
FOSTER CHILDREN PAYING FOR FOSTER CARE

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INTRODUCTION

Across the country, tens of thousands of children who have suffered a level of abuse and neglect requiring removal from the family home are being forced to pay for their own foster care.¹ As a part of revenue maximization strategies often developed through contracts with private companies such as MAXIMUS, Inc.,² foster care agencies are

¹ An amicus brief filed on behalf of thirty-nine states explains how “[t]he amici States—indeed, to our knowledge, all States” act as representative payees for foster children’s Social Security benefits in order to apply the children’s benefits to reimburse state costs, and estimates that “at any given time, state agencies serve as representative payees for tens of thousands of foster children.” Brief for State of Florida et al. as Amici Curiae Supporting Petitioners at 1, 4, *Wash. State Dep’t of Soc. & Health Servs. v. Guardianship Estate of Keffeler*, 537 U.S. 371 (2003).

² MAXIMUS is one of the largest private companies providing revenue maximization services to state and local governments. See Press Release, New Jersey Awards MAXIMUS Revenue Maximization Contract, May 31, 2002, <http://phx.corporate-ir.net/phoenix.zhtml?c=88279&p=irol-newsArticle&t=Regular&id=301531>.

engaged in the systemic practice of converting foster children's Social Security benefits into a source of state funds. The agencies identify foster children who are disabled or have deceased or disabled parents, apply for Social Security benefits on the children's behalf, and then take the children's benefits to reimburse foster care costs for which the children have no legal obligation.³ The states are using the Social Security benefits as a funding stream in order to reduce state expenditures rather than as a resource to address the children's unmet needs in the severely broken foster care system.⁴ Furthermore, the benefits are not being conserved to aid the children in their forthcoming and difficult transitions from foster care to independence.⁵

MAXIMUS promotes its "SSI Project" with the Illinois Department of Children and Family Services as an example of how the company can help state agencies benefit from the practice of using foster children's Social Security benefits to reduce state costs.⁶ The bottom line: as a result of MAXIMUS's efforts to help the state identify 4300 disabled foster children and use the children as a conduit to convert their Social Security benefits into a state funding source, "the

³ Brief for State of Florida et al. as Amici Curiae Supporting Petitioners, *supra* note 1, at 1-6. The Supreme Court also explains the State of Washington's process and notes that foster children have no liability to pay for the costs of their care. *Keffeler*, 537 U.S. at 377-79, 382. However, at least one state has passed legislation requiring the use of foster children's available resources to reimburse state costs. See MINN. STAT. § 260C.331(b)-(c) (2005).

⁴ See, e.g., Anne L. Alstott, *What Does a Fair Society Owe to Children—And Their Parents?*, 72 *FORDHAM L. REV.* 1941, 1956 (2004) (noting the "dismal state of foster care"); Martin Guggenheim, *Somebody's Children: Sustaining the Family's Place in Child Welfare Policy*, 113 *HARV. L. REV.* 1716, 1716 (2000) (reviewing Elizabeth Bartholet's *Nobody's Children: Abuse and Neglect, Foster Drift, and the Adoption Alternative*, and stating that "[v]irtually everyone familiar with current child welfare practice in the United States agrees that it is in crisis"). For a specific state example, see OFFICE OF LEGISLATIVE AUDITS, MARYLAND GENERAL ASSEMBLY, AUDIT REPORT, DEPARTMENT OF HUMAN RESOURCES, SOCIAL SERVICES ADMINISTRATION (March 2005), available at <http://www.ola.state.md.us/reportfiles/fiscal/HumanResources/SSA05.pdf> (legislative audit finding that foster children are not receiving critically needed services: 35% of foster children not in school, 40% of the children not receiving dental services, and over 30% of the children not receiving required monthly visits by their caseworkers).

⁵ See, e.g., Austen L. Parrish, *Avoiding the Mistakes of Terrell R.: The Undoing of the California Tort Claims Act and the Move to Absolute Governmental Immunity in Foster Care Placement and Supervision*, 15 *STAN. L. & POL'Y REV.* 267, 278 (2004) (describing the results of a University of Wisconsin study finding that "after leaving foster care, 27% of males were incarcerated within twelve to eighteen months, 50% were unemployed, 37% did not graduate from high school, 33% were on public assistance, 47% were receiving counseling or medication for medical problems just before leaving the system, and 33% were diagnosed with three or more psychiatric problems"); Casey Family Programs, *Improving Family Foster Care: Findings from the Northwest Foster Care Alumni Study* (March 2005), <http://www.casey.org/Resources/Publications/NorthwestAlumniStudy.htm> (access full study through link on right side of page) (finding that former foster children are twice as likely to suffer from post-traumatic stress disorder as Iraq war veterans).

⁶ MAXIMUS, Inc., Eligibility Determination Services, <http://www.maximus.com/corporate/pages/eligibilitydetermination.asp> (last visited Jan. 20, 2006).

state has realized savings of more than \$12 million since the project's inception."⁷ MAXIMUS takes a cut of up to 12.5% in such revenue maximization projects.⁸

There is no federal statute, regulation, or policy that specifically addresses this use of federal benefits. The practice is not the result of deliberative policy discussions regarding how to best serve children in foster care; it is simply an ad-hoc reaction by under-funded state agencies.

Foster care agencies screen children in state care to determine those who are currently or potentially eligible to receive Social Security benefits because of the children's disabilities or because the children's parents are deceased or disabled.⁹ The agencies then apply for benefits on the children's behalf and seek to become the children's representative payees in order to manage the benefit payments.¹⁰ Although state agencies are the least preferred choice for a representative payee¹¹ and the Social Security Administration is required to look for anyone more preferred,¹² the state agencies are selected as the payees for foster children through a virtually automatic process¹³—with the applications processed in batches through a computer programming tool termed the “kiddie loop.”¹⁴

Once the agencies become representative payees, their new roles provide access to the children's funds through a fiduciary relationship. However, rather than fulfilling their fiduciary obligation to consider and choose between various uses of the benefits to best serve the interests of

⁷ *Id.*

⁸ This calculation is based on a range of contingency fees MAXIMUS has charged in revenue maximization contracts in other states. *See Nebraska Health & Human Servs. System v. HHS Regional Director for Region X, Department of Health & Human Services Departmental Appeals Board, DAB1660 (1998)*, available at <http://www.hhs.gov/dab/decisions/dab1660.html> (noting revenue maximization contract with MAXIMUS under a contingency fee of 12.5%); KANSAS DEPARTMENT OF ADMINISTRATION, DIVISION OF PURCHASES, CONTRACT RENEWAL 02571, Feb. 5, 2003, <http://da.state.ks.us/purch/contracts/ContractData/02571.doc> (MAXMIMUS revenue maximization contract with 6.5% contingency fee); Maryland Revenue Maximization Contract, Baseline and Contingent Fee Provisions, Section IV(C) (MAXMIMUS revenue maximization contract with 8.5% contingency fee) (on file with author).

⁹ The process is described in the brief filed by the Washington State Department of Social and Health Services in *Keffeler*. Brief for Petitioners at 9-10, Wash. State Dep't of Soc. & Health Servs. v. Guardianship Estate of Keffeler, 537 U.S. 371 (2003).

¹⁰ *Id.*

¹¹ 20 C.F.R. §§ 404.2021(c), 416.621(c) (2005).

¹² *Keffeler*, 537 U.S. at 376 n.1.

¹³ See *infra* notes 200-207 and accompanying text for a discussion of the automatic process of selecting state agencies as representative payees for foster children.

¹⁴ UNITED STATES SOCIAL SECURITY ADMINISTRATION, PROGRAM OPERATIONS MANUAL SYSTEM (POMS) § GS 00502.110 (B)(3), available at <http://policy.ssa.gov/poms.nsf/lnx/0200502110> [hereinafter POMS]. The POMS is the “publicly available operating instructions” used by Social Security Administration staff. *Keffeler*, 537 U.S. at 385. The Supreme Court explains that “[w]hile these administrative interpretations are not products of formal rulemaking, they nevertheless warrant respect” *Id.*

the children, the agencies apply fixed state rules that require using the children's Social Security benefits to reimburse state costs.¹⁵ Consider the story of a fifteen-year-old boy in foster care named John,

a story of uncommon cruelty, compounded by layer upon layer of bureaucratic incompetence. And finally, no remorse from the only parent the boy, at age 15, has left—the Department of Social Services. . . . In a case that illustrates the daunting odds that face teens aging out of foster care, the story began when the boy was a baby and his father, soon after adopting him, died of cancer. In his will, [the] church custodian . . . left young John a savings account, a monthly survivor benefit and a Habitat for Humanity house with a small monthly mortgage [of \$221 per month]. But the boy was also left with a stepmother who subjected him to daily abuse for his first seven years—whippings with belt buckles and Venetian blinds, the judge recounted. To the doctor at UNC who noted broken bones and cigarette burns on the child, John had confided that the stepmother “would become mean when she smoked the rock.” Enter an aunt, who next adopted John and moved into the little house What social workers didn't know—for another six years—was that the aunt enlisted the child to sell drugs for her. . . . With the boy now left in foster care and the custody of the DSS, what at last forced the case into public view was that Habitat was about to foreclose on the vacant house, having received no payments in a year. The DSS, it turned out, was using the child's survivor benefit to reimburse itself for his support. Though the child's lawyer's pleaded that protecting the child's inheritance was “the fair and decent thing to do,” an attorney for DSS argued that the agency had no obligation to use the boy's money to pay his mortgage. “What if he had a \$2,000 monthly mortgage? What if every kid (in foster care) wanted a car?” argued [the] DSS attorney “It would be wonderful if all this court had to do was what's ‘fair and decent.’”¹⁶

If John's representative payee, now the local department of social services, applied fiduciary discretion to determine how to use the benefits to best meet John's needs, the payments could be used to make the small mortgage payments on the Habitat for Humanity home so that John not only has a place to live when he ages out of foster care, but a home that is truly his.¹⁷ Also, the excess benefits beyond the mortgage payments could be conserved as part of a plan to help John prepare for

¹⁵ See *infra* note 189 and accompanying text.

¹⁶ Lorraine Ahearn, *At Eleventh Hour, Judge Saves Boy in Foreclosure*, GREENSBORO NEWS & RECORD, Dec. 18, 2005, available at <http://www.news-record.com/apps/pbcs.dll/article?AID=/20051218/NEWSREC0101/512180313/201001/NEWSREC0201>.

¹⁷ The trial court in this case ordered that the Guilford County Department of Social Services must use the Social Security benefits to pay the back payments and monthly mortgage payments on John's home, and the agency has since appealed and has sought a stay of the order. Petition of Guilford County Dep't of Soc. Serv. for Writ of Supersedeas and Motion for Temporary Stay at 4, *In re J.G.*, No. PO5-1170 (N.C. Ct. App. 2005).

his transition to independence.¹⁸ Several options are possible. The benefits could be used to save for college or pay the cost of vocational education and training and to purchase specialized tools or equipment for John's future chosen profession. The benefits could also be saved to purchase a car—now virtually a necessity for independent living. Or, the benefits could simply be conserved in a savings account that can serve as an emergency fund for the many unforeseen expenses that John will likely encounter.

However, under current state agency practices, John's individual needs and circumstances are not considered. Apparently adhering to a blanket agency rule,¹⁹ the state agency automatically applies John's benefits to reimburse the state for costs that John is not legally obligated to pay.²⁰

Although the practice strips foster children like John of a crucially needed resource and ignores the children's individualized needs, a unanimous Supreme Court upheld the practice in *Washington State Department of Social and Health Services v. Guardianship Estate of Keffeler*,²¹ relying on supporting amicus briefs filed by most states, numerous counties, the U.S. Solicitor General, and several national child advocacy organizations.²² Luckily for Danny Keffeler, by the time of the Supreme Court's decision in his case, his grandmother had successfully held off the state's attempt to replace her as representative payee, and Danny's benefits were conserved to allow him to obtain a college degree.²³ Unluckily for the tens of thousands of other foster children receiving Social Security benefits, their state agency representative payees—now armed with the *Keffeler* decision—will

¹⁸ See *infra* notes 140-144 and accompanying text.

