id.*, at 58–59 (“[I]t’s so important to track people that are coming to employment networks and not getting services. We really need to know is it discrimination based on the economic model that’s written into this bill or discrimination based on things like HIV, or gender or sex or race or something like that.”) (statement of Sallie Rhodes); *id.*, at 71 (“I would . . . get a random sample of a representative group of ENs across the country, and tell us who is applying. I want a report [of] . . . who is applying, what do they look like; where are they coming from; and who is getting in; who is not.”) (statement of Peter Blanck).

⁹⁵Some contend that SSA records be expanded, and work and recipient wages reporting were cited as inadequate by Ticket to Work Advisory Panel members. *Id.*, at 106 (statement of Ethel Zelenske, National Organization of Social Security Claimant Services) & at 127 (statement of Ray Cebula).

- (xiii) Will the ADA's antidiscrimination provisions and TWWIA's reform of the work incentives affect employers' and co-workers' attitudes about Ticket holders as job applicants and workers with disabilities?
- (xiv) Will the ADA and TWWIA impact the attitudes of disabled individuals themselves with regard to their employment goals?

In addition to these program-specific questions, broader issues must be addressed about the composition, quality, and competitiveness of the American work force, including the following.

- (i) What types of work skills will be needed for employers to remain competitive in the U.S. and abroad, particularly with the development of the knowledge-based economy?
- (ii) Will our increasingly diversified and aging work force include millions of persons with emerging disabilities, such as those with traumatic brain injury, repetitive stress conditions, and multiple disabilities?
- (iii) What will be the educational characteristics and job qualifications of the work force of young persons with disabilities?
- (iv) What types of job training, assistive technology, and accommodations will be available to that work force?
- (v) How will the specific and generic policy changes, separately and in combination, in disability, welfare, and health care, affect that work force?

CONCLUSION

The Ticket Program encourages EN specialization in serving participants with disabilities. It prohibits discrimination not on the basis of disability *per se*, but on the basis of age, gender, race, and other status and service characteristics.

The applicability of the ADA (and section 504 of the Rehabilitation Act of 1973) to ENs, which prohibits discrimination on the basis of disability, ensures fair and meaningful access to the program for qualified individuals. As such, the Ticket Program is an important experiment in social policy. The program's goals reflect the disability policy framework and the ADA, which emphasize choice, equality of opportunity, and economic independence.

The assessment of disability policy initiatives such as the Ticket Program requires researchers and policymakers to examine a range of outcomes, at individual, group, and program levels. New outcome measures must be developed in addition to traditional labor force participation rates and income levels. Measures should include reduced dependence on government benefits, asset accumulation, use of federal and state tax credits and incentives to foster the provision of workplace accommodations, and perceived satisfaction of participants and ENs (e.g. in the development of the Individual Work Plans).⁹⁶ Other non-traditional measures of inclusion and self-determination associated with employment need to be examined,

⁹⁶See PANEL REPORT *supra* note 12, at 14. ("The Panel... recommends... a full cost-benefit study to evaluate the Ticket to Work and Work Incentives Program. Such a study should begin with a more complete view of the direct savings to the SSA Trust Fund but should also consider savings to the Federal treasury and increased productivity for the Nation as a whole?").

augmented by a review of range of employment activities, including self-employment, entrepreneurial activities, temporary employment, and tele-work.

On a program level, researchers and policy makers must assess the impact of the Ticket Program OBR payment systems on service delivery options and quality. This impact may be examined for public and private rehabilitation providers and ENs. In addition, examination is needed of consumer satisfaction with customized vocational service interventions and accommodations, as well as the scope and intensity of work supports and training.

Likewise, program data must be collected and analyzed that identify policy barriers and facilitators (in the Ticket Program and in related federal and state policies) to expanded service choice for the Ticket holders. There is a need to review the relation among generic and disability policies, such as WIA and TWWIIA, to assist Ticket participants to obtain and retain employment through integration of job-related supports, enhancement of work incentives, and access to affordable health care benefits.

In these and other areas, researchers must begin to cumulate information in ways that include individuals with disabilities in the research design, data collection, and analysis process to foster autonomy while maintaining scientific rigor and policy relevance.⁹⁷ The development of a body of research on the disability policy framework is needed, as no single study or set of studies provide definitive answers.⁹⁸ The cumulative research endeavor highlights perspectives and assumptions embedded in policy and research that may be compared and conflicting conclusions reconciled.

As knowledge about Ticket Program implementation emerges, education and training must be available to improve understanding of the protections afforded by the ADA to Ticket holders. This information should be disseminated to ENs about their ADA responsibilities and rights to enhance services, programs, and accommodations that promote equal participation and support for individuals with disabilities. The strategic policy relationship among TWWIIA, the ADA, and other policies supporting the self-sufficiency of individuals with disabilities present opportunities and challenges that require coordination and assessment of programs and service delivery.

The goals of full inclusion and equal employment opportunity for qualified persons with disabilities in the Ticket Program is grounded in the disability policy framework. In 2002, the Supreme Court reiterated these objectives in *US Airways v. Barnett*:⁹⁹

[The ADA] seeks to diminish or to eliminate the stereotypical thought processes, the thoughtless actions, and the hostile reactions that far too often bar those with disabilities from participating fully in the Nation's life, including the workplace. . . . These objectives demand unprejudiced thought and reasonable responsive reaction on the part of employers and fellow workers alike.¹⁰⁰

⁹⁷Kate Seelman, Employment of individuals with disabilities—Opportunities and challenges—The best of times/the worst of times, Paper at Employment and Disability Policy Summer Institute, Cornell University, Ithaca, NY (July 17, 2000) (on file with author). See also Peter Blanck, Heather Ritchie and James Schmeling, *Technology for Independence: A Commodity-Based Resource Center, Behavioral Sciences & The Law* (forthcoming 2003).

⁹⁸Blanck & Scharz, *supra* note 5, at 9.

⁹⁹*U.S. Airways, Inc. v. Barnett*, 122 S.Ct. 1516, 1522–1523 (2002).

¹⁰⁰*Id.*, For a review and study of historical negative stigma facing persons with disabilities, see Peter Blanck & Chen Song, "With Malice Toward None: With Charity Toward All": *Civil War Pensions for Native and Foreign-Born Union Army Veterans*, 11 *TRANSNATIONAL L. & CONTEMP. PROBLEMS* 1, 69–72 (2001).

The Court's enunciated goal is to insure opportunity, participation, independent living, and economic self-sufficiency by individuals with disabilities in all aspects of society. The common purpose is to develop policies like the Ticket Program that advance the economic independence of all Americans with disabilities.