



Children's Advocacy Institute

Ensuring Proper Use of Foster Youth's SSI-OASDI/VA Benefits Collected Resources

Issue Summary & Info

- Approximately 10-12% of foster youth are eligible for and receive disability, survivor, or veterans' benefits. Estimates show that closer to 20% should be receiving benefits. SSA and ACF have not collected or reported comprehensive data on the numbers of youth or amounts of benefits involved nationally.
- According to Maryland, the annual average of benefits per youth was \$8500
- States routinely apply for these benefits on behalf of foster youth- without notifying them or their attorneys. Then, states routinely appoint themselves as the representative payee to receive the funds, again with no notice to the youth or their attorney in most states.
- No accounting is done in most states tying the use of disabled youth's SSI benefits to any special services, therapies, or equipment related to their disability. Rather, the money is used to reimburse the state for basic foster care maintenance expenses already provided for under Title IV-E. This is a double violation of the states' obligations as fiduciaries- once as the legal parent of the child, and again in the role of representative payee.
- The same can be said for orphaned youth whose parents paid into Social Security insurance or served in the U.S. military and died, leaving survivor benefits to their children. These funds are applied for and received by the state agency in most cases, without any notice to or consent from the child or their attorney/representative, without any accounting for the use of the funds, and without any of the benefits being conserved for future use.
- Representative payees, including state agencies, must use Social Security funds for the use and benefit of the beneficiary. For children whose families have no means to provide for their basic needs, SSI can help with food, clothing, and shelter, as well as with services relating to the child's disability. States, however, are already obligated to pay for the basic needs of *all* foster children, and there should not be unequal application of this obligation to disabled and orphaned foster youth. SSI explicitly requires that any funds that are not used for unmet basic needs be conserved for the beneficiary's future use.

Children's Advocacy Institute

University of San Diego School of Law | 5998 Alcalá Park, San Diego, CA 92110-2492
P: (619) 260-4806 | F: (619) 260-4753 | www.caichildlaw.org | info@caichildlaw.org

- Why do states do this? It is a long-standing revenue maximization strategy for states, acknowledging that states may not "double-dip" with IV-E and SSI, and that SSI provides more revenue to states without requiring other income eligibility or state matching. The practice has simply become routine across states, which many agencies taking a "well, everyone else is doing it" approach without reflecting upon the ethical implications or fiduciary obligations at stake.
- The vast majority of foster youth eligible for and receiving SSI/OASDI/VA benefits never know about it. There is *no notice to youth* or their attorney/representative of application for benefits. *No notice of appointment* of benefit award. No opportunity to propose alternative payee in accordance with the SSA preference list who would use the benefits in the child's interest. There is no consent to appoint state to receive benefits or to use them to reimburse the agency for existing state financial obligations.
- If another vulnerable group such as retired veterans, were having their federal benefits intercepted by a state agency without notice or due process and without accountability for their use, it would not be tolerated.
- Existing federal legislation and regulations establish clear requirements pertaining to notice, due process, appropriate payees for youth, information sharing, and data collection which are not being followed or enforced.
- Federal law neither endorses nor prohibits this practice explicitly. Legislation to limit the practice has been introduced in Congress three times since 2008, with an updated bill being crafted now by Rep. Danny Davis.
- Litigation on the issue has produced mixed results, with the Supreme Court making a limited unfavorable ruling in 2013, and state courts acting to get benefits back in the hands of foster youth in NC, MD, and AK.
- To date, Maryland is the only state to pass legislation limiting the practice. Legislation in Texas was introduced in 2021 and several additional states are gearing up for state bills.

Federal Law, Rules and POMS Pertaining to Foster Youth Social Security Benefits

1. **Federal legislation** ending this practice has been introduced three times in Congress. The first effort, was the [Foster Children Self-Support Act in 2007](#). The most recent bill was the [Protecting Foster Youth Resources to Promote Self-Sufficiency Act of 2016](#).

The bill includes 8 elements to protect the Federal benefits of foster youth:

It prohibits State agencies from taking a foster youth's Social Security and SSI Benefits for reimbursement of foster care costs. Rather, when agencies act as representative payees they must serve as fiduciaries for the children as intended until the youth exit care or turn 18.

