

Dear Colleagues:

Across the country, child welfare and foster care agencies routinely utilize the social security benefits of children in foster care to reimburse themselves for the cost of foster care. This is done by applying to be the child's representative payee with the Social Security Administration. The Marshall Project recently published an article in partnership with NPR detailing this practice and providing examples of youth who have been negatively impacted by these policies.¹

In January 2019, students at Columbia Law School submitted a FOIL request to the Administration of Children's Services (ACS) seeking information regarding the use of the social security benefits of children in foster care in New York City. In 2020, ACS returned multiple documents that detailed their process of routinely applying to be representative payee of children in foster care, and then using these funds to offset the cost of foster care services provided by ACS. Documents returned from the FOIL include detailed financial statements and claim reports as well as policy manuals and documents.

The attached paper was written by a student in the Adolescent Representation Clinic at Columbia Law School, Jordan Carpenter, CLS '21. The paper details the process of child welfare agencies utilizing the social security benefits of children in foster care, provides legal and policy arguments against this practice, and analyzes some of the documents returned from the FOIL request. The information in this paper, as well as the FOIL documents, may be of interest to you and your organization in pursuing advocacy for children in foster care in New York City. The ACS documents received through the FOIL request can be provided upon request.

We hope you and your organization will find this topic of interest. If you have any questions, or would like to discuss this more, we can be reached at spinak@law.columbia.edu and jcc2311@columbia.edu.

Sincerely,

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Professor Jane M. Spinak

¹ The referenced article can be found here: <https://www.themarshallproject.org/2021/04/22/foster-care-agencies-take-thousands-of-dollars-owed-to-kids-most-children-have-no-idea>

The Use of Social Security Benefits for Children In New York City Foster Care

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INTRODUCTION

On any given day, there are approximately 443,000 children in foster care in the United States.¹ In 2017, almost 700,000 children in the United States spent time in the foster care system.² In New York City alone, on average, each day in 2018 there were 8,723 children in foster care.³ However, placing children in foster care does not come cheaply to the states and federal government. In 2016, child welfare agencies (or “foster care agencies”), spent \$13.5 billion in federal funds.⁴ In total, local, state, and federal agencies spent \$29.9 billion on child welfare.⁵

¹ *Foster Care*, CHILDREN’S RIGHTS, <https://www.childrensrights.org/newsroom/fact-sheets/foster-care> (last visited March 26, 2021).

² *Id.*

³ *Watching the Numbers*, CTR. FOR NEW YORK CITY AFFAIRS 1 (Mar. 2019), <https://static1.squarespace.com/static/53ee4f0be4b015b9c3690d84/t/5c8ad361f9619a54de81c702/1552601954128/watchingthenumbers2018.pdf>.

⁴ *Title IV-E Spending by Child Welfare Agencies*, CHILD TRENDS 1 (Dec. 2018), https://www.childtrends.org/wp-content/uploads/2018/12/TitleIVESFY2016_ChildTrends_December2018.pdf.

⁵ *Id.* at 7.

Although most federal foster care funding is authorized by Title IV-E of the Social Security Act, not all children are eligible for this funding.⁶ In these situations, states turn to the social security benefits of children in foster care. Children in foster care can be eligible for social security benefits for many reasons including if they are blind or disabled, or if their parents have become disabled or are deceased. As children cannot receive these social security funds directly, representative payees are appointed to receive and manage the money on their behalf. Child welfare agencies across the country routinely screen these children for benefits, apply to be the representative payee, and then use the money to reimburse themselves for foster care – something the child is entitled to receive regardless of their ability to pay. This, in essence, is requiring vulnerable children to pay for their own foster care. In addition, although this is often a small amount of a state’s budget, the receipt of these benefits to which they are entitled could make the world of difference for children who are entitled to these benefits.⁷

It seems evident that these practices are taking place in New York City as well. A FOIL request was made upon the Administration for Children’s Services in 2019 by concerned students and faculty at Columbia Law School. This request returned documents which highly suggest that the city has a practice of utilizing foster children’s social security benefits to reimburse themselves for the cost of foster care. Legal challenges to these reimbursement practices have been made across the country, and may be potential options for litigation to stop this practice in New York City. Child welfare agencies using the social security benefits of the

⁶ *Title IV-E Foster Care*, CHILDREN’S BUREAU, <https://www.acf.hhs.gov/cb/resource/Title-ive-foster-care> (last visited March 26, 2021). [Hereinafter, *Title IV-E Foster Care*].

⁷ *Child Welfare: Social Security and Supplemental Security Income (SSI) Benefits for Children in Foster Care*, CONGRESSIONAL RESEARCH SERVICE 16 (Sept. 28, 2012), <https://crsreports.congress.gov/product/pdf/RL/RL33855>.

children in care for their own use is predatory, runs in contradiction to the intent of the benefits, and is not in the best interests of the targeted children.

Part I will discuss how state and local child welfare systems are funded using federal sources and describe the practice of foster care agencies using the social security benefits of children in greater detail. Part II will discuss arguments for ending this practice beginning with an analysis of the Supreme Court Decision *Washington State Dept. of Social and Health Services v. Guardianship of Estate of Keffeler*, the only Supreme Court case addressing the practice. It will then describe how this practice is a violation of a child's Constitutional due process and equal protection rights, and outline the policy reasons for ending this practice. Part III will examine documents collected from the 2019 FOIL New York City Administration for Children's services regarding this practice in New York City. Part IV will examine recommendations for how this practice should be changed moving forward, both in New York City, and across the country.

PART I: THE COST OF FOSTER CARE AND USE OF CHILDREN'S SOCIAL SECURITY BENEFITS TO OFFSET THIS COST

Subsection 1: Federal Funding Sources for Child Welfare

The expenditures on child welfare across the nation are clearly significant. Much of this funding comes from the federal government. In 2016, the largest source of federal funding for child welfare agencies came from Title IV-E of the Social Security Act.⁸ The Federal Foster Care Program, authorized by Title IV-E of the Social Security Act, "helps to provide safe and stable out-of-home care for children until the children are safely returned home, placed

⁸ CHILD TRENDS, *supra* note 4 at 1.

permanently with adoptive families or placed in other planned arrangements for permanency.”⁹

More practically, it is an entitlement program that reimburses states for some of the costs associated with maintenance payments to cover necessary expenses for children in foster care, child placement services, administrative costs, and training staff and foster parents.¹⁰

Child welfare agencies spent \$7.5 billion in Title IV-E funds in 2016.¹¹ Further, these Title IV-E funds can account for anywhere between 19% and 96% of all federal dollars that were spent by child welfare agencies.¹² Much of this spending is part of the Federal Foster Care Program. In 2016, states claimed funding under Title IV-E for 51% of children in foster care, totaling over 2.5 trillion dollars.¹³ In order to be eligible for Title IV-E funds, children in foster care must meet certain income and asset tests, as well as meet family structure requirements.¹⁴ Most of the children eligible are from single-parent households, however, some children from two-parent households may be eligible.¹⁵ In addition to these income and household specifications, there must be specific judicial determinations made related to the removal of children from their homes, and the children must then be placed in a licensed setting that is eligible for Title IV-E funds.¹⁶

However, roughly 200,000-250,000 children in foster care are not eligible for Title IV-E funding.¹⁷ This leaves states looking for other opportunities for federal funding to help reimburse the costs of foster care. Another source of federal funding includes funding under the Stephanie

⁹ *Title IV-E Foster Care*, *supra* note 7.

¹⁰ CHILD TRENDS, *supra* note 4 at 3.

¹¹ CHILD TRENDS, *supra* note 4 at 1.

¹² CHILD TRENDS, *supra* note 4 at 2.

¹³ CHILD TRENDS, *supra* note 4 at 3-4.

¹⁴ CONGRESSIONAL RESEARCH SERVICE, *supra* note 7 at 2-3.

¹⁵ *Id.* at 2-3.

¹⁶ *Id.* at 3.

¹⁷ *Id.* at 4.