¹⁹ In North Carolina, the state policy manual directs local offices and staff that [t]he county DSS must be aware of all resources available to a child, which may include a child's unearned income from sources such as Supplemental Security Income, Social Security Survivor's benefits, trust funds, endowments, or child support paid directly to the agency. When a child is IV-E eligible, the agency *must* use the child's resources as part of the cost of care

North Carolina Dep't of Health and Human Services, Division of Social Services Manual, Chapter IV: 1203 Foster Care Funding § IV(C) <http://info.dhhs.state.nc.us/olm/manuals/dss/csm-20/man/CSs1203-09.htm>.

²⁰ See *supra* note 3.

²¹ Wash. State Dep't of Soc. & Health Servs. v. Guardianship Estate of Keffeler, 537 U.S. 371, 375, 392 (2003).

²² See Brief for Children's Defense Fund et al. as Amici Curiae Supporting Petitioners, *Keffeler*, 537 U.S. 371 (No. 01-1420), 2002 WL 1808594; Brief for Juvenile Law Center & the National Center on Youth Law as Amici Curiae Supporting Respondents, *Keffeler*, 537 U.S. 371 (No. 01-1420), 2002 WL 31399628; Brief for State of Florida et al. as Amici Curiae Supporting Petitioners, *supra* note 1; Brief for Counties of the State of California et al. as Amici Curiae Supporting Petitioners, *Keffeler*, 537 U.S. 371 (No. 01-1420), 2002 WL 1822201; Brief for the United States as Amicus Curiae Supporting Petitioners, *Keffeler*, 537 U.S. 371 (No. 01-1420), 2002 WL 1836735.

²³ See *infra* notes 73-84 and accompanying text.

continue to use the children's benefits to replenish the state coffers rather than to meet the children's needs.

However, the Court's holding in *Keffeler* was limited, concluding that the state's use of children's Social Security benefits does not violate the anti-attachment provision of the Social Security Act.²⁴ Several possible statutory and constitutional challenges survived the decision.

Despite the importance of this issue to the well-being of children in foster care, the use of children's Social Security benefits by state foster care agencies has received little attention from legal scholars.²⁵ This Article seeks to shed light on the practice—to explain why using the children's benefits to reduce state costs rather than on the children's needs is bad policy and subject to legal challenge, and to provide suggestions for reform. Part I describes the framework of children's Social Security benefits, explains how the children's benefits are used as a part of revenue maximization strategies, and reviews the Supreme Court's decision in *Keffeler*. Part II examines the policy concerns implicated by the practice, including the tension between the specialized needs of individual foster children and the fiscal interests of the state agencies. Part III analyzes possible statutory and constitutional challenges to the practice that were not addressed by the Supreme Court. In Part IV, the Article concludes with suggestions for developing reasoned policies and practices that would pay better attention to foster children's individual rights and needs.

I. THE FRAMEWORK: CHILDREN'S SOCIAL SECURITY BENEFITS, REVENUE MAXIMIZATION, AND *KEFFELER*

Children can be eligible for two types of Social Security benefits: Old-Age, Survivors, and Disability Insurance (OASDI) under Title II of the Social Security Act,²⁶ and Supplemental Security Income (SSI)

²⁴ *Keffeler*, 537 U.S. at 382-88. The anti-attachment provision of the Social Security Act protects social security benefits from "execution, levy, attachment, garnishment, or other legal process." 42 U.S.C. § 407(a) (2000).

²⁵ No legal scholarship has addressed the use of foster children's Social Security benefits since the Supreme Court upheld the practice in *Keffeler*. Two articles were written about the issue prior to the Supreme Court's decision. See 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. & POL'Y 67 (2003); Tobias J. Kammer, Note, *Keffeler v. Department of Social and Health Services: How the Supreme Court of Washington Mistook Caring for Children as Robbing Them Blind*, 77 WASH. L. REV. 877 (2002); see also Patrick Gardner, *Keffeler v. DSHS: Picking the Pockets of America's Neediest Children*, YOUTH LAW NEWS, July-Sept. 2002, at 1, available at <http://www.youthlaw.org/YLN.3.2002.pdf>; Bruce Boyer & Martha Mathews, *Should Agencies Apply for and Receive SSI on Behalf of Foster Children?*, YOUTH LAW NEWS, Nov.-Dec. 1999.

²⁶ 42 U.S.C. §§ 401-434 (2000).

under Title XVI.²⁷ The purpose of providing OASDI benefits to a child is to replace lost financial support due to a parent's disability or death.²⁸ OASDI is an insurance program: a child's eligibility to receive the benefits is not based on income or assets but is contingent upon sufficient parent contributions through payroll taxes.²⁹ SSI is a needs-based program that provides benefits to low-income disabled individuals.³⁰ Unlike OASDI, a child's receipt of SSI does not require that the parents paid into the system through payroll taxes, although eligibility is limited under specified income and asset thresholds.³¹ The Supreme Court has described the purpose of children's SSI as providing a "minimum level of income" to children who do not "have sufficient income and resources to maintain a standard of living at the established Federal minimum income level."³²

Social Security benefits for a child, both SSI and OASDI, must be paid to a representative payee.³³ A representative payee has a fiduciary relationship to the child beneficiary,³⁴ including an obligation to manage and expend the benefits "only for the use and benefit of the beneficiary" in a manner that the payee determines "to be in the best interests of the beneficiary."³⁵ To guide the exercise of this discretion, the Social

²⁷ *Id.* §§ 1381-1383f.

²⁸ *Mathews v. Lucas*, 427 U.S. 495, 507 (1976); Laurence C. Nolan, *Critiquing Society's Response to the Needs of Posthumously Conceived Children*, 82 OR. L. REV. 1067, 1100 (2003).

²⁹ Peter V. Lee et al., *Engendering Social Security Disability Determinations: The Path of a Woman Claimant*, 68 TUL. L. REV. 1477, 1482 (1994).

³⁰ *Id.* at 1483; SSI: Purpose of Program, 20 C.F.R. § 416.110 (2005).

³¹ Income and SSI Eligibility, 20 C.F.R. § 416.1100 (2005); SSI: Limitation on Resources, 20 C.F.R. § 416.1205 (2005).

³² *Wash. State Dep't of Soc. & Health Servs. v. Guardianship Estate of Keffeler*, 537 U.S. 371, 390 (2003) (quoting 20 C.F.R. § 416.110). However, legislative history provides support for a broader purpose of child SSI benefits to serve the special needs of disabled and impoverished children with a goal of promoting their successful transition to economic independence as adults. H.R. Rep. No. 92-231, at 5133-34 (1971), *reprinted in* 1972 U.S.C.C.A.N. 4989, 5133 ("It is your committee's belief that disabled children who live in low-income households are certainly among the most disadvantaged of all Americans and that they are deserving of special assistance in order to help them become self-supporting members of our society."); Frank S. Bloch, *Three Steps and You're Out: The Misuse of the Sequential Evaluation Process in Child SSI Disability Determinations*, 37 U. MICH. J.L. REFORM 39, 48-51 (2003) (discussing history and purposes of child SSI benefits); Gardner, *supra* note 25, at 1.

³³ 20 C.F.R. §§ 404.2010, 416.610 (2005). See generally Margaret G. Farrell, *Administrative Paternalism: Social Security's Representative Payment Program and Two Models of Justice*, 14 CARDOZO L. REV. 283 (1992) (providing a thorough explanation and critique of the representative payee program).

³⁴ Melissa Reiner Greener, Note, *The Social Security Administration's Representative Payee Program: An Act of Benevolence or Cruelty?*, 12 CARDOZO L. REV. 2025, 2036 (1991); see also *Riddick v. D'Elia*, 626 F.2d 1084, 1088 (2d Cir. 1980) (representative payee has a "legally enforceable fiduciary obligation"); POMS, *supra* note 14, § GN 00502.113, available at <http://policy.ssa.gov/poms.nsf/lnx/0200502113!opendocument> (last visited Feb. 15, 2006) (providing direction for SSA staff that "[i]f the payee tells you that he/she will not carry out his fiduciary responsibilities without compensation, deny the application and seek another payee.").

³⁵ 20 C.F.R. §§ 404.2035(a), 416.635(a) (2005).

Security Administration explains that “[w]e will consider that payments we certify to a representative payee have been used for the use and benefit of the beneficiary if they are used for the beneficiary’s current maintenance.”³⁶ Current maintenance is then defined to include costs “incurred in obtaining food, shelter, clothing, medical care, and personal comfort items.”³⁷ If the benefits are not needed for the beneficiaries “current maintenance or reasonably foreseeable needs,” the payee is directed that the benefits “shall be conserved or invested on behalf of the beneficiary.”³⁸ Regarding debt obligations, a representative payee “may not be required to use benefit payments to satisfy a debt of the beneficiary” that accrued prior to the period of benefit payments, and the payee is only allowed to satisfy a debt if the “current and reasonably foreseeable needs of the beneficiary are met” and it is in the beneficiary’s interest to do so.³⁹ Children generally have no debt obligation resulting from their foster care.⁴⁰

A. *Funding Foster Care with Children’s Social Security Benefits: Converting an Individual Entitlement into a Public Funding Stream*

Within this framework of regulations designed to ensure Social Security benefits are used for the benefit of the beneficiaries, state foster care agencies side-step their fiduciary responsibilities and engage in a practice that converts the children’s benefits into a funding stream for the state. Although children generally owe no debt as a result of their placement in foster care and the state agencies could not reach the children’s Social Security benefits through legal enforcement actions were there a debt obligation,⁴¹ the agencies have developed a “work-around.” The process is described by the Washington State Department of Social and Health Services in *Keffeler*: “When children enter foster care, the Department checks to see whether they are eligible for OASDI

³⁶ *Id.* §§ 404.2040(a), 416.640(a).

³⁷ *Id.*

³⁸ *Id.* § 416.645 (regarding SSI benefits). Similarly, a regulation governing use of OASDI benefits directs representative payees that after the benefits have been used for current support and maintenance and other “miscellaneous needs,” the remaining benefits must be conserved or invested on behalf of the beneficiary. *Id.* § 404.2045.

³⁹ *Id.* §§ 404.2040(d), 416.640(d).

⁴⁰ *See* Wash. State Dep’t of Soc. & Health Servs. v. Guardianship Estate of Keffeler, 537 U.S. 371, 382 (2003) (In concluding the state agency is not a creditor of foster care children, the Court notes that “[n]o law provides that they are liable to repay the department for the costs of their care.”). However, at least one state has passed legislation requiring the use of foster children’s available resources to reimburse state costs. *See* MINN. STAT. § 260C.331(b)-(c) (2005).

⁴¹ *Keffeler*, 537 U.S. at 389 (noting that the state “could not directly compel the beneficiary or any other representative payee to pay Social Security benefits over to the State”).

benefits and evaluates children to determine whether they have significant physical or mental impairments that would qualify them for SSI benefits.”⁴² The agency “applies for benefits if it concludes that a child may be eligible,” and “[w]hen the Social Security Administration . . . approves benefits for one of these children, it usually appoints the Department representative payee.”⁴³ When the agency receives the OASDI or SSI benefits on behalf of the children, “it deposits them in a special Foster Care Trust Fund Account in the State Treasurer’s Office.”⁴⁴ Then, “[e]very month the Department generates a report of how much it has paid to the foster care provider for each child,” the agency “compares this amount to the amount in the child’s individual benefit account,” and “[i]f the amount in the trust fund account is equal to or less than the entire cost of foster care, then trust fund proceeds are used to reimburse the Department.”⁴⁵

Although the practice described in *Keffeler* results in a funding stream that amounts to only one percent of the total federal funding for state child welfare programs,⁴⁶ states have a strong incentive to seek out the children’s Social Security benefits. The benefits are fully federally funded and enable states to replace state funds used to support foster children with federal funds, thereby saving state resources for other purposes.⁴⁷ For the affected foster children, millions⁴⁸ of dollars in much-needed benefits are being taken each year that otherwise could be used to meet the children’s current unmet needs⁴⁹ or could be conserved for the children’s future needs during their struggle to transition out of foster care into adulthood.⁵⁰

⁴² Brief for Petitioners, *supra* note 9, at 9-10.

