

**2019 Annual Report  
Pursuant to Mental Hygiene Law Section 33.07(i):  
The Use of Federal Benefits  
Received by Facility Directors of the  
Office for People With Developmental Disabilities  
as Representative Payees**

**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) 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 from OPWDD directors in their capacity as representative payee.

Section Two of the Report summarizes existing OPWDD regulations (14 NYCRR §§ 633.9 and 633.15) regarding the funds of individuals residing in certified residences, which provide the framework for the implementation of the 2010 amendments to MHL § 33.07 and describes OPWDD’s implementation actions.

Section Three of the Report provides information regarding the 7,099 individuals for whom OPWDD directors served as representative payees during the reporting period, the amount of money involved and the disposition of those funds.

**Section One. Mental Hygiene Law § 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, the Social Security Act 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

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<sup>1</sup> The Social Security Administration maintains a website which explains the Representative Payee (RP) Program, including 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.ssa.gov/payee/>.

the Veterans Administration and certain other federal programs.

Pursuant to the Social Security Act, 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 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.

MHL § 29.23 specifies that the receipt and application of federal benefits is governed by § 33.07, which provides that a facility director who, as representative payee of federal benefits, applies such benefits to the cost of the beneficiary's care and treatment is not violating the director's fiduciary obligation so long as the director acts in accordance with federal law and regulations. See MHL § 33.07(e).

MHL § 33.07 also provides that when the director of an OPWDD facility who is representative payee for a federal or state benefit receives a lump sum retroactive payment of such benefit on behalf of an individual which, in combination with other funds held on behalf of the individual, would cause the individual to become ineligible for government benefits, the director must, to the extent permitted by law, apply the excess funds to the individual's personal needs or seek to establish a Medicaid qualifying trust for the individual. OPWDD would seek to place such excess funds into a qualifying Medicaid exception trust after first determining the individual'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 §§ 633.9 and 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 their personal spending choices. Pursuant to Social Security Administration rules and regulations, payments 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 § 131-o requires that each individual be provided with a monthly allowance out of their income for their personal expenditures.

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, their advocate and care manager, 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 an individual who receives a lump-sum retroactive payment [as specifically defined in paragraph two of MHL § 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 sought 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 commencement of proceedings to establish appropriate Medicaid exception trusts or similar instruments.

As required by MHL § 33.07(h), OPWDD provides the Mental Hygiene Legal Service (MHLS) with this report regarding the management of funds of residents of State-operated facilities. OPWDD will meet with representatives of MHLS, as requested, to collaboratively review the processes.

Since enactment of the amendments to MHL § 33.07, OPWDD has promulgated regulations found at 14 NYCRR § 633.9, which build on the existing regulatory structure. These regulations, effective October 11, 2017, require facility directors to: determine an individual's need for a representative payee; provide notice to qualified parties when a director intends to apply to be representative payee; and requirements on transferring funds when an individual moves from one OPWDD certified residential facility to one operated by a different agency. The regulations also include policy and procedure requirements applicable when a facility director acts as representative payee.

### **Section Three. Utilization of Federal Benefits Received by OPWDD Facility Directors as Representative Payees**

A summary of the receipt and utilization of federal benefits for the 7,099 individuals for whom OPWDD facility directors served as representative payees for the period of December 2018 through November 2019 is annexed as Exhibit “A.” This report covers the period of December 2018 to November 2019 to follow the time frame of previous reports and account for the funds received in the year since the previous report.

Exhibit “A” is comprised of two charts:

- The first chart, titled “Disposition of Monthly Recurring Benefits Received by OPWDD Facility Directors for Individuals in State-Operated Residential Programs During the Period of December 2018 through November 2019”, provides a summary of the aggregate amount of federally funded benefits received by the directors of each of the 13 Developmental Disabilities Services Offices of OPWDD, as representative payees for individuals residing in State-operated residential programs for the period of December 2018 through November 2019. The chart indicates that the total amount of benefits received by all facility directors was \$83,332,527.96, and provides a breakdown showing the amount received at each facility. The total amount billed to residents for the cost of care pursuant to Article 43 of the Mental Hygiene Law was \$66,494,232.24 and the total amount allocated to personal allowance for those individuals was \$16,838,295.72. Breakdowns of the amounts per facility are also provided.
- The second chart, titled “Personal Asset Allocation Summary Report for Lump Sum Federal Benefits from December 2018 through November 2019”, provides a summary from each of the nine OPWDD Revenue Support Field Offices of the receipt and disposition of lump-sum federal benefit payments received by facility directors as representative payees for individuals residing in State-operated residential programs. There were 180 lump sum benefits received from benefit paying agencies during the reporting period, totaling \$717,777.56. The amount applied to the cost of care and maintenance as required pursuant to Medicaid regulations and as allowed by Social Security was \$240,055.80. The aggregate amount of the lump sum benefits paid into the individuals’ personal accounts for use by

the individuals for their personal needs was \$456,235.12. If at the time of receipt of a lump sum benefit, or within the standard exemption period thereafter, it appeared that such funds, in combination with other funds of the individual, would cause them to become ineligible for government benefits, OPWDD sought to place the excess amount into a qualifying Medicaid exception trust. Most of the Social Security Disability lump sum payments received during the report period are in the standard nine-month exemption period where they do not create an ineligibility for government benefits. During the report period, one trust was created. As of the drafting of this report, there are three additional individuals who received retroactive payments during the report period and proceedings to establish appropriate Medicaid exception trusts have commenced.