Tubbs Jones Child Welfare Services Program, Title IV-B of the Social Security Act.¹⁸ These funds make up a small amount of federal funding, but provide support mainly for preventive services to enable a child to stay safely at home, as well as a limited amount on foster care maintenance payments and adoption assistance. Only 10% of these Title IV-B funds may be used for administrative costs.¹⁹

When child protective services are considering removing a child from their home, they are required to assess if assistance can be provided to the family in order to prevent removal.²⁰ The Adoption and Safe Families Act (ASFA) requires an agency to make reasonable efforts to prevent children from being removed from their homes before removing them – regardless of the limited funding.²¹ Moreover, most children are in foster care due to situations of neglect, not abuse, which often stems from poverty and may be easily solved with preventive assistance from the state.²² Title IV-B funds can be used for this purpose, however, these funds have a very low cap, which could mean in order to help this family, the state would need more resources in addition to their Title IV-B funding.²³ In turn, this could lead states to determine that it makes more fiscal sense for an agency instead to place a child in foster care, where the state can receive Title IV-E funds, and spend fewer state funds.²⁴

¹⁸ *Child Welfare Services: Title IV-B, Subpart 1 of the Social Security Act*, CHILDREN’S BUREAU, <https://www.acf.hhs.gov/cb/grant-funding/child-welfare-services-title-iv-b-subpart-1-social-security-act#:~:text=Program%20Description,be%20removed%20from%20their%20homes> (last visited March 26, 2021). [Hereinafter, *Title IV-B*].

¹⁹ *Id.*

²⁰ DANIEL L. HATCHER, *THE POVERTY INDUSTRY* 69 (Nancy E. Dowd, 2016)

²¹ *ASFA: Adoption and Safe Families Act Overview*, ADOPTION AND FOSTER FAMILY COALITION, <https://affcn.org/asfa-adoption-and-safe-families-act-overview/> (last visited March 26, 2021).

²² HATCHER, *supra* note 20 at 69.

²³ *Id.*

²⁴ *Id.*

Because of these various limitations on Title IV-B and Title IV-E funding, states turn to other sources of federal funding, especially social security benefits under Title II and Title XVI of the SSA. Under Title II of the SSA, children can be eligible for social security benefits if their parents have become disabled or their parents have died. These benefits are commonly known as Old-Age, Survivor's, and Disability Insurance (OASDI). As a person works and pays Social Security taxes, they accumulate credits toward social security benefits. Their eligibility, as well as the eligibility of their family to receive benefits upon retirement or death is dependent on age and number of years they worked and paid into Social Security.²⁵ These benefits are intended provide financial support for family members and help children complete high school when a parent becomes disabled or dies.²⁶ Children are eligible for their parents benefits when they are unmarried, under the age of 18, or 18-19 years old and a full-time student (no higher than the 12th grade).²⁷ In some instances, step-children, grandchildren, step-grandchildren, and adopted children may also be eligible to receive these benefits.²⁸ The amount of the benefit is dependent on the income of the person who paid into social security, not on the resources of the family member receiving the payment.²⁹ These funds are also divided among all eligible dependents, including other children and spouses.³⁰ It is important to note that there are no resource limits for receiving OASDI benefits.

²⁵ *Survivor's Benefits*, SOCIAL SECURITY ADMINISTRATION 1 (June 2019), <https://www.ssa.gov/pubs/EN-05-10084.pdf>. [Hereinafter *Survivor's Benefits*].

²⁶ *Benefits for Children*, SOCIAL SECURITY ADMINISTRATION 1 (Mar. 2018), <https://www.ssa.gov/pubs/EN-05-10085.pdf> [Hereinafter *Benefits for Children*]

²⁷ *Id.* at 1.

²⁸ *Survivor's Benefits*, *supra* note 25 at 2.

²⁹ *Survivor's Benefits*, *supra* note 25 at 3,6.

³⁰ *Your Child in Foster Care Could Qualify for Social Security Benefits*, CHILDREN'S HOME SOCIETY AND LUTHERAN SOCIAL SERVICE OF MINNESOTA (Feb. 7, 2019), <https://chlss.org/blog/your-child-in-foster-care-could-qualify-for-social-security-benefits/>.

Another source of social security benefits that children in foster care may be eligible for is supplemental security income (SSI). SSI provides benefits for children who are blind or disabled.³¹ In order to be eligible, the person must be unmarried, under the age of 18 or under the age of 22 and a student regularly attending school (as defined by the SSA's guidelines).³² Further, to be eligible, "the child must have a medical condition, or combination of conditions that result in 'marked and severe functional limitations', and must expect the condition to be disabling for a minimum of 12 months or to result in death."³³ The child may become eligible if they develop a qualifying disability beginning as early as birth, and up until they turn 18 years old.³⁴ In addition, the child and family must also meet income and resource requirements.³⁵ The total payment amount varies state by state, as states will supplement federal funds with their own money.³⁶

SSI benefits have "resource limits".³⁷ The individual entitled to the benefit can only have \$2,000 in eligible "resources" at a time, and if the individual has over \$2,000 in resources for any given month, they cannot receive SSI for that month.³⁸ Resources that factor into this include: cash, bank accounts, stocks, land, personal property, and "anything else you own which could be changed to cash and used for food or shelter".³⁹ Resources that are not counted include: the home and land lived on, one vehicle used for transportation, household goods, personal effects,

³¹ *Supplemental Security Income (SSI) for Children*, SOCIAL SECURITY ADMINISTRATION, <https://www.ssa.gov/ssi/text-child-ussi.htm> (last visited March 26, 2021). [Hereinafter, *SSI for Children*]

³² *Id.*

³³ *Benefits for Children with Disabilities*, SOCIAL SECURITY ADMINISTRATION 2-3 (Feb., 2021), <https://www.ssa.gov/pubs/EN-05-10026.pdf> [Hereinafter *Benefits for Children with Disabilities*].

³⁴ *SSI for Children*, *supra* note 31.

³⁵ *Benefits for Children with Disabilities*, *supra* note 33 at 2.

³⁶ *Benefits for Children with Disabilities*, *supra* note 33 at 1.

³⁷ *Supplemental Security Income (SSI) for Resources*, Social Security Administration, <https://www.ssa.gov/ssi/text-resources-ussi.htm> (last visited March 26, 2021). [Hereinafter, *SSI for Children*]

³⁸ *Id.*

³⁹ *Id.*

and burial spaces the individual and their family.⁴⁰ The personal property that children in foster care have would likely be excluded from the resource limit.

When children receive any type of social security benefits, a “representative payee” must be selected. Representative payees are appointed to manage the social security payments on the behalf of the beneficiary.⁴¹ Generally, a friend or family member is appointed, however, if no one is able to serve, a social service agency or custodial institution may be appointed.⁴² More specifically, the order of preference according to the SSA for representative payees of minor children is as follows⁴³:

1. Natural or adoptive parent with custody of beneficiary or legal guardian
2. 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. Natural or adoptive parent who does not have custody of the beneficiary but is demonstrating strong concern for the beneficiary's well-being
4. Relative or step-parent who has custody of the beneficiary
5. Relative 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

⁴⁰ *Id.*

⁴¹ *Representative Payee*, SOCIAL SECURITY ADMINISTRATION, <https://www.ssa.gov/payee/> (last visited March 26, 2021). [Hereinafter, *Representative Payee*]

⁴² *Id.*

⁴³ *Preferred Representative Payee Order of Selection Charts*, SOCIAL SECURITY ADMINISTRATION, <https://secure.ssa.gov/poms.nsf/lnx/0200502105> (last visited March 27, 2021).