⁴³ *Id.* at 10.

⁴⁴ *Id.*

⁴⁵ *Id.* at 12.

⁴⁶ CYNTHIA ANDREWS SCARCELLA ET AL., THE URBAN INSTITUTE, THE COST OF PROTECTING VULNERABLE CHILDREN IV: HOW CHILD WELFARE FUNDING FARED DURING THE RECESSION 14 fig. 4 (2004), http://www.urban.org/UploadedPDF/411115_VulnerableChildrenIV.pdf.

⁴⁷ *Id.* at 28.

⁴⁸ *Id.* Thirty states provided data regarding SSI funds received in 2002, which totaled \$72 million, and nineteen states provided separate data regarding OASDI benefits received, totaling \$24 million. *Id.*

⁴⁹ See *supra* note 4; see also Sarah Ramsey, *Fixing Foster Care or Reducing Child Poverty: The Pew Commission Recommendations and the Transracial Adoption Debate*, 66 MONT. L. REV. 21, 21 (2005) (explaining that “in spite of major efforts at reform, the foster care system and the child welfare system generally are systems in crisis”).

⁵⁰ See Gail Chang Bohr, *For the Well-Being of Minnesota’s Foster Children: What Federal Legislation Requires*, 31 WM. MITCHELL L. REV. 897, 907 (2005) (discussing the need to provide assistance to foster children transitioning out of foster care).

B. Revenue Maximization

The practice of foster care agencies using children's Social Security benefits to reimburse state costs is a part of broader state strategies to increase outside funding sources in order to reduce state spending on social service programs.⁵¹ States are increasingly turning to "revenue maximization" strategies, including the use of private consultants, in order to maximize the use of federal and other non-state sources of funds.⁵² In Montana, for example, legislation was passed requiring an agency-wide "refinancing" of programs serving children with the mandate to "seek federal funds to offset general fund expenditures to the maximum extent possible."⁵³ The Iowa Department of Human Resources established a "Foster Care Recovery Unit"⁵⁴ and devoted a chapter of its employee manual to "recovery of foster care costs from financial resources that are available to a child who is placed in any type of foster care."⁵⁵ In Maryland, the foster care agency's strategic plan outlines a strategy to maximize federal foster care (IV-E) funds (federal funds used to reimburse state foster care costs)⁵⁶ and SSI funds, including making assistance available for local agency staff to increase the identification and claiming of children's Social Security benefits.⁵⁷

1. Foster Care Cost Recovery: Parents vs. Children

In addition to the revenue maximization strategy of recovering foster care costs by taking children's Social Security benefits, states also seek reimbursement from the biological parents by establishing child support obligations with payments assigned to the state rather than being owed to the children.⁵⁸ However, a comparison of these two cost-

⁵¹ ADAM CARASSO & ROSEANNA BESS, URBAN INSTITUTE, THE DISPOSITION OF FEDERAL DOLLARS IN FLORIDA'S SOCIAL SERVICES: INFORMING A FEDERAL FUNDING MAXIMIZATION STRATEGY 32-34 (June 2003), http://www.urban.org/UploadedPDF/410822_federal_dollars.pdf.

⁵² *Id.*

⁵³ MONT. CODE ANN. § 53-1-610 (2005); *see also* MONTANA DEP'T OF PUBLIC HEALTH AND HUMAN SERVS., REFINANCING, http://www.dphhs.state.mt.us/about_us/legislative_information/program_finance.pdf (last visited Jan. 9, 2003).

⁵⁴ IOWA DEP'T OF HUMAN SERVS., FOSTER CARE RECOVERY UNIT, <http://www.dhs.state.ia.us/fostercare/recovery> (last visited Feb. 15, 2003).

⁵⁵ Iowa Dep't of Human Services, Foster Care Recovery Employees' Manual 1, (Jan. 28, 1996), *available at* http://www.dhs.state.ia.us/policyanalysis/PolicyManualPages/Manual_Documents/Master/18-g.pdf.

⁵⁶ *See infra* note 146 and accompanying text.

⁵⁷ SOC. SERVS. ADMIN., MARYLAND DEP'T OF HUMAN RESOURCES, STRATEGIC PLANNING FOR THE FUTURE (January 2000), <http://www.dhr.state.md.us/ssa/strplan.htm>.

⁵⁸ 42 U.S.C. § 671(a)(17) (2000).

recovery strategies illustrates how states initially set their sights on the children, and leave the parents who committed the abuse and neglect as a back-up for the reimbursement.⁵⁹

Of the total amount of foster care costs state agencies recover, the vast amount comes from taking children's Social Security benefits rather than from enforcing the parents' child support obligations. For example, the foster care agency in Washington State has recovered approximately \$7 million in foster care costs per year by becoming the representative payee for foster children's Social Security benefits.⁶⁰ From the parents, the state has only recovered approximately \$790,000 in foster care costs per year by enforcing child support obligations.⁶¹ Thus, Washington State is enforcing approximately ninety percent of its foster care cost recovery collections against the children, compared to only ten percent against the parents.⁶²

2. Using MAXIMUS to Maximize Revenue

States are increasingly turning to private companies for assistance with their revenue maximization strategies.⁶³ MAXIMUS, Inc. advertises that its "Revenue Maximization Division" has "identified and secured \$1.5 billion in additional federal funding for our state clients," and that the company has conducted revenue maximization projects in twenty-five states.⁶⁴ MAXIMUS charges a contingency fee for its

⁵⁹ For example, Minnesota legislation explains that children are required to use all their resources to pay for the cost of care first, and then the parents are required to contribute if the children's resources are insufficient. MINN. STAT. § 260C.331(b)-(c) (2005).

⁶⁰ Press Release, Wash. State Dep't of Soc. and Health Servs., DSHS Gets Temporary OK to Collect Benefits on Behalf of Foster Children (Jan. 29, 2002).

⁶¹ OFFICE OF CHILD SUPPORT ENFORCEMENT, U.S. DEP'T OF HEALTH & HUMAN SERVS., FY 2002 ANNUAL STATISTICAL REPORT tbl. 8 (Distributed Foster Care Collections for Five Fiscal Years) (Nov. 2003), available at http://www.acf.hhs.gov/programs/cse/pubs/2003/reports/annual_statistical_report/table_8.html.

⁶² This comparison is provided to illustrate how states are targeting foster children as a source of revenue, not to argue for increased enforcement of state-owed child support obligations against the parents. Establishing state-owed child support obligations against low-income parents while their children are in foster care can reduce the possibility of a successful reunification. See Karen Gievers, *Listening to Silenced Voices: Examining Potential Liability of State and Private Agencies for Child Support Enforcement Violations*, 25 NOVA L. REV. 693, 717-18 (2001) (noting this concern); Eve A. Stotland, *Resolving the Tension Between Child Support Enforcement and Family Reunification*, 35 CLEARINGHOUSE REV. 317 (Sept.-Oct. 2001) (same).

⁶³ Thirty-four states were using private contingency-fee consultants to implement revenue maximization strategies for Medicaid reimbursements in 2004—up from ten states using the private consultants for this purpose in 2002. UNITED STATES GOVERNMENT ACCOUNTABILITY OFFICE (GAO), MEDICAID FINANCING: STATES' USE OF CONTINGENCY-FEE CONSULTANTS TO MAXIMIZE FEDERAL REIMBURSEMENTS HIGHLIGHTS NEED FOR IMPROVED FEDERAL OVERSIGHT, REPORT TO THE CHAIRMAN, COMMITTEE ON FINANCE 4 (2005), available at <http://www.gao.gov/new.items/d05748.pdf>.

⁶⁴ MAXIMUS, Inc., Revenue Maximization Services, <http://www.maximus.com/corporate/>

services, converting millions in children's Social Security benefits and other federal funds into company profits.⁶⁵

The use of private revenue maximization consultants under contingency fee arrangements is appealing to states because it has the perceived potential to increase state funds with few financial risks. Under contingency fee arrangements, no up front payments are required and the private consultants are only paid if they increase federal revenues to the states.⁶⁶ However, there are significant concerns. Several states that have used private consultants under contingency fee arrangements have been audited and forced to repay millions in improper claims.⁶⁷ Further, the incentives created through contingency fee revenue maximization strategies can conflict with the interests of individuals served by state agencies and the purpose of the federal benefits being sought.⁶⁸ In Mississippi, a legislative committee report concluded that the state's revenue maximization contract with a private consulting firm may cause the state foster care agency to have a greater financial interest in removing children from their homes if the children are eligible for federal funds, and that some children may not receive needed services if they do not qualify for the federal programs that are the subject of the revenue maximization strategies.⁶⁹

Senator Charles Grassley, Chairman of the U.S. Senate Committee on Finance, expressed similar reservations regarding private contracts to maximize state revenue from Medicaid. In a letter sent to the Secretary of the Department of Health and Human Services in early 2004, Senator Grassley noted concerns regarding contingency fee arrangements including fraudulent billing practices and the diversion of Medicaid funds to purposes other than intended: "I am extremely disconcerted that Medicaid monies intended to benefit low-income Americans, pregnant women and poor children, may instead be lining the coffers of consulting firms."⁷⁰

pages/revenuesvs.asp (last visited Feb. 15, 2006).

⁶⁵ Through the contingency fee structure, MAXIMUS typically makes between \$3 to \$5 million from each revenue maximization contract. William Welsh, *Maximus Wins Revenue Renewal in Kansas*, WASHINGTON TECHNOLOGY, Jan. 29, 2002, http://www.washingtontechnology.com/news/1_1/state/17748-1.html.

⁶⁶ UNITED STATES GOVERNMENT ACCOUNTABILITY OFFICE, *supra* note 63, at 8.

⁶⁷ JOINT LEGISLATIVE COMMITTEE ON PERFORMANCE EVALUATION AND EXPENDITURE REVIEW (PEER), REPORT TO MISSISSIPPI LEGISLATURE #413, THE DEPARTMENT OF HUMAN SERVICES' USE OF REVENUE MAXIMIZATION CONTRACTS 18 (Dec. 6, 2000), available at <http://www.peer.state.ms.us/reports/rpt413.pdf> [hereinafter PEER, Report to Mississippi Legislature #413].

⁶⁸ See Michele Estrin Gilman, *Legal Accountability in an Era of Privatized Welfare*, 89 CAL. L. REV. 569, 592 (2001) (noting that in the welfare context, private contractors receiving fees based upon services provided often have financial incentives inconsistent with the needs of the individuals they have contracted to serve).

⁶⁹ PEER, Report to Mississippi Legislature #413, *supra* note 67, at 18.

⁷⁰ Press Release, Senator Chuck Grassley, Grassley Seeks Answers on States' Use of

While similar congressional concern has not yet been expressed regarding the state agency practice of taking foster children's Social Security benefits, often with the assistance of private consultants, some advocates have begun challenging the practice through litigation.⁷¹ One case, *Washington State Department of Social and Health Services v. Guardianship Estate of Keffeler*,⁷² reached the Supreme Court.