It requires State agencies to develop procedures to screen foster youth for eligibility, assist in applying for Social Security and SSI benefits, and aid in applying for continued benefits prior to the youth leaving care to prevent any disruption of benefits.

It requires notice of eligibility to the youth and/or their guardian ad litem and provision of financial literacy training for the foster youth.

It mandates that the State agency, along with the representative payee and the child, develop a child -specific plan to help achieve self-sufficiency after leaving care, including conserving the funds in an account (e.g., a Chaffee Foster Care Independence Program account, an ABLE account, or an Individual Development Account) for future needs.

It allows foster children to benefit from the ABLE Act, so that disabled foster children can conserve their benefits in ABLE accounts to assist with the children's difficult transition to adulthood.

It allows foster youth to save benefits without violating the \$2,000 resource limit under the SSI program to better prepare for self-sufficiency.

It provides \$4.5 million a year to the Department of Health and Human Services for technical assistance to State agencies for such activities.

It mandates a GAO study within 4 years of enactment to assess compliance with the changes and outcomes for youth.

Efforts in Congress are underway to reintroduce a bill in the coming year.

2. Social Security Administration Rules, POMS/Code of Federal Regulations (CFR)

Program Operations Manual System (POMS) **GN 00502.159**
Additional Considerations When Foster Care Agency is Involved

Cases involving foster care are among the most sensitive SSA encounters. 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 conducting a complete investigation of the individual or organizational representative payee applicant, 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 (see [GN 00502.159B](#))**.

Foster care agencies have traditionally been among SSA's most dependable payees; ***however, their appointment as rep payee is not automatic. You must decide each case individually and remember to consider other concerned relatives as possible payee choices.***

Policy- Each case should be decided on its own merits. Your primary concern must be that the person, agency or organization you select as payee will best serve the interest of the child. In the absence of a parent, be sure to consider whether other concerned relatives are a better payee candidate. SSA has several policies to help you find the best possible payee.

Advance Notice - Due Process- *It is a legal requirement that we provide advance notice about the payee appointment to the proper persons.* The parents (or legal guardian) of a child in foster care must be provided advance notice of the appointment unless their parental rights were terminated by a court. (See [GN 00503.100E.2.](#))

Procedure: Investigate the Individual Situation- When you select a payee for a child in foster care, exercise caution and follow proper procedures to ensure we appoint the best payee available and provide appropriate due process.

Do not routinely appoint the foster care agency as payee for a child in foster care. Gather all pertinent information and make a thoughtful and careful choice and decide each case on its own merit.

Use the Payee Preference List (GN 00502.105B)

If there is a payee candidate higher than the agency on the payee preference list, contact that person and document why they are or are not interested in filing as payee before appointing the agency. Consider whether, in the absence of a parent, other concerned relatives are a possibility.

Application and Interview

Ensure that the foster care agency answers all pertinent questions during the payee application process via the eRPS. Make sure they tell you whether the child has a living parent or other interested family member. If they answer “no” (or they do not know) to the parent question, review all court documents obtained, the MBR/SSR and/or case file to determine if we have any record of a parent or other family member. When interviewing the representative of the foster care agency, take the time to fully discuss their **representative payee responsibilities** ([GN 00502.113.D.](#)):

- *using and saving the money for the child’s benefit;*
- *filing annual accounting reports;*
- *reporting changes (including adoptions and custody changes) which affect the beneficiaries’ eligibility and benefit amount;*
- *record keeping; and*
- *returning conserved funds*

<https://secure.ssa.gov/poms.nsf/lnx/0200502159>

§ 404.2021 What is our order of preference in selecting a representative payee?

As a guide in selecting a representative payee, we have established categories of preferred payees. The preferences are:

(c) For beneficiaries under age 18, our preference is -

- (1) A natural or adoptive parent who has custody of the beneficiary, or a guardian;
 - (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.
- [[47 FR 30472](#), July 14, 1982; [47 FR 32936](#), July 30, 1982, as amended at [69 FR 60232](#), Oct. 7, 2004; [85 FR 7664](#), Feb. 11, 2020]

Notice and due process for beneficiaries:

(xii) In advance of the first payment of an individual's benefit to a representative payee under subparagraph

(A)(ii), the Commissioner of Social Security ***shall provide written notice*** of the Commissioner's initial determination to make any such payment. Such notice shall be provided to such individual, except that, if such individual-

(I) is under the age of 15,

(II) is an unemancipated minor under the age of 18, or

(III) is legally incompetent, then such notice shall be provided solely to the legal guardian or legal representative of such individual.