6. Relative or close friend Relative who does not have custody of the beneficiary but is demonstrating strong concern for the beneficiary's well-being.
7. Social service agency or custodial institution
8. Any person not previously listed who shows concern for the beneficiary and is willing and able to act as the payee

The appointment of a social service agency or custodial institution as representative payee is near to a last resort. The SSA lists multiple options that should be considered prior to assigning a social service agency or custodial institution – *such as a child welfare or foster care agency* – as representative payee. According to a Guide for Representative Payees, published by the SSA, representative payees are obligated to first use the funds to ensure the beneficiary has adequate food and shelter.⁴⁴ The money can also be used for clothing and recreation.⁴⁵ However, when a child welfare or foster care agency is the representative payee, that money rarely, if ever, goes directly to the needs of the child who is entitled to the benefit.

Subsection 2: The Practice of Child Welfare Agencies Utilizing the Social Security

Benefits of Children in Foster Care

State and local child welfare agencies across the county secure and utilize social security benefits of children to reimburse themselves for foster care expenses. Child welfare agencies develop strategies and hire private contractors to help them identify children who have qualifying disabilities, or whose parents have died or are disabled.⁴⁶ Then the agency applies to

⁴⁴ *A Guide for Representative Payees*, SOCIAL SECURITY ADMINISTRATION 3 (Dec., 2019), <https://www.ssa.gov/pubs/EN-05-10076.pdf>

⁴⁵ *Id.* at 3.

⁴⁶ HATCHER, *supra* note 20 at 80.

be the representative payee for the child's benefits.⁴⁷ After being made the representative payee, agencies then use the social security benefits to supplement their other government revenue.

Notice requirements for assignment of a representative payee require that a legal guardian or legal representative is notified.⁴⁸ For foster children, this may be their child welfare agency, which results in this assignment often done without informing the children, or their relatives and legal advocates.⁴⁹ Moreover, once the agency has become the representative payee, these funds often are not going to the children at all – not even to reimburse for their care. Instead, these funds are either sent to general state coffers, or the state simply reduces the funding for their agency based on the social security benefit that is taken from the child.⁵⁰

State and local foster care agencies seek to maximize the number of children who are eligible for this federal funding. Often to do so, they hire consulting firms and private companies to determine which children may be eligible for these benefits, then secure those benefits with the child welfare agency as representative payee.⁵¹ Their main goal in this practice is to generate more revenue for the state. Daniel Hatcher in *The Poverty Industry* highlighted that the practice of using a third-party contractor to seek out social security benefits on behalf of the children in care has been utilized in Maryland, Kentucky, and Nebraska⁵², although the practice is likely found in many places across the country.

⁴⁷ The appointment of the agency as representative payee is so prevalent, that the state of Nebraska considered making the process automatic for every child in foster care using a 3rd party process that would not involve the foster care agency at all.. *Id.* at 95.

⁴⁸ Daniel L. Hatcher, *Foster Children Paying for Foster Care*, 27 CARDOZO L. REV. 1797, 1837 (2006).

⁴⁹ HATCHER, *supra* note 20 at 80.

⁵⁰ Daniel L. Hatcher, *Stop Foster Care Agencies from Taking Children's Resources*, 71 Fla. L. Rev. F. 104, 105 (2019).

⁵¹ HATCHER, *supra* note 20 at 82.

⁵² HATCHER, *supra* note 20 at 84-87.

Securing social security benefits by agencies serving as representative payees is not limited to simply a few states. A survey conducted in 2006 found that 37 states and Washington D.C. were able to provide some data on the use of social security benefits by child welfare agencies.⁵³ Collectively among these states, social security benefits from Title II and Title IV amounted to \$156.6 million in funding for child welfare systems.⁵⁴ It is clear that this practice is wide-spread throughout the country. Moreover, child welfare agencies are not simply taking social security benefits when children are already receiving them, but are actively seeking out children's benefits to supplement state coffers, and even using private companies to strategize on how to get more funds. These predatory practices result in the social security benefits being utilized towards the best interests of the child welfare agency or the state's treasury rather than the best interests of the child, the actual purpose of the laws.

PART II: LEGAL AND POLICY ANALYSIS OF THE UTILIZATION OF SOCIAL SECURITY BENEFITS BY CHILD WELFARE AGENCIES

Subsection 1: *Washington State Dept. Of Social and Health Services v. Guardianship of Estate of Keffeler*

Subsection A: The Decision

In *Washington State Dept. of Social and Health Services v. Guardianship of Estate of Keffeler* (hereinafter, *Washington v. Keffeler*), a landmark decision for the use of social security benefits regarding children in the child welfare system, the Supreme Court upheld the process of the state of Washington in which child welfare agencies reimbursed themselves using the social

⁵³ CONGRESSIONAL RESEARCH SERVICE, *supra* note 7 at 17-8.

⁵⁴ *Id.* at 18.

security benefits of children in their care.⁵⁵ This case is central to the discussion of how to effectively challenge the use of foster children's social security benefits, as it is the only time the Supreme Court has ruled on this issue, and is thus the most important case regarding the practice.

At the time of the case, the Washington State Department of Social and Health Services (DSHS) provided foster care to children without guardians or custodians who can adequately care for them.⁵⁶ The state of Washington also had a policy to try and recover the costs of foster care from the children's parents.⁵⁷ Further, the policy stated that "moneys and other funds" that were recovered should be used to offset the amount of public assistance that would otherwise be used to pay for the foster care.⁵⁸ Pursuant to this policy, the Department of Social and Health Services (DSHS) put in place a regulation that public benefits for a child – including SSI and OASDI benefits – should be used to help pay for the cost of the foster care the child received.⁵⁹

In practice, DSHS was designated the representative payee and once it received the social security benefits each month, it deposited the money into a special account.⁶⁰ At the end of each month, DSHS withdrew from the account in order to reimburse itself for foster care expenditures. Because the cost of foster care was typically higher than the monthly social security payment, the account was generally left empty each month, with the entire benefit going towards reimbursing the state for foster care expenses.⁶¹ A class action lawsuit challenging this practice was filed in Washington State Court on behalf of the roughly 1,500 out of 10,500 children in foster care in Washington state who received SSI or OASDI benefits, and for whom

⁵⁵ Washington State Department of Social and Health Services v. Guardianship Estate of Keffeler, 537 U.S. 371 (2003), CONGRESSIONAL RESEARCH SERVICE, *supra* note 7 at 1.

⁵⁶ *Keffeler*, 537 U.S. at 378.

⁵⁷ *Id.*

⁵⁸ *Id.*

⁵⁹ *Id.*

⁶⁰ *Id.*

⁶¹ *Id.*

DSH was designated the representative payee.⁶² The case eventually reached the United States Supreme Court.

The Court considered whether Washington State violated 42 USCA § 407, which offers protection for SSI and OASDI benefits from “execution, levy, attachment, garnishment, or other legal process.”⁶³ The question before the Court was: can the process of the DSHS assigning itself as representative payee and then reimbursing itself each month be categorized as an “other legal process” under the meaning of the statute? The Court defined an “other legal process” as involving some sort of judicial or quasi-judicial mechanism. As the state of Washington did not use a judicial or quasi-judicial process to secure the benefits from the child, the Court determined that this practice was not an “other legal process”, and therefore, not prohibited by the statute.⁶⁴ Washington State also contended that the federal regulations under 20 CFR §§ 404.2040(a) provided that social security benefits may be used for current maintenance (clothes, food, shelter) of the beneficiary. The Court agreed.

Finally the Court posits that this reimbursement system is, in fact, in the best interest of the children because for SSI beneficiaries, the children cannot accumulate more than \$2,000 so preserving these funds would be against the children’s interests.⁶⁵ In making this decision, the court also noted that organizations such as DSHS are only appointed as a last resort, when no one else is available to manage the beneficiaries benefits.⁶⁶ This is also in the best interest of the child because social services agencies identify children that are eligible who may not have been receiving their payments. If these agencies were prevented from serving as representative payees,

⁶² *Id.* at 371.

⁶³ 42 USCA § 407, *Keffeler*, 537 U.S. at 385-6.

⁶⁴ *Keffeler*, 537 U.S. at 385-6.

⁶⁵ *Id.* at 390.

