

**2011 Annual Report  
Pursuant to Mental Hygiene Law Section 33.07(i):  
The Use of Federal Benefits  
Received by Directors of Office For People With Developmental Disabilities  
Facilities  
as Representative Payee**

**Introduction**

This Report is submitted by the Commissioner of the New York State Office For People With Developmental Disabilities (OPWDD) to the Governor, the Speaker of the Assembly, the Temporary President of the Senate, the Chair of the Assembly Committee on Mental Health, and the Chair of the Senate Committee on Mental Health pursuant to section 33.07 (i) of the Mental Hygiene Law (MHL). MHL § 33.07(i) was enacted in 2010 as one of several amendments to the MHL that provided new requirements for the handling of federal benefits by “a mental hygiene facility director who is a representative payee for a person pursuant to designation by the social security administration or other federal agency and who assumes management responsibility over the funds of such person.” MHL 33.07 (i) requires the submission of an annual report by OPWDD “detailing how persons’ federal benefits are being utilized.”

Section One of the Report explains the role of the representative payee under federal law and summarizes the 2010 amendments to MHL §33.07 relating to the handling of the funds of individuals receiving services by OPWDD directors in their capacity as representative payee.

Section Two of the Report summarizes existing OPWDD regulations (14 NYCRR 633.15) regarding the funds of individuals residing in state-operated residences, which provide the framework for the implementation of the 2010 amendments to MHL 33.07, and describes the OPWDD’s implementation actions.

Section Three of the Report provides information regarding the approximately 10,000 individuals for whom the OPWDD directors served as representative payee during the reporting period, the amount of money involved and the disposition of those funds.

### **Section One. 2010 Amendments to MHL 33.07**

In order to facilitate the proper receipt and management of Social Security funds for individuals who are eligible for benefits but lack capacity to manage (or to direct management of) the funds, Social Security law provides for the appointment by the Social Security Administration of a “representative payee” to act as a fiduciary to receive and manage the beneficiary’s federal benefits.<sup>1</sup> Similar provisions exist for benefits from the Veterans Administration and certain other federal benefit programs.

Pursuant to Social Security law, the primary purpose of social security benefits is to pay for the beneficiary’s day-to-day food and shelter needs, including any “care and maintenance” received in an institutional setting. In the case *Washington State v. Keffeler et al.*, 537 U.S. 371 (2003), the United States Supreme Court held that it is the proper exercise of an institutional representative payee’s fiduciary duty to apply funds received in that capacity to the cost of care and treatment in the payee’s facility.

In New York, Chapter 111 of the Laws of 2010 clarified the law with regard to the application of federal benefits by representative payees for the cost of care and treatment. MHL Section 29.23 was amended to specify that the receipt and application of federal benefits is governed by §33.07, not §29.23, and §33.07(e) was amended to clarify that a facility director who, as representative payee of federal benefits, applied such benefits to the cost of the beneficiary’s care and treatment at the facility is not

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<sup>1</sup> The Social Security Administration maintains a website which explains the Representative Payee Program, including explaining the roles and responsibilities of a RP, and describing the proper use and management of funds received by the RP. The address for this website is: <http://www.socialsecurity.gov/payee/>.

engaging in a violation of the director's fiduciary obligation so long as the director acts in accordance with federal law and regulations.

MHL §33.07 was also amended to provide that when the director of a department facility who is representative payee for a federal or state benefit receives a lump sum retroactive payment of such benefit on behalf of a person which, in combination with other funds held on behalf of the person, would cause the person to become ineligible for government benefits, the director must, to the extent permitted by law, apply the excess funds to the person's personal needs or seek to establish a Medicaid qualifying trust for an individual. OPWDD would seek to place such excess funds into a qualifying Medicaid exception trust after first determining the person's personal needs, and providing for a burial fund, as appropriate.

## **Section Two. Exercising OPWDD's Fiduciary Duty As Representative Payee**

OPWDD regulations, found at 14 NYCRR 633.15, establish specific requirements for the management of funds of individuals with developmental disabilities who reside in residences certified or operated by OPWDD, including funds received as representative payee. The regulations establish procedures for the management of the funds to assure that they are utilized for the benefit of the individual and in a manner that reflects his or her personal spending choices. Pursuant to Social Security Administration rules and regulations, payment for care and treatment provided by OPWDD are considered to be appropriate expenditures of Social Security benefits for the use and benefit of the individuals served. New York Social Services Law Section 131-o requires that each individual be provided with a monthly allowance out of his or her income for his/her personal expenditure.

