



Children's Advocacy Institute



# BUILDING ECONOMIC SECURITY FOR FOSTER YOUTH: PRESERVING SSI / OASDI / VA BENEFITS

[HTTPS://WWW.SANDIEGO.EDU/CAI/ADVOCACY/YOUTH-BENEFITS/](https://www.sandiego.edu/cai/advocacy/youth-benefits/)

Amy C. Harfeld, JD  
National Policy Director

1



Children's Advocacy Institute



2

## BACKGROUND, INFORMATION, HISTORY

- Approximately 10-12% of foster youth receive disability, survivor, or veterans' benefits. Closer to 20% are eligible. The annual average disability benefit per youth is over \$900/month. Survivor benefits depend on income and duration of worker's contributions. In Maryland average accumulated youth benefits were between \$12,000-\$15,000 per child.
- States routinely apply at various points for benefits on behalf of foster youth- **without** notifying them or their attorneys/representatives. They then routinely appoint themselves as the representative payee, using the funds to supplant existing obligation for foster care.
- States view this as standard practice, or "revenue maximization strategy" without reflecting upon ethical implications, fiduciary obligations, youth impact, or fidelity to agency mission and purpose.
- The practice violates the agencies' fiduciary obligations under federal and state law to serve and protect children's best interests. It also violates children's due process and equal protection rights.
- [Legislation](#) to limit the practice has been introduced in Congress four times since 2008, with an updated version planned to be introduced shortly. Bipartisan support is critical. **CALL YOUR MEMBERS OF CONGRESS TO LET THEM KNOW YOU SUPPORT CHANGING THIS POLICY!**



3

## YOUTH VOICE: WHAT THE STATE TOOK



**Malerie Shockley, 24**

\$720 to \$790 per month during her teen years.

Shockley was moved between many foster homes and facilities in Alaska, where she says she faced abuse. She developed debilitating PTSD and panic attacks and qualified for disability benefits. **"I didn't realize I was basically paying for my own foster care[...]."**



**Tristen Hunter, 21**

Nearly \$700 a month starting when he was 12.

Hunter's mother died when he was 7, making him eligible for survivor benefits. Later, his father went to prison, and Hunter was placed in a foster home. **"I'm not even really sure where the money is now except that I don't have it."**



**Katrina Edwards, 21**

\$780/month when she was a teen

After entering foster care, Edwards ran away several times and was sent to mental health facilities. The state obtained disability benefits in her name. **"The state is taking my personal money when they're barely even taking care of me? That doesn't seem right."**

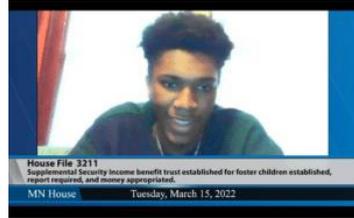
Source: Hager, E. & Shapiro, J. (2021, April 22). State Foster Care Agencies Take Millions of Dollars Owed To Children In Their Care.



4

# YOUTH VOICE: WHAT THE STATE TOOK

“I never thought that the system that was supposed to be helping me really was stealing from me the entire time.” Antonio Luna-Jackson, [Imprint News 5/17/22](#)



“How are you going to make a child pay child support?”

-Alex Carter, 21



5

# VETERAN'S BENEFITS AT STAKE

DONATE

NEWSLETTER

**The Imprint**  
YOUTH & FAMILY NEWS

Opinion

FILED 4/17/2022 6:01AM

SHARE

## Washington Must Step Up to Protect Foster Youths' Benefits

BY IAN MARX

When I was 11 years old, I lost my mother and my father was arrested for second-degree murder. With no relatives able to care for me, I was placed in foster care, where I stayed until I aged out at 18.

While other 11-year-olds were worried about video games and homework, I was starving my parents, terrified of living with strangers, and anxious about how I would survive. I never felt so alone. I was in therapy for over a decade to help deal with the trauma, eating and behavioral issues I faced after going into foster care. Some of that trauma haunts me to this day.

I had one reason to hold onto hope. My mom honorably served in the Navy at Guantanamo Bay, and because of her death, I became eligible for her Veterans Pension benefits. This money could have been the key to helping me pay for my bachelor's degree from the University of Notre Dame, or for my law degree at Emory University, where I am entering my second year. It could have helped me secure safe housing, stable transportation and do normal things like go on debate trips and participate in extracurricular sports.

But I never saw a red cent of my mother's survivor benefits, or the Supplemental Security Income benefits I became eligible for after coming into care. These benefits, which my social worker bluntly told me I shouldn't bother to pursue, would have totaled over \$1,000 a month.