⁶⁶ *Id.* at 391

they would have no incentive to screen for social security benefits and apply on the behalf of children in their care.⁶⁷

Subsection B: Assessing the Reasoning of *Washington v. Keffeler*

While this decision upheld the practice of social services and child welfare agencies using the social security funds of children in their care to reimburse themselves for expenses related to care, the reasoning that this practice is in the best interest of the children is unsupported by SSA regulations and guidance and Washington State law. The practice is not in the best interest of the children and the Court's decision is incongruent with the regulatory guidance and policy rationales intended to protect children in the foster care system.

In defining the responsibilities of a representative payee, CFR §416.635 states that the representative payee has a "responsibility to (a) use the benefits received on your behalf only for your use and benefit in a manner and for the purposes he or she determines".⁶⁸ In the intermediate appeal in the Supreme Court of Washington, the Department of Social and Health Services admitted that they would not even apply for the funds at all if they were not able to use the benefits for themselves.⁶⁹ That is why the United States Supreme Court reasoned that if state agencies were not allowed to use social security benefits to reimburse themselves, they would be discouraged from accepting appointment as representative payee.⁷⁰ This type of reasoning for wanting to serve as representative payee would not be acceptable for any other person attempting

⁶⁷ *Id.*

⁶⁸ 20 C.F.R. § 416.635 (2006).

⁶⁹ *Guardianship Estate of Keffeler v. State Dept. of Social and Health Services* 32 P.3d 267, 274 (2001); Jim Moye, *Get Your Hands Out of Their Pockets: The Case Against State Seizure of Foster Children's Social Security Benefits*, 10 GEO. J. ON POVERTY L. AND POL'Y 67, 76 (2003).

⁷⁰ *Keffeler*, 537 U.S. at 391.

to serve as representative payee, and it is confusing as to why this is allowed for child welfare agencies, but no one else.⁷¹

The Program Operations Manual System (POMS) for the SSA also contradicts this process of regularly appointing child welfare agencies as representative payee. In the “Additional Considerations When Foster Care Agency is Involved” section, it is plainly stated, “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.*”⁷² Any routine or automated process to appoint a foster care agency is in direct contradiction with SSA’s POMS guidelines. The highest priority is finding a representative payee who will act in the best interests of the child. Although more weight may be given to appoint child welfare agencies when they have legal (and not just physical) custody of the child, other options should always be considered prior to their appointment, and the representative that is in the best interests of the child should ultimately be appointed.⁷³

Moreover, children are entitled to foster care, regardless of reimbursement or if they can pay for it. The Amici Curiae brief of the Juvenile Law Center & the National Center for Youth Law in *Washington v. Keffeler* describes this entitlement clearly. Federal laws, including the Adoption Assistance and Child Welfare Act (AACWA) and the Adoption and Safe Families Act (ASFA) proscribe federal funding for child welfare systems, including foster care and adoption

⁷¹ Moye, *supra* note 69 at 76.

⁷² *Additional Considerations When Foster Care Agency is Involved*, SOCIAL SECURITY ADMINISTRATION, <https://secure.ssa.gov/poms.nsf/lnx/0200502159> (last visited March 27, 2021) [Hereinafter, *Additional Considerations*].

⁷³ *Id.*

assistance and preventive programs.⁷⁴ These requirements were then codified into Washington law.⁷⁵ Washington State law requires the Department of Social and Health Services to develop, administer and monitor a plan that establishes and aids in the protection of youth who are runaways, dependent, or neglected.⁷⁶ The law creates a duty that exists even if a youth is unable to pay.⁷⁷ The process of using the child's social security benefits to reimburse the state forces children to pay for their foster care, when they are entitled to it regardless of whether they are able to pay.

The Court's ultimate conclusion that this practice is in the best interests of the children is flawed. The Court reasoned that this practice is in the best interest of the children for agencies to be appointed representative payee because agencies will then screen for social security benefits for the children. However, it is not necessary for an agency to be appointed representative payee in order to screen for benefits. The child is in the care of the state, and the state should seek the benefits for the child regardless of whether they will receive any sort of financial gain from the child possibly being eligible. For example, a child may enter care not knowing they are eligible for benefits. Upon entering care, the agency may then determine the child is eligible and apply on their behalf. If the child never receives the money from the benefit, as agencies are using the funds to reimburse themselves, it is difficult to see how receiving the social security payments has any actual benefit for the child. It seems the only time the child would obtain any real benefit from this situation would be upon exiting care, when a more benevolent representative payee is

⁷⁴ Brief for the Juvenile Law Center & the National Center for Youth Law as Amici Curiae at 20, *Washington State Department of Social & Health Services v. Guardianship Estate of Danny Keffeler*, 537 U.S. 371 (2003) (No. 01-1420), 2002 WL 31399628.

⁷⁵ *Id.*

⁷⁶ *Id.*

⁷⁷ *Id.* at 21.

appointed, and the child is able to use the money towards their direct needs. It follows that the only entity benefitting here are the agencies acting as representative payee, to the detriment of the child in their care.

Subsection 2: Due Process Violations

The assignment of a child welfare agency as representative payee without notice to the child entitled to benefits is a violation the child's due process.⁷⁸ The SSA's notice requirement states that advance notice is to be provided to the legal guardian or legal representative of the child entitled to the benefits about the selection of a representative payee when that person is not the proposed payee.⁷⁹ If children, their legal guardians or their legal advocates are not provided with notice that the agency is applying for benefits on their behalf, they have no opportunity to object, or to propose alternative representative payees who would better use the funds towards their best interest.⁸⁰ When children are in foster care, that notice may still go to the child welfare agency, as POMS focuses on when to provide notice to a parent, but does not provide guidance for when an organization or agency is applying on behalf of a child in their care.⁸¹ The POMS ultimately concludes that "good judgement" should be used when determining whether a parent should receive notice, and if the state is the legal guardian of a child in foster care.⁸² This vague guidance does not protect the due process rights of children in foster care to receive notice that the child welfare agency is seeking to be named representative payee. If children and their legal

⁷⁸ Hatcher, *supra* note 48 at 1836.

⁷⁹ Hatcher, *supra* note 48 at 1837, *Advance Notice*, SOCIAL SECURITY ADMINISTRATION, <https://secure.ssa.gov/poms.nsf/lnx/0200503100> (last visited March 27, 2021) [Hereinafter, *Advance Notice*]

⁸⁰ Hatcher, *supra* note 48 at 1836., *Advance Notice*, *supra* note 79.

⁸¹ *Advance Notice*, *supra* note 79.

⁸² *Id.*

advocates do not receive this notice, they have no chance to object to the appointment of the child welfare agency as representative payee.⁸³

Due process notice claims have been asserted in Maryland, a state that has made progress in this area. Two Maryland cases are key to the progress of due process rights of children in foster care who have a child welfare agency assigned as their representative payee. The first is a 2010 case – *Myers v. Baltimore County Department of Social Services* (hereinafter, *Myers*).⁸⁴ Alex Myers, who entered the foster care system at the age of 12,⁸⁵ argued that the Baltimore County Department of Social Services, Maryland Department of Human Resources, and Secretary of Maryland Department of Human Resources violated their fiduciary obligations through its use of Mr. Myers OASDI benefits.⁸⁶ Without telling Alex, the child welfare agency applied for his OASDI benefits on his behalf, following his father's death.⁸⁷ They continued to collect Alex's OASDI benefits, and used them to reimburse Alex's foster care expenses, even though Alex had no obligation to pay for his own foster care.⁸⁸ Further, his agency never alerted him that he was even entitled to these benefits, let alone that the agency had applied for, and was receiving the payments on his behalf.⁸⁹ However, the case was dismissed, as under the Maryland Tort Claims Act, the case should have been brought within one year of Alex entering foster care.⁹⁰ It is important to note however, that one year into foster care, Alex was twelve years old, and was, as previously stated, completely unaware of the agency's actions.⁹¹

⁸³ Hatcher, *supra* note 48 at 1837.