(xiii) Any notice described in clause (xii) shall be clearly written in language that is easily understandable to the reader, shall identify the [person](#) to be designated as such individual's representative payee, and shall explain to the reader the right under clause (xi) of such individual or of such individual's legal guardian or legal representative, to appeal a determination that a representative payee is necessary for such individual, to appeal the designation of a particular [person](#) to serve as the representative payee of such individual, and to review the evidence upon which such designation is based and submit additional evidence.

- 3. **Federal Administration for Children and Families (ACF) policy on claiming IV-E/SSI benefits:**
https://www.acf.hhs.gov/cwpm/public_html/programs/cb/laws_policies/laws/cwpm/policy_dsp_p_f.jsp?citID=76
- 4. [2018 H.R. 4547, the Strengthening Protections for Social Security Beneficiaries Act](#)
(Sec. 101) This bill ***requires*** the Social Security Administration (SSA) to make annual grants to each state's protection and advocacy system for the purpose of conducting reviews of representative payees under the Supplemental Security Income (SSI) program and the Old Age,

Survivors, and Disability Insurance (OASDI) program. The SSA **must** also conduct periodic onsite reviews of individual and organizational payees. (see Protection and Advocacy P&A Network) (Sec. 102) The bill lessens certain monitoring requirements with respect to specified family members who are serving as representative payees.

(Sec. 103) The SSA **must**:

- (1) enter into agreements with each state for the purpose of sharing information to identify represented minor beneficiaries who are in foster care; and
- (2) determine the appropriate representative payee for any represented minor beneficiary who has entered foster care, exited foster care, or changed foster care placement in a given month.

The Government Accountability Office **must** report to specified congressional committees on certain issues related to represented minor beneficiaries in foster care.

(Sec. 104) The bill modifies provisions related to overpayment liability with respect to a represented minor beneficiary in foster care.

(Sec. 105) The SSA **must** report to specified congressional committees on certain issues related to representative payment with respect to SSI and OASDI benefits.

Federal Reports/Surveys

5. [2021 GAO Report, "Social Security Administration: New Data Exchanges with Some States Provide Limited Information on Foster Care Beneficiaries"](#) reports that, "[...]Legislation in 2018 called for more information sharing between SSA and states on SSA beneficiaries in foster care and their payees. The legislation didn't explicitly require state child welfare agencies to enter into data exchange agreements, according to SSA, but 31 states have done so. Of those, 14 states were actively sharing data with SSA as of April 2021. [] According to SSA, the Act [...] does not provide SSA with a mechanism to compel states to [enter into data exchange agreements] or to do so within a certain time frame[.]

National data from SSA show that child welfare agencies were the payees for about 81 percent of the more than 25,000 represented minor beneficiaries in foster care as of November 30, 2020; however, these data likely reflect an undercount. SSA staff stated the agency would not have complete information on these beneficiaries until all states were participating in the Section 103(a) data exchanges. According to SSA, information submitted through these exchanges has helped the agency identify over 5,500 instances in which it determined it should to appoint a new payee for a minor beneficiary in foster care.

SSA had sufficiently reliable accounting data for 2020 on child welfare agencies that served as payees for seven of the 11 states participating in the exchanges. These payees reported that Social Security funds were primarily used to cover the direct expenses of the beneficiary, such as for housing and food. Among the seven states, these payees conserved 15 percent or less of the Social Security funds on behalf of the beneficiary."

6. 2021 Bipartisan [statement](#) in response report from House Ways and Means Human Resources Subcommittee.

“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.”

7. **2018 Congressional Research Service report:** [Social Security Disability Insurance \(SSDI\) and Supplemental Security Income \(SSI\): Eligibility, Benefits, and Financing](#)

8. **2018 Social Security Advisory Board Report** on Improving Social Security’s Representative Payee Program: <https://www.guardianship.org/wp-content/uploads/2018/03/ImprovingRepPayee2018.pdf>

“Creditor relationships occur in state foster care agencies since those agencies are often assigned automatically as the rep payee for children in foster care without an analysis of whether better choices are available. As the board’s 2014 annual SSI Statement indicated, this practice is problematic because it creates conflicts of interest. The interests of state foster care programs may be at odds with, and possibly in conflict with, the interests of beneficiary/recipient. Particularly with highly vulnerable populations such as children in foster care, SSA should consider all potential rep payees to find one that will act in the best interests of the child.”