C. *Danny Keffeler*

In 1990, Danny Keffeler's mother died while he was in foster care provided by the Washington State Department of Social and Health Services (DSHS).⁷³ Danny's grandmother, Wanda Pierce, was appointed guardian of Danny's estate, and when Danny began receiving OASDI benefits as a result of his mother's death, his grandmother was appointed representative payee.⁷⁴ Ms. Pierce expended some of the benefits to pay for Danny's needs that were not being met by the foster care program, and conserved the remainder to pay for Danny's future college expenses.⁷⁵ Over Ms. Pierce's objection, DSHS filed a successful application to replace the grandmother as Danny's representative payee so the agency could use Danny's OASDI benefits to reimburse state costs.⁷⁶ Ms. Pierce appealed the agency determination and was reinstated as Danny's payee after the Administrative Law Judge determined Ms. Pierce was justifiably concerned that DSHS was reimbursing itself with Danny's benefits rather than conserving the benefits for his future needs.⁷⁷

DSHS did not accept the result and in 1994 initiated a two-pronged legal strategy to again obtain access to Danny's Social Security benefits.⁷⁸ The agency filed a creditor's claim in state court against Danny's guardianship estate, while contemporaneously continuing its administrative action with the Social Security Administration to replace Danny's grandmother as representative payee.⁷⁹ DSHS dismissed its creditor's claim after Danny's guardianship estate asserted the action

Consultants to Increase Medicaid Funds (Feb. 13, 2004), <http://www.grassley.senate.gov/releases/2004/p04r02-13.htm>.

⁷¹ See, e.g., *Willingham v. McDonald*, No. 96 CO 00120 (Ill. Cir. Ct. June 1996); *Gean v. Hattaway*, 330 F.3d 758 (6th Cir. 2003) (rejecting multiple legal challenges to the practice); *In re Cajun C.*, 2003 WL 1901362 (Cal. App. Ct. Apr. 18, 2003) (same).

⁷² 537 U.S. 371 (2003).

⁷³ Brief for Respondent at 10, *Keffeler*, 537 U.S. 371 (No. 01-1420), 2002 WL 31261027.

⁷⁴ *Id.*

⁷⁵ *Id.*

⁷⁶ Brief for Petitioners, *supra* note 9, at 16.

⁷⁷ *Id.*; Joint Appendix at 45a, *Keffeler*, 537 U.S. 371 (No. 01-1420), 2002 WL 32102954.

⁷⁸ Brief for Respondent, *supra* note 73, at 10-11.

⁷⁹ *Id.*

was barred by the anti-attachment provision of the Social Security Act,⁸⁰ but the agency continued the administrative action.⁸¹ After remand from the Appeals Council, a second Administrative Law Judge determined that removal of Danny's grandmother as representative payee was improper.⁸² The ALJ reasoned that because Danny's current maintenance needs were already met through the foster care program, his grandmother was not required to use the Social Security benefits to pay for the foster care services that were already provided.⁸³ As a result of the efforts by Danny's grandmother, much of his Social Security benefits were saved for his college education, and Danny ultimately graduated from Central Washington University in June 2002.⁸⁴

D. *The Keffeler Decision*

During her multiple administrative appeals, Danny's grandmother also brought a class action in state court against DSHS to challenge the agency's use of foster children's Social Security benefits to reimburse state costs while the state agency acted as the representative payee.⁸⁵ The trial court concluded that the agency's use of OASDI and SSI benefits to reimburse foster care costs was in violation of the anti-attachment provision of the Social Security Act, 42 U.S.C. § 407(a), and the decision was upheld on appeal to the Washington Supreme Court.⁸⁶

The decision left state agencies at risk of being held liable to repay billions of dollars of children's Social Security Benefits.⁸⁷ Amicus briefs in support of DSHS's appeal to the U.S. Supreme Court were filed by the U.S. Solicitor General, several counties, thirty-nine states, and several national child advocacy organizations.⁸⁸ Giving considerable weight to the concerns raised by amici, the Supreme Court reversed the decision of the Washington Supreme Court in a unanimous decision written by Justice Souter.⁸⁹

⁸⁰ 42 U.S.C. § 407(a) (2000).

⁸¹ Brief for Respondent, *supra* note 73 at 10-11.

⁸² *Id.*

⁸³ *Id.*

⁸⁴ *Id.*

⁸⁵ Brief for Petitioners, *supra* note 9, at 16.

⁸⁶ *Id.*

⁸⁷ Elizabeth Oppenheim, *Funding for Children in Foster Care: The Keffeler Case*, AMERICAN PUBLIC HUMAN SERVICES ASSOCIATION, POLICY & PRACTICE, March 2003, at 23.

⁸⁸ Brief for State of Florida et al. as Amici Curiae Supporting Petitioners, *supra* note 1; Brief for the United States as Amici Curiae Supporting Petitioners, *supra* note 22; Brief for Counties of the State of California et al. as Amici Curiae Supporting Petitioners, *supra* note 22; Brief for Children's Defense Fund et al. as Amici Curiae Supporting Petitioners, *supra* note 22.

⁸⁹ *Keffeler*, 537 U.S. at 390-92.

Justice Souter's opinion rejects the notion that a state agency representative payee's use of children's Social Security benefits to reimburse state costs is a violation of the anti-attachment provision in 42 U.S.C. § 407(a), which generally protects Social Security benefits from legal actions to collect debts.⁹⁰ The opinion explains that neither the agency's actions to become a representative payee for the children, nor its use of the children's Social Security benefits to reimburse state costs is the equivalent of an "execution, levy, attachment, garnishment, or other legal process" that is prohibited under § 407(a).⁹¹ After explaining that the agency's actions clearly did not amount to the formal judicial processes of execution, levy, attachment or garnishment, the Court also adopted a restrictive understanding of the "other legal process" prohibited by § 407(a), concluding that the term would, at a minimum, require "utilization of some judicial or quasi-judicial mechanism" that transfers control over property to discharge a liability.⁹² Because the agency has no enforceable claim against the foster children to recover state costs, the Court concluded the agency's actions did not meet this interpretation.⁹³

Although the Court primarily focused on whether the agency actions are prohibited by § 407(a), the *Keffeler* decision also addressed the argument that it is contrary to the foster children's best interests to apply their Social Security benefits to cover state costs which the children are not legally responsible to reimburse. Rejecting this argument, the Court explained that although the state agency could not compel the foster child or another representative payee to pay the Social Security benefits to the state, "that fact does not render the appointment of a self-reimbursing representative payee at odds with the Commissioner's mandate to find that a beneficiary's 'interest . . . would be served' by the appointment."⁹⁴ The Court reasoned that the obligation to promote the best interests of a beneficiary does not require maximizing the beneficiary's resources from "leftover benefit income," which the Court implied would be a windfall for the children if they were able to receive the full amount of their Social Security benefits while also benefiting from state foster care expenditures.⁹⁵

In reaching these conclusions, Justice Souter's opinion placed significant weight on policy concerns raised by amici: Foster children may be worse off if states cannot apply their Social Security benefits to

⁹⁰ *Id.*

⁹¹ *Id.* at 382-85.

⁹² *Id.* at 385.

⁹³ *Id.* at 386.

⁹⁴ *Id.* at 389.

⁹⁵ *Id.* at 389-90. The Court explained that "a representative payee serves the beneficiary's interest by seeing that basic needs are met, not by maximizing a trust fund attributable to fortuitously overlapping state and federal grants." *Id.*

reimburse state costs because state agencies would no longer be willing to act as representative payees, fewer children's disabilities would be recognized and treated, and fewer resources would be available for all foster children.⁹⁶ These policy concerns and others not considered by the Supreme Court are analyzed below.

II. THE POLICY CONCERNS

The practice addressed in *Keffeler* raises numerous policy questions regarding the proper use of foster children's Social Security benefits and how to address the tension between protecting the best interests of the individual foster child and promoting the common good of the entire population of foster children in the overburdened and far-from-perfect foster care system.⁹⁷ The questions are not easily resolved, as is evident by the differing opinions of child advocates. Six nationally known child advocacy organizations filed amicus briefs in *Keffeler*, four in support of the practices of Washington State⁹⁸ and two in support of the class of foster care children challenging the practices.⁹⁹ The following section of this Article provides an overview of the policy and practical concerns, explains flaws in the Supreme Court's analysis of these concerns in *Keffeler*, and offers support for the Article's conclusion that the best interests of foster children—both as individuals and as a class—are not being served by the current agency policies and practices.

A. *Eliminating the Representative Payee of Last Resort*

When the Social Security Administration selects a representative payee to manage a child's Social Security benefits, it is required to conduct an investigation to find the most preferred person or organization.¹⁰⁰ To guide the selection, federal regulations provide a

⁹⁶ *Id.* at 390-92.

⁹⁷ See *supra* notes 4, 49 and accompanying text; Robert M. Gordon, *Drifting Through Byzantium: The Promise and Failure of the Adoption and Safe Families Act of 1997*, 83 MINN. L. REV. 637, 679 (1999) ("Every facet of the child welfare system is now overburdened."); see also U.S. GEN. ACCOUNTING OFFICE, GAO/HEHS-95-208, FOSTER CARE OVERVIEW, COMPLEX NEEDS STRAIN CAPACITY TO PROVIDE SERVICES (1995).

⁹⁸ Brief for Children's Defense Fund et al. as Amici Curiae Supporting Petitioners, *supra* note 22.

⁹⁹ Brief for Juvenile Law Center & the National Center on Youth Law as Amici Curiae Supporting Respondents, *supra* note 22.

¹⁰⁰ 20 C.F.R. §§ 404.2024, 416.624 (2005); *Keffeler*, 537 U.S. at 376 n.1 (noting that state agencies come last in order of preference for representative payees for children, and that "the Commissioner must also attempt to identify any other potential representative payee whose

prioritized list of possible representative payees for children, with state agencies being the least preferred.¹⁰¹ Thus, if the investigation is done appropriately and a suitable and willing parent, relative, close friend, or any other more preferred payee is not located, a state social services agency remains an option.¹⁰²

Concern has been expressed that if state agency representative payees are no longer allowed to use foster children's Social Security benefits to reimburse state costs, the lack of financial incentive may cause a significant decline in the agencies' willingness to serve as the representative payee of last resort and thus children may not be able to receive their Social Security benefits.¹⁰³ The Supreme Court placed considerable weight on this concern in reaching its conclusions in *Keffeler*, explaining that "[i]f respondents had their way, however, public offices like [the state agency] might well not be there to serve as payees even as the last resort" and as a result "many eligible children would either obtain no Social Security benefits or need some very good luck to get them."¹⁰⁴

The reasoning is flawed when considered in light of practical truths and the inherent responsibilities of foster care agencies. First, the Court failed to understand the bureaucratic reality in which foster children live. The Court incorrectly assumes that state agencies only apply to become representative payees when they believe no one else is available and that the Social Security Administration adequately performs its investigatory function to ensure there are no other better-suited choices. Rather, there is an automatic process under which the state foster care agency is virtually always selected as representative payee without any serious investigative attempt to locate a more preferred payee.¹⁰⁵ In many if not most of these cases, there are likely other more preferred individuals or organizations available to serve as representative payees who are not properly considered under the inadequate investigation and application process.¹⁰⁶

appointment may be preferred").

¹⁰¹ 20 C.F.R. §§ 404.2021(c), 416.621(c) (2005).

¹⁰² *Id.*; see Daniel L. Skoler & Amy L. Allbright, *Judicial Oversight of the Nation's Largest Guardianship System: Caselaw on Social Security Administration Representative Payee Issues*, 24 MENTAL & PHYSICAL DISABILITY L. REP. 169, 170-71 (2000) (presenting an overview of state court decisions regarding the Social Security Administration's duties in investigating and selecting representative payees).

¹⁰³ Brief for Children's Defense Fund et al. as Amici Curiae Supporting Petitioners, *supra* note 22, at 21-22; see also *Keffeler*, 537 U.S. at 391 n.13 (noting that the Washington foster care agency has stated that it would not seek to become representative payee for SSI beneficiaries without the ability to use the benefits to reimburse state costs).

¹⁰⁴ *Keffeler*, 537 U.S. at 391.

¹⁰⁵ See *infra* notes 205-209 and accompanying text.

¹⁰⁶ See *infra* notes 205-209 and accompanying text.

