

August 6, 2012

The Honorable Eric H. Holder, Jr.  
Attorney General  
United States Department of Justice  
950 Pennsylvania Avenue, NW  
Washington, DC 20530-0001

Dear Attorney General Holder:

We write to request that the Department of Justice (DOJ) review its practices concerning settlement of Federal Tort Claims Act (FTCA) claims brought by individuals with disabilities who have been harmed by medical malpractice. Such settlements encourage the needless institutionalization of these individuals. The undersigned organizations urge this review to ensure that FTCA settlements afford individuals with disabilities the opportunity to receive services in the most integrated setting appropriate to their needs.

On June 22, 2009, President Obama celebrated the 10<sup>th</sup> anniversary of the landmark Supreme Court decision in *Olmstead v. L.C. and E.W.* and launched the “Year of Community Living.” In his comments, the President stated,

*“The Olmstead ruling was a critical step forward for our nation, articulating one of the most fundamental rights of Americans with disabilities; having the choice to live independently. I am proud to launch this initiative to reaffirm my Administration’s commitment to vigorous enforcement of civil rights for Americans with disabilities and to ensuring the fullest inclusion of all people in the life of our nation.”*

Just this past June, on the 13<sup>th</sup> anniversary of *Olmstead*, the President reaffirmed his Administration’s commitment to ensuring that Americans with disabilities can live in their communities.

In settling medical malpractice cases under the FTCA, however, DOJ has used standardized stipulation and trust agreements which provide for institutional care but do not cover the services necessary for people to live in their own homes and communities. This practice is in violation of Section 504 of the Rehabilitation Act and the Supreme Court’s *Olmstead* decision, and contrary to the President’s stated policy. This burden falls primarily upon veterans and military family members who have been catastrophically injured by government doctors.

It is the customary practice of the FTCA Section within the DOJ’s Civil Division to require use of a reversionary trust in order to settle these medical malpractice cases. Moreover, in a number of cases, DOJ has challenged expenditures for community-based medical and other services to beneficiaries under these trusts and, after losing at the district court level, has appealed.

These trusts do not qualify as special needs trusts under 42 U.S.C. § 1396p(d)(4). As a consequence, beneficiaries are ineligible for federal benefits, including Medicaid waivers and Supplemental Security Income (SSI). The standard requirement to purchase lifetime annuities within these settlement agreements forever disallows federal benefits even in circumstances in which the monthly income provided by the trust is insufficient to provide for the victim of a tragic medical mistake.

Accordingly, reversionary trusts are typically the only option for beneficiaries to finance needed services. These DOJ produced trusts cover institutional care, but do not cover the types of basic services needed to ensure beneficiaries can remain in their own homes and communities. Here are examples from the standardized trust:

*“The Administrator shall authorize and the Trustee shall pay for reasonably incurred transportation expenses of the Beneficiary (including ambulance hire) primarily for and essential to obtaining emergency medical care, emergency medical treatment, or emergency medical services. The Administrator shall not authorize and the trustee shall not pay for any other transportation expenses...The Administrator shall not authorize and the Trustee shall not pay for any expenses relating to a motor vehicle.”*

*“The Administrator shall not authorize and the Trustee shall not pay for any expenses relating to home or real estate...The type of expenses precluded by this Paragraph include but shall not be limited to: the purchase, lease, or rent of a home or real estate; the construction, renovation, modification, repair, or addition to a home or real estate or access or mobility within a home or real estate; fixtures for a home or real estate; insurance or taxes on a home or real estate; and all other types of expenses relating to a home or real estate.”*

*“The Administrator shall not authorize and the Trustee shall not pay miscellaneous expenses of the Beneficiary. For purposes of the Trust, the term ‘miscellaneous expenses’ shall mean any expense of the Beneficiary that is not otherwise specifically authorized by the terms and conditions of the Trust, regardless of the Beneficiary’s medical or other needs.”*

It is highly unlikely that an individual would be able to live in the community when the only source for payment for services and living expenses, this trust, disallows transportation and housing costs. Typically the trust may not be used to pay the rent, mortgage, insurance, taxes, or home modifications required on an ongoing basis for the person to stay in the home. As the trusts disqualify beneficiaries for SSI -- which is often the sole source for basic necessities such as utilities, food, and clothing -- and for Medicaid, which could be used to cover home and community-based services, these trusts make it virtually impossible for many beneficiaries to live in their own homes and communities. Because these trusts will fully fund a person’s placement in an institution, beneficiaries and their guardians are offered little choice but to accept placement in an institution even though the beneficiary is capable of living in the community.

As such, it is imperative that DOJ review its policies and procedures related to its use of reversionary trusts for medical malpractice cases and the previously discussed provisions which we believe violate the Olmstead decision and the President's disability policy. We believe it is imperative that you to issue a directive concerning when DOJ can utilize reversionary trusts in settlement or after trial and what parameters must be placed on those trusts to ensure that they comply with Section 504 and the Olmstead decision. Whatever type of structure and trust is utilized, it is our strongly held belief that regulations should be issued to ensure they comply with Section 504 and ensure the beneficiary is not needlessly institutionalized.

We request that this review be conducted by the Civil Rights Division of the DOJ, which can best ensure that DOJ's policies and practices are consistent with the DOJ's enforcement of Olmstead. This review must include all those cases in which DOJ currently is negotiating and those with settlements that are currently being implemented. In the event that these trusts are not in compliance, DOJ should offer the plaintiffs' counsel the opportunity to renegotiate the terms to bring the trusts into compliance with Section 504 and Olmstead.

Our military and veterans' families have already sacrificed in a myriad of ways. This one percent of the population has borne the effects of two wars over the past decade. In these cases where the government is the cause of a veteran or military dependent's disability, it is imperative that they be treated with fairness and respect, and in accordance with civil rights laws.

We thank you in advance for your consideration and prompt attention in this matter. If you have any questions, please contact Heather Ansley, Vice President of Veterans Policy, for VetsFirst, a program of United Spinal Association, at (202) 556-2076, ext. 7702 or by e-mail at [hansley@vetsfirst.org](mailto:hansley@vetsfirst.org).

#### ACCSES

American Foundation for the Blind  
The Arc of the United States  
Bazelon Center for Mental Health Law  
Disability Rights Education and Defense Fund  
Easter Seals  
Epilepsy Foundation  
Mental Health America  
Military Officers Association of America  
National Association of Councils on Developmental Disabilities  
The National Council on Independent Living  
National Disability Rights Network  
Paralyzed Veterans of America  
VetsFirst, a program of United Spinal Association  
Vietnam Veterans of America