⁸⁴ Brief of Appellant *Myers v. Baltimore County Department of Social Services*, No. 2765, 2010 WL 4890061 (M.D. Ct. of Special Appeals, Oct. 8, 2010).

⁸⁵ *Id.* at *2.

⁸⁶ *Id.* at *1.

⁸⁷ *Id.* at *2.

⁸⁸ *Id.* at *3-4

⁸⁹ *Id.* at *3

⁹⁰ Hatcher, *supra* note 50 at 110.

⁹¹ *Id.*

However, a subsequent case, *In re Ryan W.*, was more successful. Ryan was a child in foster care in Baltimore whose parents died while he was in care, making him eligible for OASDI benefits.⁹² The Baltimore City Department of Social Services (DSS) applied, and was approved to be Ryan’s representative payee.⁹³ However, neither Ryan, his counsel, or the juvenile court were notified that the DSS had applied for and received these benefits on his behalf.⁹⁴ By the time the case was brought, the DSS had received \$31,693.50 as Ryan’s representative payee, and the entire amount was used to reimburse the Department for funds used to pay for his foster care.⁹⁵

The court ultimately found that the failure to provide notice, at least to Ryan’s legal representative, that the DSS had applied for benefits as his representative payee, constituted a violation of Ryan’s constitutional due process rights under the fourteenth amendment.⁹⁶ Due process violations require “(1) state action has been employed (2) to deprive that individual of a substantial interest in property”.⁹⁷ Here, the DSS, by acting as representative payee without notice, deprived Ryan of his social security benefits.⁹⁸ Applying the standard established in *Mathew v. Eldridge*, the court considered the following factors:

“First, the private interest that will be affected by the official action; second, the risk of an erroneous deprivation of such interest through the procedures used, and the probable value, if any, of additional or substitute procedural safeguards; and finally, the

⁹² *In re Ryan W.*, 434 Md. 577, 582 (2013).

⁹³ *Id.* at 589.

⁹⁴ *Id.*

⁹⁵ *Id.* at 590.

⁹⁶ *Id.* at 608.

⁹⁷ *Id.* at 609.

⁹⁸ *Id.* at 611.

Government's interest, including the function involved and the fiscal and administrative burdens that the additional or substitute procedural requirement would entail.”⁹⁹

The court found that the private interest at risk was Ryan’s free use of his social security benefits.¹⁰⁰ The court found a high likelihood of risk that Ryan would be deprived of this interest. In cases similar to this, where children are in foster care, the notice that is provided before appointing a representative payee, and before the first benefit payment, would go directly to the DSS.¹⁰¹ Therefore, because the representative payee has such discretion over the use of the social security benefits, there is significant risk that children in Ryan’s situation will be deprived of their interests in the benefits.¹⁰² The court concluded that to rectify this due process violation, in situations like these, the DSS must notify the child’s attorney when seeking to be assigned as representative payee, and when receiving any benefit payments for the period since the child’s last permanency hearing.¹⁰³

Following this victory, advocacy for the rights of these children in foster care began in Maryland. Ryan Weinberger, the youth whose case was won, then Maryland State Senator Jamie Raskin, and Daniel L. Hatcher, a professor at the University of Baltimore, advocated for the passage of protections for the social security funds for youth in foster care.¹⁰⁴ Organizations like Advocates for Children & Youth created information for the public on how important this money

⁹⁹ Mathews v. Eldridge, 424 U.S. 319, 355 (1976).

¹⁰⁰ *In re Ryan W.*, 434 Md. 577 at 611.

¹⁰¹ *Id.*

¹⁰² *Id.*

¹⁰³ *Id.* at 612.

¹⁰⁴ Yvonne Wenger, *Bill seeks to let foster children keep survivor, disability payment*, THE BALTIMORE SUN (Feb. 28, 2014), <https://www.baltimoresun.com/maryland/bs-xpm-2014-02-28-bs-md-foster-care-benefits-20140217-story.html>.

could be for youth in care – one year of SSI/SSDI funds saved for a youth in care could pay for anywhere from a year of childcare for an infant, to 6.8 years of books and supplies for college.¹⁰⁵

This advocacy resulted in the Maryland General Assembly passing legislation entitled “Protection of Resources of Child in State Custody”, which became effective October 1, 2018.¹⁰⁶ This law requires the DSS to work with the child’s attorney to identify a representative payee.¹⁰⁷ The Department must immediately notify the child, through the child’s attorney, upon any application for Veteran’s Administration benefits, SSI, or social security benefits made on the child’s behalf, or any application to become the representative payee for those benefits.¹⁰⁸ Additionally, when the DSS is assigned as representative payee, once a child reaches the age of 14, the social security benefits must be conserved at the following rates: Ages 14-15, at least 40% of the benefits must be conserved; ages 16-17, at least 80% of the benefits; and ages 18-20, 100% of the benefits.¹⁰⁹ To avoid the asset limit for SSI, 529A (ABLE) accounts are available as an option for saving the children’s social security benefits.¹¹⁰ These accounts will allow money to be saved for children in care without impacting the SSI asset limit. Importantly, the law also requires financial literacy training be provided to all foster children when they reach the age of 14.¹¹¹ The literacy training, in combination with the conservation of social security benefits, could potentially help many former foster youths become financially independent upon aging out of care, and avoid the poverty and homelessness that disproportionately affects youth who age

¹⁰⁵ BY THE NUMBERS SB 914/HB 1270, <https://www.acy.org/wp-content/uploads/2014/09/Hatcher-Bill-Infographic.pdf> (last visited Mar. 27, 2021).

¹⁰⁶ MD. CODE ANN., FAM. LAW § 5-527.1(b) (West 2018); *Protecting the Resources of Children in Custody*, MARYLAND DEPARTMENT OF HUMAN SERVICES 1 (2018) <https://dhs.maryland.gov/documents/SSA%20Policy%20Directives/Child%20Welfare/SSA%2019-06%20CW%20Protecting%20Resources%20of%20Children%20in%20Custody.pdf>.

¹⁰⁷ MD. CODE ANN., FAM. LAW § 5-527.1(b) (West 2018).

¹⁰⁸ MD. CODE ANN., FAM. LAW § 5-527.1(d)(1)(i) (West 2018).

¹⁰⁹ MD. CODE ANN., FAM. LAW § 5-527.1(c)(2)(i-iii) (West 2018).

¹¹⁰ Hatcher, *supra* note 50 at 111.

¹¹¹ *Id.*

out of foster care. The success of *In re Ryan W.*, and the subsequent legislation, may lead to similar due process claims being brought in other states to protect the rights of children in foster care.

Subsection 3: Equal Protection Violations

Equal Protection claims may also prove to be successful in the future. In deciding *Washington v. Keffeler*, the Supreme Court issued a narrow decision and did not address “whether it was a violation of the Equal Protection Clause to require foster children who receive Social Security benefits to reimburse state costs while other foster children are not required to pay for their own care”.¹¹² This process inherently creates two unequal classes of children in foster care – those who have the agency appointed as their representative payee and who use their social security benefits to reimburse their foster care expenses, and those who have private representative payees whose benefits can be used for other needs or saved for future use.¹¹³ When *Washington v. Keffeler* was remanded to the Supreme Court of Washington, the problem of the creation of unequal classes of children was addressed by both the majority and dissenting opinions.¹¹⁴ The majority concluded that there was no equal protection violation because in order to have an equal protection violation, there must be two groups of people with differential treatment. The court found only one – all foster children receiving social security benefits with appointed representative payees.¹¹⁵ According to the majority, it did not matter who the representative payee was here because all children were supposed to use their benefits according to the state and federal guidelines.¹¹⁶ The court did acknowledge that private individuals serving

¹¹² Hatcher, *supra* note 48 at 1832.

¹¹³ *Id.* at 1833.

¹¹⁴ *Id.* at 1833.

¹¹⁵ Guardianship Estate of Keffeler ex rel. Pierce v. State 88 P.3d 949, 953 (Wash. 2004).