9. **2018 U.S. Department of Health and Human Services Administration for Children and Families, Children’s Bureau Webinar:** [Social Security Administration \(SSA\) Data Exchanges & Child Welfare Webinar](#)

10. **2011 Congressional Research Service Report:** [Child Welfare: Social Security and Supplemental Security Income \(SSI\) Benefits for Children in Foster Care](#)

Research, Media and Litigation

11. **The three-part NPR/Marshall Project investigative series from May-July 2021:** <https://www.npr.org/2021/04/22/988806806/state-foster-care-agencies-take-millions-of-dollars-owed-to-children-in-their-ca> which had two follow up segments: the [second one](#) on how young people are recouping some of this intercept, and the [third one](#) on how private for-profit companies are mining children for benefits

12. As part of NPR series, the [Marshall Project developed a tool](#) to conduct a real-time search on status and history of individual benefits/beneficiaries.
13. **2021 Veteran Survivor and Foster Youth Alum Ian Marx's article**, [Reforming Foster Care's Social Security Benefits System](#), Congressional Coalition on Adoption Institute Foster Youth Internship 2021, p 33-36.
14. 2021 Children's Advocacy Institute report, [The Fleecing of Foster Children How We Confiscate Their Assets and Undermine Their Financial Security](#) review of practice as it intersects with other obstacles to financial security for transition aged foster youth.
15. NYTimes coverage of John G litigation in North Carolina ordering that the state use John's benefits to help with a mortgage/housing stability: <https://www.nytimes.com/2006/02/17/us/welfare-agencies-look-for-foster-childrens-assets.html>
16. Wisconsin coverage on state's use of private-for profit revenue maximization firm to mine foster youth for benefits: <https://www.badgerinstitute.org/WI-Magazine/Diggings1/Fall-2017/The-shameless-chase-for-federal-money.htm>
17. Baltimore Sun piece referencing Maryland's legislative reform and Ryan and Alex's related litigation by Dan Hatcher. <https://www.baltimoresun.com/opinion/op-ed/bs-ed-foster-care-maryland-20131013-story.html>
18. Alaska coverage of case, 2nd appeal pending, of state's improper use of foster youth benefits. <https://www.alaskanewssource.com/content/news/Court-finds-OCS-Alaska-foster-kids-Social-Security-monies-559405261.html>
19. Foundational background research and writing by Professor Dan Hatcher at the University of Baltimore School of Law: https://scholarworks.law.ubalt.edu/all_fac/283/
20. U.S. Supreme Court case of Keffeler from 2003 upholding Washington state's practice via a narrow holding related to the anti-attachment clause of the Constitution, but abstaining from other substantive ruling. <https://supreme.justia.com/cases/federal/us/537/371/>
21. Cook County, IL complaint, and consent decree requiring adherence to notice and due process for beneficiaries, attached. Related regulations: <https://www.ilga.gov/commission/jcar/admincode/089/08900353sections.html>, as well as accompanying procedures: https://www2.illinois.gov/dcf/aboutus/notices/Documents/procedures_353.pdf