My faith in the system that was supposed to care for me was shattered as I realized I was in the midst of an Orwellian nightmare: government agencies pocketing money from children who were orphaned or disabled, with no accountability or transparency.

As Congress and the Biden administration just affirmed, we take care of our veterans and their families. This is a hole in that net. The financial security my mother meant to be my legacy after her proud service slipped right by me and into the hands of my new legal parent — the foster care agency — who was ultimately more concerned about its bottom line

IAN MARX




6

## HOW DO YOUTH SAY THEY WOULD USE THEIR BENEFITS?



Safe Housing



Education



Reliable  
Transportation



Medical  
Expenses



7

## WHAT ARE THE RULES? SOCIAL SECURITY ADMINISTRATION (SSA) GUIDANCE

**Cases involving foster care are among the most sensitive SSA encounters. Agency payees are responsible for using children's benefits to optimize their well-being.**

It is essential that SSA do all it can to protect the rights of children who may not be able to rely on their parents to do so. It is extremely important that SSA follow all legal requirements, including using the payee preference list appropriately to identify when other payee leads should be developed and providing due process to the child's parent and/or legal guardian.

IV-E agency payees must meet with a foster youth beneficiary on a regular basis to ascertain their current unmet and foreseeable needs.

Payees must conserve any benefits not needed for current maintenance for the beneficiary's future needs.



8

## SSA PREFERENCE LIST FOR REPRESENTATIVE PAYEES

- 1) A natural or adoptive parent who has custody of the beneficiary, or a guardian; *\*a parent may serve as a representative payee as long as their rights have not been terminated.*
- 2) A natural or adoptive parent who does not have custody of the beneficiary, but is contributing toward the beneficiary's support and is demonstrating strong concern for the beneficiary's well-being;
- 3) A natural or adoptive parent who does not have custody of the beneficiary and is not contributing toward his or her support but is demonstrating strong concern for the beneficiary's well-being;
- 4) A relative or stepparent who has custody of the beneficiary;
- 5) A relative who does not have custody of the beneficiary but is contributing toward the beneficiary's support and is demonstrating concern for the beneficiary's well-being;
- 6) A relative or close friend who does not have custody of the beneficiary but is demonstrating concern for the beneficiary's well-being; and
- 7) **An authorized social agency or custodial institution.** [such as a foster care agency]

as amended at [69 FR 60232](#), Oct. 7, 2004; [85 FR 7664](#), Feb. 11, 2020



9

## SSA RULES ON FIDUCIARY OBLIGATIONS OF REP. PAYEES OF FOSTER YOUTH

Representative Payees of foster youth benefits are fiduciaries. They must act solely in the best interest of the child, and may only use the child's funds for their exclusive "use and benefit" in their individual best interest.



### Duties of fiduciaries for foster youth include :

- using and saving the money for the child's sole use and benefit;
- filing annual accounting reports on use of funds in child's best interest;
- reporting changes regarding the beneficiaries' eligibility and benefit amount;
- returning conserved funds when child leaves care (which when appropriate are then sent by SSA back to the beneficiary/new representative payee).

***Would the child's relative or adult serving as rep. payee ever identify their best interest as reimbursing the agency? When agencies take children's benefits to supplant their costs, whose best interest does that serve?***



10

## FEDERAL CHILD WELFARE LAW AND RULES

Foster children have no obligation to pay for nor owe any debt for their own care. Although a fiduciary may use a child's benefits to pay for current maintenance needs, federal [rules](#) require that if current maintenance costs are otherwise provided for- as is the case with children in foster care-, the money must be used or conserved in the beneficiary's best interest.

State and federal law explicitly require states and in some cases the federal government to pay the costs of foster care (e.g. [MD](#) "Department shall pay for foster care" for all foster children). Title [IV-E](#) directs foster care maintenance payments to be paid for eligible youth including "payments to cover the cost of (and the cost of providing) food, clothing, shelter. . . .",

an agency may not use a child's Social Security benefits to meet the Title IV-E non-federal share.