¹¹⁶ *Keffeler*, 88 P.3d at 953-54.

as representative payees may choose not to use their money to reimburse the state for the cost of care, and the State is not able to go after a representative payee to recoup those benefits.

Nevertheless, the court concluded there was not an equal protection violation.¹¹⁷

The dissent took a different approach to the equal protection question. Judge Tom Chambers stated that “These statutes and regulations create two different classes of foster children: those with kind hearted individual designated payees and those with the Department of Social and Health Services as the designated payee.”¹¹⁸ Judge Richard Sanders went on to explain how this practice differentially affected these classes in a hypothetical where one child has the Department of Social and Health Services as their representative payee and another has their Grandmother.

“By illustration, when the child who has the beneficent DSHS as her representative payee is having gruel for breakfast, grandma is serving steak and eggs. When the State's child is watching sitcoms on TV, grandma's is off to the movies. When the State's child finds a pair of knock-off sneakers underneath the Christmas tree, grandma has wrapped a new pair of Nikes (...) And when the State's child turns 18 she's on her own, but grandma may set aside up to \$2,000 from the social security to help her grandson get started without losing SSI eligibility.”¹¹⁹

In essence, the child with the private individual as representative payee has access to their benefits in addition to the standard foster care funding, while the child with an organizational representative payee only has access to the standard foster care funding. Judge Sanders also

¹¹⁷ *Id.* at 954.

¹¹⁸ *Id.* at 959.

¹¹⁹ *Id.* at 958.

concluded that there was no legitimate government interest to satisfy rational basis requirement of the equal protection clause.¹²⁰ The fact that the government wants the money is not a sufficient reason for the disparate treatment of these groups of foster children, and would fail the rational basis test.¹²¹ In Judge Sanders' eyes, this is clearly an equal protection violation, and this line of reasoning may be helpful in future litigation.

Subsection 4: Policy Reasons for Ending or Limiting this Practice

This practice of agencies screening for social security benefits creates another inherent problem for children in care. If agencies are able to obtain financial gains from children who are eligible for social security benefits, then it is to their advantage to have as many children eligible as possible. This can lead to states, possibly in conjunction with private consulting companies, to seek out children who are eligible for benefits or have them diagnosed with a disability upon entrance to care in order to become eligible for SSI.

Further to this point, this practice can lead to the overmedication of children with SSI and in foster care. In order to generate more revenue by having more children qualify for SSI, states and agencies may use prescription drugs to support a disability finding for a child.¹²² Evidence of the intent can be found in the Public Consulting Group's proposal to Kentucky on how to help obtain children's social security funds. In discussing the denials of applications for SSI benefits, the proposal states:

“[w]e also will request the most up to date prescription drug information, and other treatments. This information is extremely important to the appeal because it provides the

¹²⁰ Hatcher, *supra* note 48 at 1834.

¹²¹ *Keffeler*, 88 P.3d at 958.

¹²² HATCHER, *supra* note 20 at 74.

evidence of severity and duration on a claim as well as new and material evidence that can be used to overturn a prior denial decision.”¹²³

The increased use of antipsychotic drugs is prevalent among both children in foster care and children receiving SSI benefits. Generally, children in foster care and children on SSI are at an increased risk of receiving multiple concurrent antipsychotics.¹²⁴ In addition, when compared to children who are income-eligible for Medicaid, children in foster care are more likely to have a higher than recommended dose of antipsychotics.¹²⁵ Children on SSI are also more likely to receive higher doses.¹²⁶ A 2004 study in Texas indicated that almost 35% of foster children in Texas were prescribed at least one anti-psychotic drug.¹²⁷

The involvement of these consulting companies can have other undesired effects on the foster care system. For example, they may also work with foster care agencies to help increase the percentage of children in foster care who are eligible for Title IV-E funding – those who come from low-income families.¹²⁸ This reinforces that children from the “poorest of poor” families are the ones who are placed in foster care, as there is less financial incentive to place children from higher income families.¹²⁹ This creates not only an income disparity, but a racial disparity as well. Because many people who live in poverty are racial and ethnic minorities, these agencies and systems are incentivized to place these children in foster care.¹³⁰

¹²³ *Id.* at 75.

¹²⁴ Emily Leckman-Westin, et al., *Differences in Medicaid Antipsychotic Medication Measures Among Children with SSI, Foster Care, and Income-Based Aid*, J. Manag. Care Spec. Pharm. 238, 244 (2018).

¹²⁵ *Id.*

¹²⁶ *Id.*

¹²⁷ HATCHER, *supra* note 20 at 75.

¹²⁸ *Id.* at 70.

¹²⁹ *Id.* at 70.

¹³⁰ *Id.* at 70.

The resource limit for SSI can be used as an easy justification for why foster care agencies may keep the money for themselves. As child welfare agencies would argue, if the money goes to the youth and they do not spend it, or they have resources over the limit, then they would become ineligible for benefits. The catch-all resource provision¹³¹ makes it easy to see how agencies could argue that children, even though they have very minimal belongings, could go over the resource limit if they were to get the money themselves. However, as previously stated there are exceptions to the SSI limits: one vehicle used for transportation, household goods, and personal effect, are not counted towards this resource limit. A child in foster care typically has minimal belongings that would fall under these exceptions, their personal property would likely be excluded from the resource limit so they could access many more personal items that are often expensive but necessary, like a laptop. Efforts could be made to ensure that children not accumulate over \$2,000 but use the money to improve their lives so the asset limit would be less relevant. For children receiving OASDI, there is no resource limit, and the money would be able to be saved or used however the child could best use it.

The money from these benefits could be immediately helpful to many children in care. It is no secret that children in foster care are often lacking essential, as well as non-essential resources. Many children in foster care experience food insecurity.¹³² These children may also be moved around frequently, and sometimes without notice, making it difficult for them to take all their belongings, including clothing, with them. This money could help them cover basic needs in these emergency situations. Youth may also want to use funding to cover things that foster care payments may not cover, including, but not limited to; school events, cell phones, laptops,

¹³¹ add

¹³² Noora Barakat, *Healthy Nutrition for Children in Foster Care*, AMERICAN BAR (Oct. 1, 2011), https://www.americanbar.org/groups/public_interest/child_law/resources/child_law_practiceonline/child_law_practice/vol30/october_2011/healthy_nutritionforchildreninfostercare/.

outings with friends, summer camps, extracurricular activities, and healthcare costs not covered by their insurance.¹³³

In addition, youth in foster care also face tremendous difficulties upon aging out of foster care.¹³⁴ When compared with the general population, youth that age out of foster care have a higher likelihood to experience unemployment, incarceration and homelessness as adults.¹³⁵ Receiving the social security funds they are entitled to may help mitigate this risk. For example, although the SSI may not be able to be saved past \$2,000 due to asset limits, it could be used for clothing, household supplies, food, and other needs and resources that could aid in living on their own and aging out of foster care. Further, a savings of \$2,000 could be enough to help pay a security deposit and first month's rent when a youth ages out of care, and could be the difference between them having a place to live and homelessness. Finally, states could follow Maryland's lead and pass legislation that could safeguard the funds without being in violation of SSA rules.

PART III: ADMINISTRATION FOR CHILDREN'S SERVICES FOIL REQUEST

Subsection 1: The Practice of Child Welfare Agencies Using the Social Security Benefits of Children is Present in New York City

In February of 2019, a Freedom of Information Law (FOIL) request was made to the New York State Office of Children and Family Services (OCFS) and the New York City's Administration for Children's Services (ACS). The FOIL requested records related to the collection and use of social security benefits of children in foster care, and records related to

¹³³ Emily W. McGill, *Penny Wise, Pound Foolish: Child Welfare Agencies as Social Security Representative Payees for Foster Children*, 58 CASE W. RES. L. REV. 961, 965 (2008).

¹³⁴ Kimberly A. McFarlane, *Tackling Foster Care Age-Out Issues*, AMERICAN BAR (Jul. 1, 2013), <https://www.americanbar.org/groups/litigation/committees/childrens-rights/articles/2013/tackling-foster-care-age-out-issues/>

¹³⁵ CHILDREN'S RIGHTS, *supra* note 1.