Second, the Court's acceptance of the assertion that foster care agencies will no longer serve as representative payees if they cannot take the children's benefits ignores the agencies' inherent responsibilities and the very purpose of their existence—to serve and protect the best interests of children in foster care.¹⁰⁷ An analogous situation provides an instructive comparison. Several state and county agencies act as representative payees for disabled adults without the financial incentive of applying the adults' Social Security benefits to state costs.¹⁰⁸ Some of these agencies charge a \$25 monthly fee that is allowed by the Social Security Administration,¹⁰⁹ but the remaining benefits are used for the benefit of the beneficiaries, not the state. Thus, without the incentive of taking the benefits from those served, the agencies serving disabled adults display a willingness to provide this needed representative payee service simply as a part of their governmental function and purpose in serving their client population.

Third, in asserting that eligible children may not receive their Social Security benefits if a state agency is no longer willing to serve as representative payee,¹¹⁰ the Supreme Court overlooks the Social Security Administration's duty to investigate and locate a suitable representative payee, and that the duty does not simply cease if a state agency declines the responsibility.¹¹¹ The payment of Social Security payments may be temporarily delayed until a representative payee is located, but the child's eligibility does not end.¹¹² The benefits will be conserved and then paid out once a suitable representative payee is chosen.¹¹³

¹⁰⁷ See, e.g., *Miller v. Martin*, 838 So. 2d 761 (La. 2003) (holding that when the foster care agency is entrusted with the custody of foster children, the agency has a nondelegable duty of care and protection to the children); MD CODE ANN., FAMILY LAW § 5-525 (2005) (explaining that the foster care agency shall “concurrently develop and implement a permanency plan that is in the best interests of the child” and “shall provide 24-hour a day care and supportive services for a child who is committed to its custody or guardianship in an out-of-home placement”); see generally Michele Benedetto, *An Ounce of Prevention: A Foster Youth's Substantive Due Process Right to Proper Preparation for Emancipation*, 9 U.C. DAVIS J. JUV. L. & POL'Y 381 (2005).

¹⁰⁸ See, e.g., PORTLAND MAINE HEALTH AND HUMAN SERVS. DEP'T, REPRESENTATIVE PAYEE PROGRAM, <http://www.ci.portland.me.us/hhs/ssreppayee.asp> (last visited Jan. 10, 2006); SCOTT COUNTY IOWA COMMUNITY SERVS., REPRESENTATIVE PAYEE PROGRAM, http://www.scottcountyiowa.com/community/repres_payee.php (last visited Jan. 10, 2006); BUNCOMBE COUNTY NORTH CAROLINA DEP'T OF SOCIAL SERVS., ADULT SOCIAL SERVICES: REPRESENTATIVE PAYEE, <http://www.buncombecounty.org/governing/depts/dss/adults/payee.htm> (last visited Jan. 10, 2006).

¹⁰⁹ 42 U.S.C. § 1383(a)(2)(D) (2000); 20 C.F.R. §§ 404.2040(a), 416.640(a) (2005).

¹¹⁰ Wash. State Dep't of Soc. & Health Servs. v. Guardianship Estate of Keffeler, 537 U.S. 371, 391 (2003).

¹¹¹ 20 C.F.R. § 404.2011 (2005).

¹¹² *Id.*

¹¹³ *Id.*

Finally, the state agency is not necessarily the representative payee of last resort for foster children. Although the relevant regulations list an “authorized social agency or custodial institution” last in the list of preferred representative payees, the regulations explain that the list is flexible, imply that it is not exclusive, and state that the primary concern is simply “to select the payee who will best serve the beneficiary’s interest.”¹¹⁴ The Social Security Administration’s Program Operations Manual System (POMS), the detailed instructions that guide the practices of Social Security Administration staff,¹¹⁵ further explains that there is a need for flexibility and that the Administration should consider other possible representative payees not listed in the preferences.¹¹⁶ Several other possibilities exist. For example, volunteer representative payee programs have been developed through non-profit organizations and state and local government agencies in which volunteers agree to serve as representative payees for adult beneficiaries who require the service but do not have family members or friends available.¹¹⁷ Similar programs could be created, or existing programs expanded, to provide the same service to foster children. Also, several organizations provide representative payee services for a small fee.¹¹⁸ From the children’s perspective, virtually any person or organization would be preferable to the state agencies because non-agency representative payees cannot be required to expend the children’s benefits to reimburse state costs.¹¹⁹ Rather, like Danny Keffeler’s grandmother, the payees can exercise their discretion as fiduciaries to use the benefits for current needs not met through the foster care program or to conserve the benefits for the children’s future needs.

¹¹⁴ *Id.* §§ 404.2021(c), 416.621(c).

¹¹⁵ See *Keffeler*, 537 U.S. at 385 (providing an explanation of the POMS and noting that while they “are not products of formal rulemaking, they nevertheless warrant respect . . .”).

¹¹⁶ The POMS explain that the Administration should also consider “[a]nyone not listed above who shows strong concern for the child, is qualified, and able to act as payee, and who is willing to do so.” POMS § GN 00502.105(B), available at <http://policy.ssa.gov/poms.nsf/lnx/0200502105!opendocument> (last visited Feb. 16, 2006).

¹¹⁷ See, e.g., Bread for the City, The Representative Payee Program, Washington D.C., <http://www.breadforthecity.org/rpp/index.html> (last visited Jan. 10, 2006); MARYLAND DEP’T OF HUMAN RESOURCES, OFFICE OF ADULT SERVICES, REPRESENTATIVE PAYEE PROGRAM, <http://www.dhr.state.md.us/oas/payee.htm> (last visited Jan. 10, 2006); CITY OF PORTLAND, MAINE, REPRESENTATIVE PAYEE PROGRAM, <http://www.portlandmaine.gov/hhs/ssreppayee.asp> (last visited Jan. 10, 2006).

¹¹⁸ See, e.g., Benefit Payee Services, Inc., Denver, Colorado, http://www.geocities.com/jsmith_2645/ (last visited Jan. 10, 2006); Systems Unlimited, Representative Payee & Financial Services, Iowa City, Iowa, <http://www.sui.org/payee-services.htm> (last visited Jan. 10, 2006).

¹¹⁹ *Keffeler*, 537 U.S. at 389; see Farrell, *supra* note 33, at 335-36 (suggesting additional options for increasing the use of nonprofit organizations, public guardians and private volunteer organizations to provide representative payee services).

B. *Screening Children for SSI Eligibility*

The ability to convert children's Social Security benefits into a state funding stream is a powerful incentive for states to help as many children as possible to become eligible for benefits. If the incentive is removed and state agencies can no longer use foster children's benefits to reimburse state foster care costs, the agencies may reduce their efforts to help more children initially qualify for Social Security benefits.¹²⁰ If fewer foster children go through the SSI screening process, it is likely that fewer children's disabilities and special needs will be recognized or addressed.¹²¹

Although the concern is real, there are better methods than bribing the state agencies with the children's Social Security benefits for addressing the need to increase screening of foster children for disabilities and corresponding special needs. In Section IV, this Article provides a suggested reform to realign the interaction of federal foster care (IV-E) benefits and SSI benefits in a manner that would incentivize state agencies to help children apply for SSI without allowing the agencies to take the resulting benefits. Also, several federal laws already require such health screening and treatment services. For example, foster care children are entitled to Early and Periodic Screening, Diagnosis and Treatment (EPSDT) services under Medicaid, which include comprehensive medical screenings and necessary treatment for physical and mental health conditions.¹²² The Individuals with Disabilities Education Act (IDEA) requires state school districts to identify, assess, and treat children with disabilities related to education.¹²³ Also, provisions of the Adoption Assistance and Child Welfare Act of 1980¹²⁴ and the Adoption and Safe Families Act¹²⁵ require states to have standards and plans to ensure foster children are provided quality services to protect the children's health and safety.¹²⁶

¹²⁰ Brief for Children's Defense Fund et al. as Amici Curiae Supporting Petitioners, *supra* note 22, at 22; *Keffeler*, 537 U.S. at 390-91.

¹²¹ See *supra* note 120.

¹²² 42 U.S.C. § 1396a-1396d (2000); see Bohr, *supra* note 50, at 910-13 (discussing EPSDT requirements and the fact that foster children are often not receiving the required services); Sara Rosenbaum, Anne Markus, & Colleen Sonosky, *Public Health Insurance Design for Children: The Evolution from Medicaid to SCHIP*, 1 J. HEALTH & BIOMEDICAL L. 1, 12-16 (2004) (discussing the scope of required EPSDT services); Gardner, *supra* note 25, at 9 (discussing EPSDT requirements for foster children).

¹²³ 20 U.S.C. §§ 1400-1474 (2000). See generally Sharon C. Strett, *The Individuals with Disabilities Education Act*, 19 U. ARK. LITTLE ROCK L.J. 35 (1996) (providing a general overview of what the IDEA requires of school districts and what remedies are available).

¹²⁴ Adoption Assistance and Child Welfare Act of 1980, Pub. L. No. 96-272, 94 Stat. 500 (1980) (codified at 42 U.S.C. §§ 620-28, 670-79 (2000)).

¹²⁵ Adoption and Safe Families Act of 1997, Pub. L. No. 105-89, 111 Stat. 2115 (1997) (codified in scattered sections of 42 U.S.C.).

¹²⁶ See Bohr, *supra* note 50, at 907. See generally Cristina Chi-Young Chou, *Renewing the*

C. *Resources for Foster Children: Individual Rights vs. the Common Good*

Because state child welfare programs are dramatically underfunded,¹²⁷ it can be argued that foster children as a class benefit from the practice of taking Social Security benefits from individual foster children to reimburse state costs. Although individual children are deprived of resources, more resources may be available for all children. If state agencies can no longer use individual foster children's Social Security benefits as a source of revenue to fund foster care services, foster children as a class may be harmed.¹²⁸ The Supreme Court found this theory persuasive,¹²⁹ but failed to address the real underlying policy question: Do the harsh realities of the under-funded foster care system rationalize a policy of taking Social Security benefits from those individual foster children who may have the greatest needs in order to increase state funding available for all foster children?

This trade-off is bad policy and a bad bargain for foster children. First, foster children as a class receive little benefit. The Social Security benefits taken from foster children amount to less than one percent of the total reported state foster care funding.¹³⁰ Further, the state savings that result from the practice do not necessarily translate into additional services to foster care children. Using the children's Social Security benefits to pay foster care costs reduces the amount state legislatures would otherwise have to appropriate to foster care agencies for the expenses. The additional state funds resulting from the savings can certainly be used to provide additional or improved foster care services, but the savings can also be used for any other purpose.¹³¹ Thus, state

Good Intentions of Foster Care: Enforcement of the Adoption Assistance and Child Welfare Act of 1980 and the Substantive Due Process Right to Safety, 46 VAND. L. REV. 683 (1993).

¹²⁷ See *supra* note 97 and accompanying text.

¹²⁸ Brief for Children's Defense Fund et al. as Amici Curiae Supporting Petitioners, *supra* note 22, at 22.

¹²⁹ Wash. State Dep't of Soc. & Health Servs. v. Guardianship Estate of Keffeler, 537 U.S. 371, 391 (2003).

¹³⁰ See generally SCARCELLA ET AL., *supra* note 46.

¹³¹ *Id.* at 28 ("[I]f the child were eligible for survivor's benefits, the state's portion of the payment could be decreased by the amount of the survivor benefits, saving state dollars for other purposes, including child welfare activities."); see also MARYLAND DEP'T OF HUMAN RESOURCES, SOC. SERVS. ADMINISTRATION, TITLE IV-E FOSTER CARE & SUBSIDIZED ADOPTION PROGRAM, www.dhr.state.md.us/ssa/pdfs/4eone.pdf. Rather than explaining that the state agency practice of applying children's social security benefits to offset state costs can lead to additional foster care services for all children, the practice is simply described as a savings to the state general fund:

As the custodial parent of [f]oster children, the Department is entitled to become the representative payee As of June 30, 1999, 586 foster children committed to the Department were in receipt of SSI benefits. This represents total potential annualized savings to the General Fund in excess of \$3.5 million (586 foster children receiving SSI x \$500 SSI benefit/month x 12 months/year).

savings from using children's Social Security benefits to pay foster care costs may just as likely be used to fund a new highway or to help finance a new baseball stadium as to hire new foster care social workers.