11

## STATE & LOCAL REFORM

### [Policy Reform](#)

To varying degrees, policy changes have been enacted in:

[Maryland, California, Connecticut, Illinois, Nebraska, Hawaii, Alaska, Oregon, Arizona, New Mexico, New York City, Philadelphia, Los Angeles and Washington D.C. Reforms have been introduced or are pending in Massachusetts, Michigan, Minnesota, and Washington, and Texas.](#)



12

## FEDERAL LAW & NEED FOR NEW LEGISLATION

Congress passed limited federal [legislation](#) to promote better data sharing and prevent suing youth for overpayments in 2018. The law is not being implemented properly to reflect Congressional intent- *including in Colorado* where an agreement was signed, but data is still not being shared. House Ways and Means leadership stated in 2021:

*“GAO’s [report](#) makes it evident we have work to do to make sure all foster youth receive and benefit from all SSA benefits for which they qualify and that benefits follow the child. [The data we have suggests that the SSA benefits are not always being used as intended, in the youth’s best interest, although there appears to be wide variation among states. We are specifically concerned[] about reports that benefits are being used to help state budgets instead of children.”*



13

## WHAT DOES COLORADO LAW SAY?

### Not much!

12 CCR 2509-7:7.601.72 requires county to make application for “any child who is believed to meet SSI eligibility criteria” and for all children enrolled in Colorado’s CHRP waiver. Application must begin within 45 days of out of home placement.

CDHS OM-CW-2023-0001 provides guidance for trust accounts, stating that if they are maintained by county departments, they imply fiduciary responsibilities and that SSA/SSI/SSDI trust accounts have time frame limits.



14

## INTRODUCED AND PENDING REFORM

New legislation or policy has been adopted in:

[Nebraska](#), [Connecticut](#), [Illinois](#), [California](#), [Oregon](#), [New York City](#), [Philadelphia](#), [Los Angeles](#) and [Washington D.C.](#) and is pending in [Washington](#), [Massachusetts](#), and is pending in [Oregon](#) (with a bill preserving all benefits and other assets and a partner bill providing for a retroactive [refund](#) of benefits), [Minnesota](#) (also including restitution of benefits), [Massachusetts](#), [Texas](#) (requiring notice), and the biggest piece of the pie, [California](#). Congress introduced [H.R.9654](#) at the end of 2022, which would ban the practice, and plans to reintroduce a bill in the 118th Congress.



15

## UPDATED FEDERAL POLICY GUIDANCE- THE BRIGHT SIDE

- ★ New SSA [policy](#) encouraging benefits application immediately upon entry into care and urges agencies to assist with adult redetermination earlier.
- ★ The letter addresses how state representative payees must handle foster youth's benefits, but presses agencies and SSA to seek preferred payees and encourages others to apply, reminding states that they are the payee of last resort.
- ★ SSA requires agency payees to meet regularly with foster youth beneficiaries (and presumably their attorneys/GALs) to explain their benefits and inquire about current and future needs.
- ★ Agencies are reminded that benefits are for the sole "*use and benefit*" of the beneficiary, and that a payee must conserve any benefits not needed for current maintenance to cover unmet current and future needs.



16

## UPDATED FEDERAL POLICY GUIDANCE CONTINUED

- ☆ Agencies are instructed that they "*must*" consider the use of exempt sources, like ABLE accounts, to conserve benefits when it would be in the child's best interest.
- ☆ States are reminded that they *may not* use a child's Survivor benefits to supplant their state match for IV-E dollars.
- ☆ "*SSA encourages title IV-E agencies to act within their authority and capacity to make the best decision for using each child's benefits*"
- ☆ "*CB encourages title IV-E agencies to consider using all of the tools at their disposal when conserving youth's federal benefits, if it is in their best interest, as it can be invaluable as that that youth enters adulthood.*"



17

## 5 STEPS TO PROTECT YOUR CLIENT'S RIGHTS & BENEFITS

### \*PRACTICE TOOLS/RESOURCES\*

1. Check or file motions to see if your client is receiving benefits, how they are being spent, and counsel accordingly.
2. Request documentation of proper notice to child/parent. Agency is required by SSA to meet regularly with youth beneficiaries to ensure they understand their benefits.
3. Request an accounting/explanation of how your clients benefits were spent in *their* best interest. After consulting with your client, present a motion for use of your client's benefits to support their unmet current needs and foreseeable future needs.
4. Identify an alternative rep payee who has your client's best interest at heart, [apply](#) for a change, and help establish an exempted account to deposit benefits. If no preferred payee is available, the agency may serve as long as they honor their fiduciary obligations.
5. Demand fiduciary accountability for agency payees. What benefit did your client derive from their benefits? Raise misuse of funds or breach of fiduciary duty claims if they have violated any of their [duties](#).