OCFS and ACS acting as representative payee.¹³⁶ OCFS did not provide any documents, and in response stated they do not possess these types of records, and to contact applicable local social services departments.¹³⁷ ACS however, provided many documents that shed light on the collection and use of social security benefits in foster care. In addition to the documents discussed below, numerous social security claim reports for ACS for years between 2004-2019 were received. These documents will not be analyzed here, but could be useful by future advocates. Although these documents are in no way conclusive, there are similarities in ACS's practices to other states that were previously discussed, and may be evidence of strategic collection and use of social security benefits of children in foster care in NYC.

The documents received in the FOIL request suggest ACS is utilizing the exact procedure that has been discussed throughout this paper – a routine practice of applying to be the representative payee of the children in foster care who are entitled to social security benefits, and then using those funds to reimburse ACS for foster care expenditures. The document, “Supplemental Security Income (SSI) Benefits”, outlines the specifics of what SSI benefits entail.¹³⁸ Although this document is very general, it makes an important note that the United States Supreme Court ruled that local social services departments are allowed to serve as representative payee for children in their care, and that these funds may be used to offset the cost of the foster care services that are provided by the department to that child.¹³⁹ Further, it notes that NY provides regulatory guidance in this area, and allows ACS to use the SSI benefits of

¹³⁶ Re: Freedom of Information Law Request to Office of Children and Family Services and New York City Administration for Children's Services (Feb. 8, 2019) (on file with author).

¹³⁷ Letter from Frank Nuara, Esq, Records Access Appeals Officer, New York State Office of Children and Family Services (Jul. 2, 2019) (on file with author).

¹³⁸ Supplemental Security Income (SSI) Benefits (8/15/2007) (On File with Author).

¹³⁹ *Id.* at 1.

children in their care for whom they are acting as representative payee.¹⁴⁰ This regulation further states that in these situations where the children received foster care from an authorized child-caring agency, both the child's federal and state SSI benefits can be used to meet the "cost of care and maintenance including administration and services provided as part of a comprehensive plan of care by such agency".¹⁴¹ In addition, ACS specifically tracks the number of new SSI cases, and the number of cases where the representative payee was changed each year.¹⁴²

ACS has an entire unit dedicated to social security benefits, entitled the Social Security Benefits Unit (SSBU), whose responsibility is to "seek and analyze social security benefits on behalf of children in foster care"¹⁴³ The SSBU manages the Title XVI SSI benefits and Title II Retirement Survivor's Disability Insurance of children in the care of ACS. Their work is detailed in a 2017 document entitled "SSBU Policies and Procedural Manual" (hereinafter the "Manual").¹⁴⁴ The practice of ACS serving as representative payee is widespread. ACS, through SSBU, serves as the representative payee for over 1,000 children in foster care who are entitled to SSA benefits.¹⁴⁵

Similarly to some states discussed above, ACS has contracted with a public consulting firm, Public Consulting Group (PCG), for "the purpose of identifying foster care children who may be potentially eligible for social security benefits".¹⁴⁶ In addition, the PCG, "conduct work on behalf of ACS to initiate and submit all necessary paperwork for new SSA applications, reapplication, recertification, tracking of SSI/RSDI open and closed cases for eligible foster

¹⁴⁰ *Id.* at 1.; 18 NYCRR 628.3.

¹⁴¹ 18 NYCRR 628.3 (h)(2)(i).

¹⁴² Updated_Chart_2011-Feb_2019 (On File with Author).

¹⁴³ Social Security Benefits Unit (SSBU) Policy and Procedural Manual 1, New York City Administration For Children's Services (2017) (On File with Author).

¹⁴⁴ *Id.*

¹⁴⁵ *Id.* at 1.

¹⁴⁶ *Id.* at 2.

children under the placement and care responsibility of ACS”.¹⁴⁷ When a child is initially placed in foster care, the PCG immediately screens each child for potential entitlement for SSI and RSDI benefits, and files the application documentation with the SSA for eligible children.¹⁴⁸ PCG is also responsible for follow up paperwork with the SSA, tracking active recipients of SSI and RSDI benefits, managing closed SSI and RSDI cases, and conducting a routine check for SSA benefit eligibility every 12 months.¹⁴⁹

It follows that because ACS and PCG have placed such a significant effort into screening children for benefits they would want to serve as representative payee of these children as well. The guidelines in the Manual state simply that “ACS is the representative payee of all foster children’s SSA benefits”. This is in direct contradiction to the Policies Operations Manual System (POMS) of the SSA, which states “Do not routinely appoint the foster care agency as payee for a child in foster care” and advises that other payees, including family members and friends, should be considered before selecting the agency as representative payee.¹⁵⁰ It seems highly unlikely that there is not a single child in foster care who is eligible for social security benefits who does not have some relative or friend in their life who could adequately protect their interests by serving as representative payee. None of the documents received through the FOIL request discuss following the SSA POMS policy to seek other types of representative payees before simply applying for ACS to serve. In the section of the ACS guidelines regarding what to do when ACS no longer will be serving as representative payee, the only example provided of when this would occur is when a child is leaving foster care.¹⁵¹

¹⁴⁷ *Id.* at 10.

¹⁴⁸ *Id.*

¹⁴⁹ *Id.* at 10-11.

¹⁵⁰ *Additional Considerations, supra* note 72.

¹⁵¹ Social Security Benefits Unit, *supra* note 143 at 24.

It is important to note that when outlining their procedures, the SSBU did not include a notice requirement, or even a suggestion of notice, to the child, or to the child's legal advocate, when they are screening and applying for benefits on the child's behalf. PCG will contact the foster care agency to request additional information when necessary, but again no mention of notice that could protect a child's due process rights.¹⁵² There is mention of notice that must be provided to the child by their foster care agency caseworker upon exiting care of the SSA benefits that were received on the child's behalf during their time in foster care so the family may inquire with SSA about continuing those benefits.¹⁵³ However, notice upon leaving care does not provide the child, or their legal counsel, with time to object to the appointment of ACS as representative payee and provide a more suitable alternative.

Subsection 2: Potential Litigation Strategies Moving Forward

Due to ACS's policies related to securing a child's Social Security benefits, it is possible that Equal Protection and Due Process cases could be brought in New York City on behalf of children in ACS care. The policies provided in the FOIL documents and statutory guidance state that social security benefits may be used to reimburse the county for their foster care expenditures, and can even be used towards administrative costs. This in effect creates two classes of children in foster care – those that must reimburse the state for their care and those that do not. The classes here are slightly different than those discussed in the dissent of *Guardianship Estate of Keffeler ex rel. Pierce v. State* (the remand of *Washington v. Keffeler*) – where some children had private individuals as representative payee. It is unclear here if any children in the care of ACS have private individuals acting as their representative payee. It may be possible that

¹⁵² *Id.* at 10.

¹⁵³ *Id.* at 31.

those two classes are present, but more information would be needed to make that determination. Regardless, it does not follow that children in care who receive social security benefits should be required to reimburse the city for their foster care, when children who do not receive those benefits do not have a similar requirement. There is no rational basis for the government to make this distinction other than they want the funding, which as stated by Judge Sanders, is not enough justification for the disparate treatment.

A due process claim here, similarly to the claim made in *In re Ryan W.* in Maryland,¹⁵⁴ may also prove successful in helping children obtain access to the social security benefits to which they are entitled. Similar to Ryan, there is no indication these children are being notified when ACS and PCG apply for benefits on the child's behalf, and apply for ACS to be the representative payee. The claim that ACS is the representative payee for all children in care provides further support to the suspicion that children and their counsel are not being notified. If they were being notified, it is likely at least some would object to this appointment and provide better alternatives. If children in foster care and their lawyers in New York City are not being notified of this practice, it is a violation of the children's due process rights.