Also, while foster children as a class are receiving little benefit from the trade-off, the individual foster children are losing out by having their Social Security benefits taken. When the state agencies become their representative payees, the children's benefits are simply used to replenish the state coffers rather than to address the children's current or future needs. Had DSHS been successful in stopping Danny Keffeler's grandmother from acting as his representative payee, Danny might not have been able to afford college.¹³²

Thus, the trade-off results in significant harm to the individual foster children and provides little benefit to the class of all foster children. Moreover, even if protections are implemented to ensure children's Social Security benefits taken by state agencies are only used to fund foster care services, the simple conclusion cannot be escaped that foster children should not be required to pay for their own care. As the Supreme Court has often explained, the practice of Government should not force "some people alone to bear public burdens which, in all fairness and justice, should be borne by the public as a whole."¹³³

D. SSI Resource Limit

Eligibility for SSI is based upon financial need, including a \$2000 asset limit.¹³⁴ If a foster child receives SSI and unused benefits accrue to more than \$2000, the child may no longer be eligible for benefits. When a state agency applies a child's SSI benefits to repay state costs, the practice acts as mechanism to ensure the child's benefits do not pass the \$2000 accrued asset limit.¹³⁵ Thus, the Supreme Court expressed concern that if the practice stops, the foster children's assets will "creep above" the asset limit and their eligibility will terminate.¹³⁶ The Court failed to consider several other options.

Id.

¹³² See *supra* note 84 and accompanying text.

¹³³ See, e.g., *Lingle v. Chevron U.S.A. Inc.*, 125 S.Ct. 2074, 2080 (2005) (citing *Armstrong v. United States*, 364 U.S. 40, 49 (1960)); *Tahoe-Sierra Preservation Council, Inc. v. Tahoe Reg'l Planning Agency*, 535 U.S. 302, 336 (2002) (same); *Palazzolo v. Rhode Island*, 533 U.S. 606, 618 (2001) (same).

¹³⁴ 20 C.F.R. § 416.1205(c) (2005). Unlike SSI, there is no asset limit for OASDI eligibility (Social Security benefits based upon parent's death or disability). Therefore, the asset limit is not a concern for foster children like Danny Keffeler who receive OASDI benefits.

¹³⁵ *Wash. State Dep't of Soc. & Health Servs. v. Guardianship Estate of Keffeler*, 537 U.S. 371, 390 (2003).

¹³⁶ *Id.*

A representative payee's fiduciary obligation to manage SSI payments in the beneficiary's best interests includes the responsibility to ensure that benefit payments are not terminated because accumulated benefits surpass the asset limit.¹³⁷ If the accrued payments approach the \$2000 limit, the benefits should be properly used to ensure continuing eligibility.¹³⁸ The Supreme Court apparently embraced a theory that available uses of the SSI benefits other than to reimburse the state agencies will not be sufficient to avoid the asset limit. However, an unending list of possible uses is not difficult to contemplate—uses that provide a direct benefit to the disabled foster children as opposed to simply handing over the money to the state to reimburse costs for which the children have no legal obligation.¹³⁹ The Court also failed to consider several exceptions to the resource limit that foster children could utilize to meet special needs or to plan for future independence. For example, resources that are not counted towards the asset limit include funds placed in a special needs trust,¹⁴⁰ benefits received under an approved Plan for Achieving Self Support (PASS),¹⁴¹ household items and personal effects,¹⁴² an ownership interest in a home,¹⁴³ and

¹³⁷ See SOC. SEC. ADMIN., LESSON PLAN, TRAINING ORGANIZATIONAL REPRESENTATIVE PAYEES, available at <http://www.ssa.gov/payee/LessonPlanORGTGNGUIDEfinalnumber10.htm#SSILIMIT>:

As an organizational payee, you should know when a beneficiary's resources . . . approach the \$2,000 limit. You should attempt to find out if they have extra needs You should make the purchase now when the resources are available. If excess resources do accumulate, the beneficiary will no longer be eligible for SSI payments. . . . Some organizations flag the accounts of SSI beneficiaries when conserved funds reach \$1,500. This serves as an alert to assess the personal needs of the beneficiary and maintain countable resources below the \$2,000 limit by meeting these needs.

Id.

¹³⁸ *Id.*

¹³⁹ For example, the Baltimore City Department of Social Services provides such a list in its standard operating procedures for ensuring that children's accumulated SSI benefits do not exceed to \$2000 limit. The policy directs case managers that "[i]tems which may be purchased include, but are not limited to: psychiatric evaluations and treatment; psychological testing; clothing; medicine; recreation, i.e. camps; vocational training; furniture; dental or optical care; day care; educational needs, i.e. computers, books, uniforms, tuition; rent/security deposits and utilities for teens" Letter from Yvonne Gilchrist, Director, Baltimore City Department of Social Services, attachment 4 (Mar. 15, 2001) (on file with author).

¹⁴⁰ 42 U.S.C. § 1396p(d)(4)(A) (2000). See generally Joseph A. Rosenberg, *Supplemental Needs Trusts for People with Disabilities: The Development of a Private Trust in the Public Interest*, 10 B.U. PUB. INT. L.J. 91 (2000); Joel A. Mendler, *Using Trusts for Disabled Clients: Preserving Governmental Benefits*, 44 LA. B.J. 26 (1996).

¹⁴¹ 20 C.F.R. §§ 416.1225-416.1226 (2005). See generally Sarah H. Bohr, *Evaluating Children Seeking SSI and Sheltering Benefits in Trusts*, 41 SOC. SEC. REP. SERV. 711 (1993) (discussing the use of PASS programs for children); James R. Sheldon, Jr. & Edwin J. Lopez-Soto, *PASS: Supplemental Security Income's Plan for Achieving Self-Support*, 30 CLEARINGHOUSE REV. 1101 (Mar.-Apr. 1997).

¹⁴² 20 C.F.R. § 416.1216 (2005).

¹⁴³ *Id.*

ownership of an automobile.¹⁴⁴ Any one of these options could be utilized to help foster children plan for their transition out of foster care while avoiding the \$2000 resource limit. Representative payees are appointed to make precisely these choices—to navigate the landscape of complex eligibility issues and the countless choices for using benefits, and to make decisions in a manner that best serves the individualized interests of beneficiaries.

E. *The “Penetration Rate” and the Interaction of Social Security and IV-E Foster Care Benefits*

Further complicating the policy considerations are the interactions between a foster child’s potential receipt of both federal foster care benefits (Title IV-E benefits) and Social Security benefits. When a child is placed in the home of a licensed foster care parent or foster care group home, the state pays an established monthly rate to the care provider. These state foster care payments are made “without strings attached,” meaning a child has no obligation to repay the state for the benefits and the benefits are provided regardless of the economic situation of the household from which the child was removed.¹⁴⁵ Through the Foster Care and Adoption Assistance program in Title IV-E of the Social Security Act,¹⁴⁶ the state may then receive partial reimbursement for the payments if the child is eligible for the IV-E benefits under a complex set of regulations.¹⁴⁷ To receive this federal reimbursement, states have a strong incentive to find ways to increase the percentage of foster children determined IV-E eligible. Therefore, with the assistance of private revenue maximization consultants as discussed in section I.B, the states set target percentages, termed “penetration rates,” as goals for maximizing the number of children in foster children eligible for IV-E reimbursement.¹⁴⁸

¹⁴⁴ *Id.*

¹⁴⁵ Wash. State Dep’t of Soc. & Health Servs. v. Guardianship Estate of Keffeler, 537 U.S. 371, 378, 382 (2003).

¹⁴⁶ 42 U.S.C. §§ 670-679b (2000).

¹⁴⁷ 45 C.F.R. §§ 1356.10-1356.71(2005).

¹⁴⁸ *See, e.g.*, WISCONSIN DEP’T OF HEALTH AND FAMILY SERVS., TITLE IV-E FEDERAL FUNDING OVERVIEW, <http://www.dhfs.state.wi.us/Children/TitleIV-E/progserv/FedGovFundingPortion.HTM> (“Frequently, the percentage of IV-E eligible children is referred to as the state’s IV-E ‘penetration rate.’”); WASHINGTON DEP’T OF SOCIAL AND HEALTH SERVS., DECISION PACKAGE, DP CODE/TITLE: M2-AD TITLE IV-E STATE AND FEDERAL SWITCH, http://www1.dshs.wa.gov/pdf/FSA/2004_Supplemental_Budget/CA_M2_ADTitleIV_E_StateFederalSwitch.pdf (last visited Feb. 16, 2006). This is budget document that explains the Children’s Administration (CA) staff

have been working to increase the Title IV-E penetration rate. As a result, CA has been able to increase the number of IV-E eligible children and decrease the total children counted, thus increasing the penetration rate from an average of 37 percent to an

The complexity of IV-E eligibility determinations is compounded when a foster child is also eligible for Social Security benefits. If a child is disabled and eligible to receive SSI, concurrent receipt of SSI and IV-E benefits is possible.¹⁴⁹ However, because the Social Security Administration has determined that IV-E benefits are “income based on need” to the child, the receipt of IV-E benefits result in a dollar-for-dollar reduction in the SSI benefits.¹⁵⁰

As a result of this interaction, a number of questions arise. For a child eligible for both SSI and IV-E, how should the decision to apply on a child’s behalf for one or both of the benefits be made, and who should decide? Federal guidance explains the child’s best interests should control the decision and implies that someone other than the state agency should decide: “Information regarding the benefits available under each program should be made available by the State title IV-E agency so that an informed choice can be made in the child’s best interests.”¹⁵¹ However, ignoring the federal guidance, some state policies leave the choice to the state agency based upon what brings in the most money to the state rather than which choice is in the best interests of the child.¹⁵²

Were the decision left to someone acting in the best interests of the foster children, the rational choice would be to choose the SSI over the IV-E benefits. Although IV-E benefits are considered “income based on need” to children, the children do not receive any direct payment.

average of 55 percent per year. The increase in the penetration rate has resulted in an increase in Title IV-E, which will enable CA to switch approximately \$15 million (\$7.5 million per year) General Fund-State to General Fund-Federal.

Id.

¹⁴⁹ U.S. DEP’T OF HEALTH AND HUMAN SERVS., ADMINISTRATION FOR CHILDREN AND FAMILIES, CHILD WELFARE POLICY MANUAL, 8.4D, TITLE IV-E, GENERAL TITLE IV-E REQUIREMENTS, CONCURRENT RECEIPT OF FEDERAL BENEFITS, http://www.acf.dhhs.gov/programs/cb/laws_policies/laws/cwpm/policy_dsp.jsp?citID=76 (last visited Feb. 16, 2006).

¹⁵⁰ *Id.* However, there is an exception to this policy for certain Title IV-E independent living benefits provided to help foster children in the transition to independence. Because the benefits are not considered income based on need, foster children can receive both the independent living benefits and the full amount of the SSI benefits. POMS, *supra* note 14, § SI 00830.410, available at <http://policy.ssa.gov/poms.nsf/lnx/0500830410>.

¹⁵¹ U.S. DEP’T OF HEALTH AND HUMAN SERVS., *supra* note 149.