Key provisions of OPWDD regulations include the requirement for an expenditure planning process conducted by the individual's planning team, which must include the

individual, his or her advocate and service coordinator, along with agency staff; a requirement that the planning process consider the individual's needs, preferences and personal spending choices; detailed requirements for access to funds and documentation of expenditures; and provisions for transfer of funds when an individual moves to a new living arrangement.

MHL §33.07 sets forth a requirement that OPWDD seek to establish a Medicaid qualifying trust (or similar device) for a person who receives a lump-sum retroactive payment (as specifically defined in paragraph 2 of §33.07(e)) when receipt of such payment places their eligibility for governmental benefits at risk. Beginning in the late 1990's, OPWDD voluntarily initiated procedures to identify lump sum payments that could potentially disqualify individuals from receiving federal benefits, and to seek to place the funds into Medicaid exception trusts or other qualifying instruments. If there is no guardian, family member or other individual able and willing to take the necessary actions to place the funds into a Medicaid qualifying exception trust, OPWDD initiates action to protect the funds, including making referrals to the Office of the Attorney General, where appropriate, for the initiation of proceedings to establish appropriate Medicaid exception trusts or similar instruments.

As required by MHL 33.07(h), OPWDD provided the Mental Hygiene Legal Service with a report regarding the management of funds of residents of state-operated facilities by DDSO Directors during the first year following enactment of the 2010 legislative changes, and met with representatives of MHLS to collaboratively review those results.

Since enactment of the amendments to MHL 33.07, OPWDD has drafted revised regulations which build on the existing regulatory structure and has provided them for review and comment to self-advocates with developmental disabilities, family members, advocate groups, and the Mental Hygiene Legal Service. OPWDD is continuing to work with these important stakeholders in the development of final regulations as required by MHL 33.07(e.)

### **Section Three. Utilization of Federal Benefits Received By DDSO Directors as Representative Payee.**

A summary of the receipt and utilization of federal benefits for the 10,066 individuals for whom OPWDD DDSO directors served as representative payees for the period from July, 2010 through December, 2011 is annexed as Exhibit "A." Exhibit "A" comprises two charts:

The first chart, titled "Disposition of Monthly Recurring Federal Benefits Received by DDSO Directors" provides a summary of the aggregate amount of federally funded benefits received by the directors of each of the thirteen Developmental Disabilities Service Offices (DDSOs) of OPWDD, as representative payees for individuals residing in state-operated residential programs for the period commencing July, 2010 through December, 2011. The chart indicates that the total amount of benefits received by all DDSO directors was \$147,504,269.16, and provides a breakdown showing the amount received by each DDSO Director. The total amount billed to residents for the cost of care pursuant to Article 43 of the Mental Hygiene Law was \$120,420,462.60, and the total amount allocated to personal allowance for those individuals was \$27,083,806.56. Breakdowns of these amounts for each DDSO are also provided.

The second chart, titled "Personal Asset Allocation Summary Report for Lump Sum Federal Benefits" provides a summary from each of the nine Revenue Support Field Offices of OPWDD, of the receipt and disposition of lump-sum federal benefit payments received by OPWDD DDSO directors as representative payees for individuals residing in state-operated residential programs for the period commencing July, 2010 through November, 2011. The chart indicates that 319 lump sum benefits were received during the reporting period. The total amount of lump sum benefits received was \$2,080,686.87, and the amount applied to the cost of care and maintenance as required pursuant to Medicaid regulations was \$52,230.13. The aggregate amount of the lump sum benefits paid into the individuals' personal accounts maintained by the DDSOs for use by the individuals for their personal needs was \$1,401,474.24. If at the time of

receipt of a lump sum benefit it appears that such funds, in combination with other funds of the person, would cause them to become ineligible for government benefits, the DDSO seeks to place the excess amount into a qualifying Medicaid exception trust. As shown in the column headed "Amount Placed in Trust" the amount placed in such trusts was \$626,982.50 during the reporting period.