PART IV: RECOMMENDATIONS FOR AMENDING THE SYSTEM

Recommendations for best practices on how the federal, state, and local governments can amend this problem going forward involve two main components. First, changes must be made to the current practices concerning foster care agencies and representative payees. Notice must be given to children and/or their legal advocates when an agency applies for benefits on their behalf and when they apply to be appointed representative payee. Alternative representative

¹⁵⁴ *In re Ryan W.*, 76 A.3d at 1067.

payees must also be considered prior to the assignation of the foster care agency as representative payee. Second, when agencies are appointed representative payee, there must be limits on how the agency can use the funding as reimbursement, and means through which children receiving these benefits can conserve them.

Legislation has been introduced in Congress within the last few years to rectify this problem, but so far has proven unsuccessful on a national level.¹⁵⁵ In 2010, Congressmen Pete Stark and Jim Langevin introduced a pair of bills intended to protect youth in foster care.¹⁵⁶ The “Foster Youth Financial Security Act” was intended to provide protections to youth in foster care from identity theft, as well as literacy training. In addition, they introduced the “Foster Children Self-Support Act”, which would require states to use social security benefits of children in foster care towards current and future needs of the child instead of utilizing them as a revenue source for the state, and also created individual accounts for the children to conserve these benefits.¹⁵⁷ In addition, in 2016, a bill entitled “Protecting Foster Youth Resource to Promote Self Sufficient Act”, sponsored by Congressman Danny Davis, sought to ban the practice of reimbursing the state government with the SSI benefits for youth in foster care who have state agencies acting as representative payee.¹⁵⁸ The bill also provides for accounts to be created for these children.¹⁵⁹ Although these bills were ultimately unsuccessful in gaining traction in Congress, the proposed legislation, and the model Maryland created in 2018, may prove to be effective and useful for future advocacy for children in foster care.

¹⁵⁵ H.R. 1104 110th Cong. (2007); H.R. 6192 11th Cong. (2010); H.R. 5737 114th Cong. (2016).

¹⁵⁶ Press Release, Congressman Jim Langevin, Stark, Langevin Introduce Bills to Protect Foster Youth (Sept. 24, 2010).

¹⁵⁷ *Id.*

¹⁵⁸ John Sciamanna, *Legislation Targets Strategies to Assist Foster Youth*, CHILD WELFARE LEAGUE OF AMERICA, <https://www.cwla.org/legislation-targets-strategies-to-assist-foster-youth/>.

¹⁵⁹ *Id.*

Subsection 1: Representative Payee – Notice Requirements and Alternatives to
Appointing Foster Care Agencies

A notice requirement is essential not only to ensure the best person is the representative payee for the child, but to protect the child's due process rights as well. The Maryland legislation provides that the social services department must immediately notify the child, through the child's attorney, upon any application for Veteran's Administration benefits, SSI, or social security benefits made on the child's behalf, or any application to become the representative payee for those benefits.¹⁶⁰ This notice not only protects due process rights, but gives the child and their legal advocate an opportunity to propose an alternative representative payee who they feel may better represent the child's interests. It is likely the child has a relative or family friend who would be willing to take on this task, and could help give the child funds when they need it, or identify with the child what the child wants.

Of course, there will be situations where the child does not have someone in their life that is able to act as representative payee. Another option here would be appointing a volunteer representative payee.¹⁶¹ This is not a new idea, or even a new system. These types of volunteer representative payee programs currently exist for adults who are not able to manage their own social security benefits, and could easily be adapted to fit the needs of foster children.¹⁶² The combination of the notice requirement and the appointment of an alternative representative payee will work to protect a child's due process rights and ensure that they are able to obtain the most advantage from their social security benefits.

¹⁶⁰ MD. CODE ANN., FAM. LAW § 5-527.1(d)(1)(i) (West 2018).

¹⁶¹ Hatcher, *supra* note 50 at 107.

¹⁶² *Id.*

Subsection 2: Limiting the Use of Foster Care Funds by Agencies by Providing
Specialized Savings Accounts

Another key change is to limit the practice of agencies in utilizing these funds to reimburse themselves for care, and then provide a way to use and save the benefits for children in such a way that they will not exceed the resource limit making them ineligible for the benefits. H.R. 1104, a proposed bill in the House of Representatives, sought to ban the practice of the child welfare agencies reimbursing themselves using the social security benefits of foster children, however, this bill was ultimately unsuccessful.¹⁶³ While it may be difficult to get a bill with a complete ban passed, a limit on this practice may be more likely to be successful. As previously stated, in Maryland, social security benefits of children in foster care who have the agency assigned as representative payee must be conserved on behalf of the child at the following rates: once a child reaches the age of 14, the social security benefits must be conserved at the following rates: Ages 14-15, at least 40% of the benefits; ages 16-17, at least 80% of the benefits; and ages 18-20, 100% of the benefits.¹⁶⁴ This is a good start, however, unless a child's benefits would exceed the \$100,000 cap before they turned 18, there does not really seem to be a reason why the funds could not begin to be saved as soon as the child enters foster care.

Once the use of children's benefits by foster care agencies is limited, there must be a way for the children to use and save these funds without exceeding the \$2,000 SSA resource limit for SSI. For children with special needs, these benefits could be conserved in a special needs trust, or 529A (ABLE) account.¹⁶⁵ An ABLE account is defined by the SSA as "a tax-advantaged

¹⁶³ H.R. 1104 110th Cong. (2007).

¹⁶⁴ MD. CODE ANN., FAM. LAW § 5-527.1(c)(2)(i-iii) (West 2018).

¹⁶⁵ MARYLAND DEPARTMENT OF HUMAN SERVICES, *supra* note 106 at 7; *Survivor's Benefits*, *supra* note 25.

account, similar to a Section 529 qualified tuition program (QTP)”.¹⁶⁶ Any amount saved in this type of account under \$100,000 will not count towards the resource limit for the purposes of social security benefit eligibility.¹⁶⁷ Again, these accounts would not apply to OASDI benefits, as they have no resource limit. Further, distributions used for “education, housing, transportation, employment support, assistive technology, health, and wellness” do not affect the eligibility to SSI benefits or the amount of the payment.¹⁶⁸ There does not seem to be a reason why these accounts could not be expanded to include children in foster care who are not disabled. ABLE accounts provide an easy solution to help children in care save their social security benefits to assist their transition to independent living.

CONCLUSION

Foster care agencies across the country routinely utilize children’s social security benefits for their own use. This is often facilitated through a paid 3rd party consulting firm, without even considering whether there is anyone else in the child’s life who could serve as representative payee. This practice is depriving children of their Constitutional due process and equal protection rights. The failure to provide notice to children and their legal advocates prior to the agencies applying for and receiving benefits on their behalf constitutes a due process violation, as they have no opportunity to object and provide a more suitable alternative. This practice also creates two classes of individuals – those who must reimburse the state for their care through their social security benefits and those who do not – either because they are not eligible for social security benefits, or they have a more benevolent individual serving as their representative payee. This process is also depriving these children of money that could have a substantial and immediate

¹⁶⁶ *Survivor’s Benefits*, *supra* note 25 at 84.

¹⁶⁷ *Id.*

¹⁶⁸ *Id.* at 25.

impact on their life. It could be used to support current needs, but also be saved to help provide support when the child leaves foster care. The documents received from the FOIL request of ACS support a finding that New York City is engaged in these predatory practices, and these arguments may prove beneficial in future litigation.

There is hope for the severe limitation or even end of this practice. Legislation instituted in Maryland may prove to be a model for how the rest of the country should treat these situations. Other individuals, including volunteers, must be considered prior to the child welfare agency being appointed as representative payee. Most importantly, notice must be given to these children and their legal advocates so they have the opportunity to object to foster care agencies utilizing the funds to further their financial interests. Specialized savings accounts need to be established for these children so they are able to use the benefits they are entitled to when they need it most. The practice of child welfare agencies utilizing children's social security benefits for the interests of the agency, should be severely limited to protect the best interest of the children.