¹⁵² See, e.g., OR. ADMIN. R. 413-100-0330 (2005) (“The agency must make a determination of which funding source is of most financial benefit to the agency.”); STATE OF NEW HAMPSHIRE, INTER-DEPARTMENT COMMUNICATION, PD 98-11, CONCURRENT ELIGIBILITY FOR SSI AND TITLE IV-E FOSTER CARE PAYMENTS, May 1, 1998, available at http://www.dhhs.state.nh.us/SR_hm/pd_98-11_dated_05_98.htm:

The difference between SSI and Title IV-E must be considered carefully by the decision maker (CPSW/JSO/case technician) when choosing whether to apply for either or both Title IV-E or SSI benefits on behalf of the child. Circumstances for each child must be evaluated. . . . The child’s SSI benefit amount, the child’s foster care payment, and the child’s expected length of stay in a foster care placement must be considered. The fiscal impact on DCYF must also be taken into consideration.

Id.

Rather, the IV-E benefits reimburse the states for foster care payments already made on behalf of eligible children to their foster care providers.¹⁵³ The children receive the state foster care services regardless of whether the state receives the IV-E reimbursement.¹⁵⁴ SSI, in contrast, does provide direct benefit payments to the children, and if the children are able to have a representative payee appointed other than a state agency, it is possible that the SSI benefits can be used for special needs not met by the foster care services or conserved for future needs.

If all children were able to decline IV-E benefits in favor of SSI and use the SSI for their own needs rather than to reimburse state costs, the result would be a reduction of federal benefits (either IV-E or SSI) available for use by state foster care programs. Such a decline in available federal funds would clearly be a concern to already underfunded state foster care programs. However, the practice of using foster children as a tool to achieve target “penetration rates”—thereby placing the state’s fiscal interests over the individual interests of the children—is equally if not more concerning. Recommendations in section IV.B address this tension.

F. *Poor Performance and Oversight of State Agency Representative Payees*

To provide assurances to any Supreme Court Justices who may have had concerns with the agency practices in *Keffeler*, the amicus brief of several California counties points to audits of agency representative payees by the Social Security Administration as a safeguard that ensures compliance with statutory and regulatory obligations: “the Administration’s Office of Inspector General has conducted at least 19 audits of local social service agencies’ actions as representative payee since 1997. Accordingly, the amici curiae have complied with the Act and their programs have been approved of by the Administration.”¹⁵⁵ The amici portray the fact of the audits as a stamp-of-approval by the Social Security Administration.¹⁵⁶ The assertion that the Social Security Administration’s Office of Inspector General (OIG) has conducted numerous audits of state agency representative payees is

¹⁵³ Libby S. Adler, *The Meanings of Permanence: A Critical Analysis of the Adoption and Safe Families Act of 1997*, 38 HARV. J. ON LEGIS. 1, 20-21 (2001).

¹⁵⁴ Wash. State Dep’t of Soc. & Health Servs. v. Guardianship Estate of Keffeler, 537 U.S. 371, 378 (2003) (noting that the “department provides foster care without strings attached to any child who needs it”).

¹⁵⁵ Brief for Counties of the State of California et al. as Amici Curiae Supporting Petitioners, *supra* note 22, at 7.

¹⁵⁶ *Id.*

correct. However, the amici and the Supreme Court both failed to address the audits' results.

1. Example Audit of an Organizational Representative Payee
Receiving a Poor Review: Baltimore City
Department of Social Services

According to its 2001 audit by the OIG, the Baltimore City Department of Social Services (BCDSS) has not adequately performed its duties as representative payee.¹⁵⁷ Record keeping and proper accounting practices were virtually nonexistent,¹⁵⁸ and BCDSS may have improperly spent children's funds.¹⁵⁹ As of August 2000, BCDSS records showed \$864,000 in conserved funds owed to 290 beneficiaries no longer in state care, and the agency had taken no action to pay the conserved funds to the affected beneficiaries.¹⁶⁰ In more than twenty-five percent of the cases reviewed, the children were no longer in BCDSS's care, but the agency continued to receive and spend the benefit payments as representative payee.¹⁶¹ As a result of the audit, the Office of Inspector General referred numerous cases for representative payee misuse determinations.¹⁶² Although a determination of misuse normally means a payee is no longer considered suitable to provide representative payee services,¹⁶³ BCDSS continues to act as the representative payee for foster children in its care.¹⁶⁴

¹⁵⁷ SOC. SEC. ADMIN., OFFICE OF THE INSPECTOR GENERAL, FINANCIAL-RELATED AUDIT OF THE BALTIMORE CITY DEPARTMENT OF SOCIAL SERVICES—AN ORGANIZATIONAL REPRESENTATIVE PAYEE FOR THE SOCIAL SECURITY ADMINISTRATION, A-13-00-10066 (Sept. 2001), <http://www.ssa.gov/oig/ADOBEPDF/A-13-00-10066.pdf> [hereinafter BALTIMORE CITY DEPARTMENT OF SOCIAL SERVICES AUDIT REPORT].

¹⁵⁸ The agency completely failed to record, or incorrectly recorded, benefit receipts and/or disbursements in 82% of the records reviewed. *Id.* at 4.

¹⁵⁹ 1.6 million in beneficiary-conserved funds should have been deposited in beneficiaries' savings accounts, but were inappropriately maintained in the agency's general funds. *Id.* at iii.

¹⁶⁰ *Id.* at 9.

¹⁶¹ *Id.* at 8.

¹⁶² *Id.* (finding that the concern was noted in thirteen out of a random sample of fifty beneficiaries' cases).

¹⁶³ POMS, *supra* note 14, § GN 00604.045, available at <http://policy.ssa.gov/poms.nsf/lnx/0200604045!opendocument> (last visited Feb. 16, 2006).

¹⁶⁴ Telephone Interview with Jim Becker, Baltimore City Department of Social Services, Division of Legal Services (Feb. 6, 2006) (confirming that BCDSS continues to serve as representative payee for foster children).

2. Example Audit of an Organizational Representative Payee
Receiving a Favorable Review: San Francisco
Department of Human Services

Compared to the poor audit results received by the Baltimore City Department of Social Services, the San Francisco Department of Human Services (SFDHS) received one of the more favorable reviews.¹⁶⁵ However, the audit reveals that even this agency representative payee that received good marks from the OIG has not performed its duties in a manner instilling trust that the interests of foster children are being properly served. SFDHS failed to maintain a detailed accounting of the benefits received and disbursed for the foster children for whom it acted as representative payee.¹⁶⁶ The agency failed to conserve excess funds of the beneficiaries,¹⁶⁷ and inappropriately titled the checking account for foster care children's benefits to show that the funds belonged to the state agency rather than to the children.¹⁶⁸ Further, SFDHS failed to report changes in custody for its beneficiaries which resulted in the agency receiving benefit payments for child beneficiaries no longer in the agency's care.¹⁶⁹

3. Monitoring Representative Payees: A Safeguard in Name Only

Poor performance of organizational representative payees may often go undetected since the Social Security Administration is not monitoring the agencies' practices well. A 1996 audit found that the Social Security Administration was not collecting the required representative payee accounting reports for approximately \$1.2 billion in annual benefits, and that agencies and institutions were the most common high-volume non-responding payees.¹⁷⁰ Also, a 2002 OIG

¹⁶⁵ The 2003 audit by OIG concluded that SFDHS "had effective safeguards over the receipt and disbursement of Social Security benefits," and the agency "ensured Social Security benefits were used in accordance with SSA's policies and procedures." SOC. SEC. ADMIN., OFFICE OF THE INSPECTOR GENERAL, SAN FRANCISCO DEPARTMENT OF HUMAN SERVICES—AN ORGANIZATIONAL REPRESENTATIVE PAYEE FOR THE SOCIAL SECURITY ADMINISTRATION, AUDIT REPORT, A-09-03-13011, at 2-3 (Nov. 2003), <http://www.ssa.gov/oig/ADOBEPDF/A-09-03-13011.pdf> [hereinafter SAN FRANCISCO DEPARTMENT OF SOCIAL SERVICES AUDIT REPORT].

¹⁶⁶ *Id.* at 9-10.

¹⁶⁷ *Id.* at 8-9.

¹⁶⁸ The agency established the checking account for foster children's benefits as part of the general fund for the City and County of San Francisco, rather than a trust or custodian account, in violation of the requirement that representative payees should not commingle a beneficiary's funds with their personal or organizational operating funds. *Id.* at 10.

¹⁶⁹ *Id.* at 5.

¹⁷⁰ SOC. SEC. ADMIN., OFFICE OF THE INSPECTOR GENERAL, MONITORING REPRESENTATIVE PAYEE PERFORMANCE: NON-RESPONDING PAYEES, A-09-96-64208 (Dec. 1996), http://www.ssa.gov/oig/ADOBEPDF/audit_htms/96-64208.htm.

analysis found significant problems with the SSA's monitoring and oversight of benefit misuse by representative payees.¹⁷¹ OIG reviewed 670 cases with documented misuse amounts of over \$5000 and determined that seventy-eight percent of those cases were not properly referred to the OIG for possible criminal, civil, or administrative remedies.¹⁷² The Social Security Administration frequently retained representative payees after determining they had misused benefit payments,¹⁷³ and those retained representative payees rarely made the mandatory repayment of misused benefits.¹⁷⁴

Thus, a review of the OIG audits and reports does not provide assurances, but reveals that state agencies are using foster children's Social Security benefits to reimburse state costs in a context of systemic and unchecked noncompliance with statutory and regulatory obligations. According to the view of Social Security Administration staff, the entire representative payee system is "fundamentally flawed."¹⁷⁵ In addition to the need for thorough policy deliberations to improve this system in which foster children's Social Security benefits are managed, litigation strategies should be developed and pursued to bring pressure for reform upon a system that has refused to fix itself.

III. UNANSWERED LEGAL QUESTIONS AFTER *KEFFELER*

Section 405(j) of the Social Security Act governs the selection and duties of representative payees.¹⁷⁶ Section 407(a) of the Act, the anti-attachment provision, protects Social Security benefits from "execution, levy, attachment, garnishment, or other legal process."¹⁷⁷ The Supreme Court's decision in *Keffeler* addressed the limited question of whether the process of a state agency applying to become a representative payee for foster children, and then using the children's Social Security benefits to reimburse state costs, is a violation of § 407(a).¹⁷⁸ The Court

¹⁷¹ SOC. SEC. ADMIN., OFFICE OF THE INSPECTOR GENERAL, ANALYSIS OF INFORMATION CONCERNING REPRESENTATIVE PAYEE MISUSE OF BENEFICIARIES' PAYMENTS, A-13-01-11004 (June 2002), <http://www.ssa.gov/oig/ADOBEPDF/A-13-01-11004.pdf>.

¹⁷² *Id.* at 4-5.

¹⁷³ *Id.* at 6.

¹⁷⁴ A review of the recovery status of misused benefits as of September 2000 found that only 1.3% of misused benefits were fully repaid by those representative payees who were retained by SSA after misuse determinations. *Id.*

¹⁷⁵ SOC. SEC. ADMIN., OFFICE OF THE INSPECTOR GENERAL, MONITORING REPRESENTATIVE PAYEE PERFORMANCE: MANAGEMENT AND STAFF SURVEY, A-09-96-64212, at 4 (Feb. 1997), <http://www.ssa.gov/oig/ADOBEPDF/A-09-96-64212.pdf>.

¹⁷⁶ 42 U.S.C. § 405(j) (2000).

¹⁷⁷ *Id.* § 407(a).