18

## WHAT CAN YOUR LEGISLATURE/CONGRESS DO? ELEMENTS OF A GOOD BILL

1. Agencies screen and begin applying for benefits within 60 days of a child's entry into care. Agencies apply for IV-E administrative dollars to help pay for process.
2. If eligibility is determined, seek and document search for appropriate representative payee and assist with appointment. If none is available, agency should step up to serve. Provide financial literacy training to new representative payees on establishing proper accounts to preserve eligibility, disburse funds and reassign ownership when appropriate.
3. Provide notice to child and attorney/GAL when benefits are applied for/received, reassigned, or terminated. Meet with youth regularly to educate them about their rights and benefits and engage them in planning for use of conserved funds.
4. Ensure child's assets are used as required for child's current *unmet* needs or conserved for their foreseeable future needs in appropriate account. Monitor annual accounting on use of funds in child's best interest.
5. Ambitious states are working towards providing retroactive refunds to impacted youth, sometimes with interest.



19

## DISMANTLING ROADBLOCKS

- ≠ **Everybody else is doing it**
  - ≠ Not anymore. Over eighteen states, counties and Congress have introduced or passed new policy barring or limiting the practice.
- ≠ **Not our fault- passing the buck**
  - ≠ SSA blames DHHS, both blame Congress. Federal legislation and administrative action, as well as state legislation and regulatory action AND litigation is needed to act to end this.
- ≠ **State plan requires revenue maximization strategy**
  - ≠ That may be true, but child welfare agencies have a common fundamental mission and mandate to serve the best interests of the child, not the fiscal interests of the state.
- ≠ **If states can't take kids benefits, they will stop screening/applying for benefits**
  - ≠ This is highly unlikely- this practice is baked in to most agency practice and would be difficult to stop and open them up to litigation. Agencies can/should seek IV-E administrative dollars to help pay for this.
- ≠ **Taking kids' money helps us secure their benefits**
  - ≠ Securing benefits for eligible foster youth serves the best interest of the child. Taking the money serves only the best interest of the state. See above point about IV-E admin \$.



20

# YET MORE ROADBLOCKS TO DISMANTLE

- ≠ **The Supreme Court endorsed this practice in the Keffeler case.**
  - ≠ The SCOTUS ruling was unfavorable but limited to the anti-attachment clause of the Constitution. SCOTUS explicitly declined to rule upon other Constitutional issues, and emphasized that the SSA Commissioner has authority to define “use and benefit.”
- ≠ **Agencies or state have incorporated this source of revenue into their budgets. How will the state make up for these funds if and have to forego IV-E maintenance claims in some instances?**
  - ≠ Children in foster care have no obligation to pay for their care. That the state has been improperly taking their funds and must now properly use the benefits is not the responsibility of the foster children to resolve. States can find the money now, or defend lawsuits later. Or, risk the exorbitant costs of allowing impacted youth to age out into homelessness, jail, trafficking, food insecurity, or unemployment.
- ≠ **Preserving federal benefits of foster youth promotes systemic inequity by creating advantages for disabled and orphaned foster youth that will not be enjoyed by other youth in care.**
  - ≠ Disabled and orphaned foster youth are singled out to pay for their own care while the state pays for care for all other youth. Policy reform on this alleviates an additional layer of inequity for impacted youth, without impacting other youth in the system.
- ≠ **Conserving foster youth benefits will result in a windfall to youth who don’t know how to manage their money and may use it for imprudent or illicit purposes.**
  - ≠ This concern reveals paternalistic and prejudiced presumptions about foster youth. Available data shows that youth will use cash assets for housing, food, education, etc.



21

# MINDING ASSET CAPS

There is no asset limit that applies to OASDI/Survivor/VA Survivor Benefits. Generally, SSI recipients may not accrue assets over \$2000 without jeopardizing eligibility. Pending bipartisan [legislation](#) would increase the asset cap to \$10,000.

Assets excluded from this cap include household goods, a vehicle, and a home.