This report has also been placed on the OPWDD website at:

<http://www.opwdd.ny.gov/wt/publications/msc/index.jsp>

**Exhibit A**

**OPWDD**

DISPOSITION OF MONTHLY RECURRING

FEDERAL BENEFITS

AND

PERSONAL ASSET ALLOCATION SUMMARY

REPORT FOR LUMP SUM

FEDERAL BENEFITS

Disposition of Monthly Recurring Federal Benefits Received by DDSO  
Directors for Individuals in State-Operated Residential Programs During the  
Period July 2010 through December 2011

DDSO	<u>Benefits Received</u>	<u>Amount Billed for Services Provided</u>	<u>Amount Allocated to Personal Allowance</u>
BERNARD M. FINESON DDSO	\$6,013,401.84	\$5,088,827.16	\$924,574.68
BROOKLYN DDSO	\$3,698,867.70	\$3,031,908.66	\$666,959.04
BROOME DDSO	\$13,115,287.62	\$11,059,657.20	\$2,055,630.42
CAPITAL DISTRICT DDSO	\$8,438,746.14	\$6,860,332.08	\$1,578,414.06
CENTRAL NEW YORK DDSO	\$21,281,163.30	\$16,940,102.94	\$4,341,060.36
FINGER LAKES DDSO	\$22,702,026.24	\$18,526,881.24	\$4,175,145.00
HUDSON VALLEY DDSO	\$14,838,241.14	\$12,162,391.56	\$2,675,849.58
LONG ISLAND DDSO	\$13,185,945.18	\$11,575,859.40	\$1,610,085.78
METRO NEW YORK DDSO	\$5,375,422.26	\$4,206,489.12	\$1,168,933.14
STATEN ISLAND DDSO	\$3,705,067.08	\$3,011,432.40	\$693,634.68
SUNMOUNT DDSO	\$6,410,257.92	\$4,667,438.88	\$1,742,819.04
TACONIC DDSO	\$11,825,717.76	\$9,775,462.50	\$2,050,255.26
WESTERN NEW YORK DDSO	\$16,914,124.98	\$13,513,679.46	\$3,400,445.52
<b>Totals</b>	<u>\$147,504,269.16</u>	<u>\$120,420,462.60</u>	<u>\$27,083,806.56</u>

TOTAL NUMBER OF INDIVIDUALS = 10,066

**Personal Asset Allocation Summary Report for Lump Sum Federal Benefits from  
July 2010 through November 2011**

<b>Listed by Responsible RSFO</b>	<b>Amount Received</b>	<b>Amount Applied to Care &amp; Maintenance</b>	<b>Amount Paid to Personal Account</b>	<b>Amount Placed in Trust</b>
<b><u>Broome (BR)</u></b>				
33.07 Totals	\$41,908.05	\$0.00	\$41,908.05	\$0.00
<b><u>Capital (CD)</u></b>				
33.07 Totals	\$201,385.60	\$3,016.00	\$64,387.10	\$133,982.50
<b><u>Central/Smt (CS)</u></b>				
33.07 Totals	\$294,985.09	\$32,082.31	\$262,902.78	\$0.00
<b><u>Finger Lakes (FL)</u></b>				
33.07 Totals	\$25,766.94	\$0.00	\$25,766.94	\$0.00
<b><u>Hudson Valley (HV)</u></b>				
33.07 Totals	\$419,320.57	\$0.00	\$117,320.57	\$302,000.00
<b><u>Long Island (LI)</u></b>				
33.07 Totals	\$581,765.13	\$13,465.73	\$377,299.40	\$191,000.00
<b><u>New York City (NY)</u></b>				
33.07 Totals	\$429,259.57	\$0.00	\$429,259.57	\$0.00
<b><u>Taonic (TA)</u></b>				
33.07 Totals	\$32,075.52	\$3,666.09	\$28,409.43	\$0.00
<b><u>Western (WS)</u></b>				
33.07 Totals	\$54,220.40	\$0.00	\$54,220.40	\$0.00
<b><u>NYS Grand Totals</u></b>				
<b>33.07</b>	<b>\$2,080,686.87</b>	<b>\$52,230.13</b>	<b>\$1,401,474.24</b>	<b>\$626,982.50</b>

Total Number of Asset Receipts:

319