22. In Nebraska, and perhaps other states, mining of foster youth for benefits extend far beyond federal disability and survivor benefits. In addition to Social Security and Veterans Administration (VA) benefits, a [state regulation encourages the agency to consider taking the following assets from foster children](#) – 1. Cash on hand; 2. Cash in savings or checking accounts; 3. Stocks; 4. Bonds; 5. Certificates of deposit; 6. Investments; 7. Collectable unpaid notes or loans; 8. Promissory notes; 9. Mortgages; 10. Land contracts; 11. Land leases; 12. Revocable burial funds; 13. Trust or guardianship funds; 14. Cash value of insurance policies; 15. Real estate; 16. Trailer houses; 17. Burial spaces; 18. Life estates; 19. Farm and business equipment; 20. Livestock; 21. Poultry and crops; 22. Household goods and other personal effects; and 23. Federal and state tax refunds.
23. Omaha World Herald: [Editorial: Nebraska must stop seizing foster children's Social Security benefits](#). Editorial staff, Jun 8, 2021 Updated Jul 15, 2021.
24. In Nebraska, [LR 198](#) is Senator Megan Hunt's interim study about the practice of intercepting Social Security benefits that are owed to children in State care. A hearing was held on 10/29/21 and the state has plans to introduce legislation similar to the Maryland and Texas bills.
25. Washington Post covers story of suing former youth and their families for overpayments of benefits: https://www.washingtonpost.com/politics/social-security-continuing-to-pursue-claims-against-family-members-for-old-debts/2014/12/13/4fbdc1f4-7fc7-11e4-81fd-8c4814dfa9d7_story.html
26. 2016 Article by Dan Hatcher: The Poverty Industry: How Foster Care Agencies Exploit Children In Their Care <https://talkpoverty.org/2016/06/24/poverty-industry-foster-care-agencies-exploit-children-care/>
27. Summary of Maryland's 2018 bill history and provisions: <http://blog.liftingtheveil.org/2015/03/06/maryland-legislators-file-new-laws-to-protect-foster-children/>
28. Information about Florida's Master Trust, [Florida Statute §402.17](#), and [402.33](#) requiring the department to act in both the current and long-term interests of clients. In addition to current needs, the trustee shall take into account providing for the long-term needs of a client, including, but not limited to, ensuring that a client under the age of 18 will have sufficient financial resources available to be able to function as an adult upon reaching the age of 18, meeting the special needs of a client who has a disability and whose special needs cannot otherwise be met by any form of public assistance or family resources, or maintaining the client's eligibility for public assistance, including medical assistance, under state or federal law. Notice of Fee Assessment & Rights of Foster Child: DCF Form 285D Application for Review of Assessed Fee: DCF Form 285e Master Trust Expenditure Plan: DCF Form 5312.

29. September 2021 Texas bill introduced, mirroring the provisions in Maryland bill to limit practice and conserve a portion of benefits for future use:
<https://capitol.texas.gov/tlodocs/87R/billtext/html/HB042441.htm>.
30. December 2021 article in Journal of the National Association of Counsel for Children, [Preserving the Social Security Disability and Survivor Benefits of Youth in Foster Care](#), by Amy Harfeld.
31. December 2021 Philadelphia Inquirer piece, [Philly took \\$5 million in foster children's Social Security payments without telling them](#).
32. December 2021 Children's Legal Rights Journal, [The Strengthening Protections for Social Security Beneficiaries Act Fails to Improve Foster Youth's Awareness of their Federal Benefits](#) by Abigail Mitchell.
33. December 2021: New York City's ACS puts out press release on STOPPING the practice of intercepting benefits in 2022. Policy/rules to be released during the year. **FIRST ACTION TO END PRACTICE.** <https://www1.nyc.gov/assets/acs/pdf/PressReleases/2021/SocialSecurityIncome.pdf>
34. January 2022 Marshall Project [PAYING FOR THEIR OWN FOSTER CARE: Inside Story examines the conflict between legality and morality when states take money intended for foster children](#). By Lawrence Bartley and Donald Washington, JR.
35. January 2022 Illinois State Senator Robert Peters introduces bill in IL mirroring MD bill:
<https://openstates.org/il/bills/102nd/SB3470/>
- 36.

How to Apply to Change Rep. Payee

SSA appoints the representative payee. We do not need consent to remove any person or organization from serving as payee. The Social Security Act (42 U.S.C. 405(j); 1383 (a)(2)) and our regulations (20 CFR 404.2001, .2015 - .2024; 416.601, .615 – .624) give the Commissioner of Social Security the authority to appoint representative payees.

A person or organization can apply to be payee for a beneficiary by contacting their local field office. The field office will interview the payee applicant, including completing a form SSA-11, *Request to be Selected as Payee*. <https://secure.ssa.gov/poms.nsf/lnx/0200502115> Even if a beneficiary already has a payee, another individual or organization may still apply to serve as the beneficiary's payee. When this happens, we will investigate the payee applicant's suitability, and if we determine that the applicant will best serve the beneficiary's interests, we will change the payee. We do not require or seek the approval of the current payee before selecting a new payee.