This report has also been placed on the OPWDD website.

Exhibit A

**OPWDD**

Disposition of Monthly Recurring Benefits Received by OPWDD Facility Directors for  
Individuals in State-Operated Residential Programs

And

Personal Asset Allocation Summary Report for Lump Sum Federal Benefits

Disposition of Monthly Recurring Benefits Received by  
OPWDD Facility Directors for Individuals in State-  
Operated Residential Programs During the Period of  
December 2018 through November 2019

	Benefits Received	Amount Billed for Services Provided	Amount Allocated to Personal Allowance
<b>Developmental Disabilities State Operations Office - Region 1</b>			
Finger Lakes	\$13,642,592.28	\$10,956,008.52	\$2,686,583.76
Western New York	\$10,534,752.36	\$8,245,257.00	\$2,289,495.36
<b>Developmental Disabilities State Operations Office - Region 2</b>			
Broome	\$6,412,133.64	\$5,197,350.24	\$1,214,783.40
Central New York	\$14,018,980.68	\$11,142,881.64	\$2,876,099.04
<b>Developmental Disabilities State Operations Office - Region 3</b>			
Capital District	\$4,975,624.20	\$3,875,478.00	\$1,100,146.20
Sunmount	\$3,747,850.80	\$3,124,534.08	\$623,316.72
<b>Developmental Disabilities State Operations Office - Region 4</b>			
Hudson Valley	\$8,860,647.96	\$7,109,801.40	\$1,750,846.56
Taconic	\$5,398,878.84	\$4,392,735.72	\$1,006,143.12
<b>Developmental Disabilities State Operations Office - Region 5</b>			
Brooklyn	\$1,780,275.00	\$1,243,878.60	\$536,396.40
Metro New York	\$2,745,430.68	\$2,156,117.52	\$589,313.16
Staten Island	\$2,664,187.44	\$2,115,343.20	\$548,844.24
<b>Developmental Disabilities State Operations Office - Region 6</b>			
Bernard M. Fineson	\$2,798,736.36	\$2,275,198.08	\$523,538.28
Long Island	\$5,752,437.72	\$4,659,648.24	\$1,092,789.48
<b>TOTALS</b>	<b>\$83,332,527.96</b>	<b>\$66,494,232.24</b>	<b>\$16,838,295.72</b>

TOTAL NUMBER OF INDIVIDUALS = 7,099

Personal Asset Allocation Summary Report for  
Lump Sum Federal Benefits from December 2018 through November 2019

Responsible RSFO	Amount Received	Amount Applied to Care & Maintenance	Amount Paid to Personal Account	Amount Placed in Trust
<u>Broome (BR)</u> 33.07*	\$42,298.48	\$20,105.52	\$22,192.96	\$0.00
<u>Capital (CD)</u> 33.07	\$76,223.59	\$8,897.19	\$67,326.40	\$0.00
<u>Central/Sunmount (CS)</u> 33.07	\$118,102.33	\$47,197.22	\$49,418.47	\$21,486.64
<u>Finger Lakes (FL)</u> 33.07	\$94,271.60	\$15,794.72	\$78,476.88	\$0.00
<u>Hudson Valley (HV)</u> 33.07	\$12,832.23	\$1,223.00	\$11,609.23	\$0.00
<u>Long Island (LI)</u> 33.07	\$25,577.00	\$16,720.00	\$8,857.00	\$0.00
<u>New York City (NY)</u> 33.07	\$265,225.06	\$118,351.19	\$146,873.87	\$0.00
<u>Taconic (TA)</u> 33.07	\$15,903.00	\$526.00	\$15,377.00	\$0.00
<u>Western (WS)</u> 33.07	\$67,344.27	\$11,240.96	\$56,103.31	\$0.00
<b><u>NYS Grand Totals</u></b> <b>33.07</b>	<b>\$717,777.56</b>	<b>\$240,055.80</b>	<b>\$456,235.12</b>	<b>\$21,486.64</b>

Total Number of Asset Receipts: 180

\*Lump sum retroactive benefit payments received by an OPWDD Facility Director as Representative Payee