**Several Federal Exempt Savings Vehicles Can be Used to Conserve Assets:**

**Plan for Achieving Self Support (PASS)**  
Information available at the [SSA](#).

**[ABLE \(529A\) accounts:](#)**  
Information available at the [SSA](#).

**[Special Needs Trusts \(or Pooled Special Needs Trusts\)](#)**

22

## ASK AND FOIA AWAY

- How many children in care are receiving benefits? (SSI, disability, OASDI survivor, Veteran's survivor)? What other benefits is the state taking (some have LONG lists)? Savings? How much money does this amount to?
- How is the agency screening and applying for benefits for children entering care? Is the requirement to screen memorialized in statute or just in rules? Is there a trigger age or timeline?
- Do children/attorneys know about benefit application, status, and use? What state laws/policies provide for proper notice to foster children and their attorneys/GALs?
- What efforts are being made by the state agency and SSA to identify preferred representative payees for foster children according to the SSA list?
- Is the state using children's benefits to supplement or to supplant its existing foster care obligations?
- HOW IS THE AGENCY'S USE OF THE CHILD'S BENEFITS IN THE CHILD'S BEST INTEREST? WHAT UNIQUE BENEFIT/SERVICE IS THE CHILD RECEIVING FROM THEIR BENEFITS? AGENCY REP PAYEES ARE REQUIRED TO CAREFULLY CONSIDER THE CHILD'S NEEDS AND MAKE AN INDIVIDUAL DETERMINATION ON WHAT USE OF FUNDS WOULD BEST SERVE THE CHILD'S INTERESTS.
- THIS the state handling SSI/OASDI/VA benefits in the same manner or differently according to category of benefits?
- How is the agency reporting/tracking use of the funds? Are the annual required reports to SSI and VA being filed? Shared w/child/atty? Conserved in dedicated/sheltered accounts?



23

## EDUCATION AND TRAINING



- Agencies and advocates must have clear information on rules and restrictions regarding choosing between and supplementing/supplanting IV-E match with SSI, OASDI, VA.
- Agency staff, caseworkers, ILPs, judges, CASAs, and children's and parents' attorneys should be provided information on the rules regarding benefits application, assignment, process to apply or appeal rep. payee appointment as well as on ensuring agencies provide required due process and comply with their fiduciary duties when serving.
- Foster youth must be informed and counseled about their rights/benefits and have an opportunity to identify their unmet current and foreseeable future needs and understand how to request access/expenditure of their funds while in care.
- States must facilitate establishment and oversight of ABLE/Special Needs Trusts as appropriate to conserve benefits and other capped earnings/assets of youth without risk of compromising continued eligibility.
- Financial literacy training for new payees and youth themselves should be provided.



24

## CASE LAW



### U.S. SUPREME COURT

KEFFELER, 2003

States not violating Anti-attachment provision in acting as representative payee for foster youth receiving SSI benefits. Decision did not rule on other constitutional or fiduciary concerns.

- Cook County: Willingham  
**Consent Decree:** Notice and Accounting Required- no admin costs allowed
- North Carolina: [John G](#)  
Benefit to house restored to youth
- Maryland: [Ryan W.](#)  
Agency violated constitutional due process rights of youth
- Alaska: [Alaska v. Z.C.](#)  
Appeal pending- trial court upheld foster youths' due process and equal protection rights.
- San Diego County: [V.R. and B.R. v. County of San Diego HHS](#) et all  
Complaint filed on behalf of adopted girls whose survivor benefits were taken after they were adopted. Fiduciary obligation claims.



25

## LITIGATION: CASE PLANNING

### Who is the plaintiff?

- Current foster youth – minor or in extended foster care?
- Former foster youth – minor or adult?
- Receiving/received what type of benefits (SSI, Survivor, VA)?

### What are you seeking for your client?

- A rep payee other than the agency?
- Conservation of more funds while child is in care?
- Back payments?



### Are you seeking to change policy?

- An injunction prohibiting the state from applying for benefits without notifying youth and legal representative?
- A declaration that youth are entitled to notice and a hearing regarding application for benefits and appointment of rep payee?
- An injunction requiring the state to demonstrate use of funds in child's best interest or conserve funds in protected account for the beneficiary?
- A declaration that the state may not use SSA benefits to reimburse itself for foster care?



26

## LITIGATION: INITIAL CONSIDERATIONS

### Potential Claims

- Violation of Due Process (federal or state)
- Violation of Equal Protection (federal or state)
- Misuse of Funds
- Breach of Fiduciary Duty



### Other Considerations

- Consider venue – federal or state?
- Research relevant case law interpreting *Keffeler* in your jurisdiction
- Consider individual or class action (or mandamus)
- What unintended consequences might there be if successful?



27

## OCR Efforts

- ✓ Case-level litigation resources
  - discovery and information requests
  - motions
- ✓ CDHS meetings, stakeholder engagement
- ✓ Legislative opportunities



28

## CONTACT INFORMATION



**The Administration wants to help- ASK THEM!**  
Requests for technical assistance on establishing exempt accounts, and  
implementing reform can be directed to  
Children's Bureau Associate Commissioner Aysha Schomburg  
[aysha.schomburg@acf.hhs.gov](mailto:aysha.schomburg@acf.hhs.gov)

**Contact:**

Amy C. Harfeld, JD  
National Policy Director, Children's Advocacy Institute  
E-Mail: [amyharf@hotmail.com](mailto:amyharf@hotmail.com)  
Phone: 917-371-5191

<https://www.sandiego.edu/cai/advocacy/youth-benefits/>