¹⁷⁸ Wash. State Dep't of Soc. & Health Servs. v. Guardianship Estate of Keffeler, 537 U.S. 371, 375 (2003).

recognized that foster children may have other constitutional and statutory claims to challenge the practice, including arguments under § 405(j), but declined to reach such arguments.¹⁷⁹ This section addresses several possible legal arguments and questions left unresolved by the Supreme Court.¹⁸⁰

A. *The Representative Payee as Fiduciary:
Discretion vs. Fixed Rules*

Under § 405(j) of the Social Security Act, representative payees have fiduciary obligations to beneficiaries.¹⁸¹ In *Keffeler*, the state agency's fiduciary obligations to foster children came into conflict with the state's pecuniary self-interests in seeking to maximize federal funds. The Supreme Court recognized the self-interested behavior of the state agency but did not resolve the conflict within the context of the agency's fiduciary duties. Concluding that the use of foster children's Social Security benefits to reimburse state costs is permissible, the Court concluded that "the appointment of a self-reimbursing representative payee" is not "at odds with the Commissioner's mandate" to serve the interests of the beneficiary.¹⁸²

The Court's conclusion contradicts the centuries-old fiduciary duty of loyalty,¹⁸³ which encompasses the negative duty to "do no harm,"¹⁸⁴ and the broader and affirmative fiduciary duty of care.¹⁸⁵ Fiduciaries have "an obligation to refrain from self-interested behavior that constitutes a wrong to the beneficiary as a result of the fiduciary exercising discretion with respect to the beneficiary's critical resources."¹⁸⁶

The Court's failure to properly resolve the conflict within the framework of fiduciary law creates a paradoxical scenario. While the state as creditor is prevented from doing harm, the state as fiduciary is

¹⁷⁹ *Id.* at 380 n.4, 390 n.12 (explaining that the arguments were not addressed by the lower court and "are far afield of the question on which we granted certiorari.").

¹⁸⁰ This is not intended to be an exhaustive list but rather an analysis of some of the legal arguments I believe are the most compelling. Other legal challenges have been raised in litigation that I do not address here. For example, the Sixth Circuit determined a challenge to the practice under the Rehabilitation Act was sufficient to survive a motion to dismiss in *Gean v. Hattaway*, 330 F.3d 758, 774-76 (6th Cir. 2003).

¹⁸¹ *See supra* notes 34-35 and accompanying text.

¹⁸² *Keffeler*, 537 U.S. at 389.

¹⁸³ Arthur B. Laby, *Resolving Conflicts of Duty in Fiduciary Relationships*, 54 AM. U. L. REV. 75, 99-109 (2004).

¹⁸⁴ *Id.* at 125.

¹⁸⁵ *Id.* at 109-25.

¹⁸⁶ D. Gordon Smith, *The Critical Resource Theory of Fiduciary Duty*, 55 VAND. L. REV. 1399, 1407 (2002).

free to do so. A state agency would be prohibited from attaching the children's Social Security benefits if the agency was acting as a creditor trying to collect on a debt.¹⁸⁷ However, once cloaked in the fiduciary role of representative payee, the agency can decide to use the children's benefits to reimburse state costs for which the children have no legal obligation.

Moreover, although the Supreme Court concluded that state agency representative payees have discretion to use foster children's Social Security benefits to reimburse state costs as a form of current maintenance, the Court did not address the manner in which the discretionary power is being exercised.¹⁸⁸ The state agencies are applying blanket rules rather than making decisions based upon the individual circumstances of foster children. Under the direction of statutes, regulations, and policy manuals, state agencies acting as representative payees for foster children are required to apply the children's Social Security benefits to reimburse state costs.¹⁸⁹ The individualized needs of foster children are not considered.

This practice is not consistent with a representative payee's discretionary authority, which requires a payee to exercise independent judgment and to use the Social Security benefits in a manner the payee determines "to be in the best interests of the beneficiary."¹⁹⁰ The exercise of this discretion requires the weighing of individual circumstances and available options. Whereas strong arguments can be

¹⁸⁷ *Keffeler*, 537 U.S. at 382.

¹⁸⁸ *Id.* at 390 n.12.

¹⁸⁹ Such blanket rules exist in several states. For example, a regulation directs the Maryland foster care agency how to treat a foster child's Social Security benefits (or any other resources belonging to the child): "The child's resources *shall* be applied directly to the cost of care . . ." No exceptions or opportunities to exercise discretion are provided unless the state costs of care have already been paid and excess children's resources remain. MD. CODE REGS. 7.2.11.26(L) (2005) (emphasis added). In North Carolina, the state policy manual directs local offices and staff that

[t]he county DSS must be aware of all resources available to a child, which may include a child's unearned income from sources such as Supplemental Security Income, Social Security Survivor's benefits, trust funds, endowments, or child support paid directly to the agency. When a child is IV-E eligible, the agency *must* use the child's resources as part of the cost of care . . .

NORTH CAROLINA DEP'T OF HEALTH AND HUMAN SERVS., DIVISION OF SOCIAL SERVICES MANUAL, CHAPTER IV: 1203 FOSTER CARE FUNDING § IV(C), <http://info.dhhs.state.nc.us/olm/manuals/dss/csm-20/man/CSs1203-09.htm>. In Los Angeles, the Foster Care Eligibility Handbook directs the agency to become the representative payee for foster children receiving Social Security benefits, and that "this income *must* be applied toward the placement costs." LOS ANGELES COUNTY DEP'T OF CHILDREN AND FAMILY SERVS., FOSTER CARE ELIGIBILITY HANDBOOK, E080-0620, <http://dcfs.co.la.ca.us/Policy/Hndbook%20FCE/E080/E080-0620.doc> (last visited Feb. 16, 2006) (emphasis added).

¹⁹⁰ 20 C.F.R. §§ 404.2035(a), 416.635(a) (2005); see POMS, *supra* note 14, § GN 00602.001, available at <http://policy.ssa.gov/poms.nsf/lnx/0200602001> ("The payee receives the benefit with the full right and duty to spend it, in the best interests of the beneficiary, according to his/her best judgment.").

made for fixed rules in some matters involving children, such as the use of mandatory guidelines in determining the amount of a child support order,¹⁹¹ it cannot be argued that children's interests are advanced by a fixed rule requiring state agency representative payees to use foster children's Social Security benefits to reimburse state costs without any consideration of the children's individual needs.

Further, such fixed rules are in conflict with the Social Security Act and implementing regulations that establish the fiduciary duties of representative payees to exercise independent and individualized judgment.¹⁹² Although the Supreme Court did not reach this issue in *Keffeler*,¹⁹³ some lower courts have addressed the question and have concluded that the discretion of representative payees cannot be hampered or controlled by state policies.¹⁹⁴

Thus, while the Supreme Court in *Keffeler* concluded that state agency payees *may* decide to use foster children's Social Security benefits to reimburse state costs, the obligation to exercise independent and individualized discretion remains. The agencies must make decisions that take into account the individual circumstances of each foster child. The substitution of such considered judgment with fixed agency rules is in violation of the Social Security Act and should be challenged.

¹⁹¹ See Jane C. Murphy, *Eroding the Myth of Discretionary Justice in Family Law: The Child Support Experiment*, 70 N.C. L. REV. 209 (1991).

¹⁹² See *supra* note 190 and accompanying text.

¹⁹³ The Court did place significance on the state policy in Washington that provides the agency with discretion to occasionally depart from the normal practice to use the Social Security benefits for special needs. *Wash. State Dep't of Soc. & Health Servs. v. Guardianship Estate of Keffeler*, 537 U.S. 371, 378-79 (2003). However, amici point out that the discretion is rarely utilized, with the agency only using 3% of the children's benefits for the children's needs rather than reimbursing state costs in a random sampling of forty-eight cases. Brief for Juvenile Law Center & the National Center on Youth Law as Amici Curiae Supporting Respondents, *supra* note 22, at 16.

¹⁹⁴ *Ecolono v. Div. of Reimbursements of the Dep't of Health and Mental Hygiene*, 137 Md. App. 639 (2001). After being to committed to a state mental health facility, Mr. Ecolono successfully challenged the automatic use of his Social Security benefits to pay for the cost of care. The Court concluded the state agency representative payee failed to exercise required discretion by not considering whether the benefits should be used for his post-release living expenses rather than reimbursing state costs. *Id.* Also, in *Snider v. Creasy*, 728 F.2d 369 (6th Cir. 1984), *Riddick v. D'Elia*, 626 F.2d 1084 (2d Cir. 1980), and *Barnes v. Reagen*, 501 F. Supp. 215 (N.D. Iowa 1980), the courts all concluded that OASDI benefits paid to mothers with representative payees cannot be deemed income to AFDC applicants, because such state policies conflict with the federal requirements that representative payees must exercise discretion in determining how the benefits should best be used for the beneficiaries, and are therefore invalid under the Supremacy Clause.

B. *SSA Duty to Investigate: The “Kiddie Loop” and the Automatic Process of Selecting Agencies as Representative Payees*

The selection of a representative payee is a crucial decision. The person or agency chosen will be in a position of trust and responsible for managing what are often the only resources for a disabled individual. For a foster child, the importance of the selection is heightened. The selection of the state foster care agency, now armed with the *Keffeler* decision, all but ensures the child will never see a dollar of her Social Security benefits. If a representative payee other than the agency is chosen, the child may benefit from the payments because the state cannot force another payee to reimburse state costs and the child may bring a misuse complaint against the payee if the benefits are not properly used or conserved.¹⁹⁵

Recognizing the importance of the decision, the Social Security Administration explains that “extreme care” must be exercised in the selection of representative payees.¹⁹⁶ A detailed listing of preferred categories of representative payees for children are set out in regulations, with parents at the top of the list, followed by relatives and close friends.¹⁹⁷ The least preferred are government agencies or other institutional representative payees.¹⁹⁸ When presented with a state agency as a potential representative payee, the Social Security Administration Commissioner “must also attempt to identify any other potential representative payee whose appointment may be preferred.”¹⁹⁹

Thus, the duty of the Administration to investigate and choose the most suitable representative payee is clear, including the duty to search for any payee more preferred than a state agency. Unfortunately, it is equally clear that the duty is being ignored. Rather than conducting thorough investigations and making individualized decisions to select the most preferred payees, an automatic process is used.²⁰⁰ Faced with

¹⁹⁵ *Keffeler*, 537 U.S. at 389.

¹⁹⁶ POMS, *supra* note 14, § GN 00501.005(C), available at <http://policy.ssa.gov/poms.nsf/lnx/0200501005> (last visited Feb. 16, 2006).

¹⁹⁷ 20 C.F.R. §§ 404.2021(c), 416.621(c) (2005).

¹⁹⁸ *Id.*

¹⁹⁹ *Keffeler*, 537 U.S. at 376 n.1; see Skoler & Allbright, *supra* note 102, at 170-71.

²⁰⁰ See Boyer & Mathews, *supra* note 25, at 2 (explaining that the process of selecting the state agency as representative payee for foster children is practically automatic in many jurisdictions); ABA COMM. ON LEGAL PROBLEMS OF THE ELDERLY AND CENTER ON CHILDREN AND THE LAW, ENHANCING COORDINATION OF STATE COURTS WITH THE FEDERAL REPRESENTATIVE PAYMENT PROGRAM: MODEL TRAINING CURRICULUM FOR JUDGES AND STAFFS OF JUVENILE AND FAMILY COURTS, REPRESENTATIVE PAYMENT AND KIDS, 30 (2001) (noting concern that SSA field offices appoint agencies as representative payees without investigating other possible payee candidates); IOWA DEPT. OF HUMAN RESOURCES, FOSTER CARE RECOVERY UNIT, WHAT IF MY CHILD RECEIVES SOCIAL SECURITY PAYMENTS OR OTHER GOVERNMENT MONEY?, <http://www.dhs.state.ia.us/fostercare/recovery> (last visited Feb. 17, 2006) (providing a statement to parents with children in foster care that discourages the parents or others

tens of thousands of applications from state agencies to become representative payees,²⁰¹ the Social Security Administration developed a shortcut in its computer system, called the “kiddie loop,” to process applications in batches when a single applicant files to be the representative payee for multiple beneficiaries.²⁰² With the “kiddie loop” in place, rather than conducting investigations to identify the most preferred payees for foster children, the Social Security Administration simply reviews information provided in applications from the state agencies and looks no further.²⁰³

The practice is evident in the conduct of MAXIMUS through its revenue maximization contract in Illinois.²⁰⁴ To assist the state agency in applying to be representative payee for foster children, court pleadings indicate that MAXIMUS created a pre-printed form application in which the following statement has been submitted to the Social Security Administration without any individualized inquiry:

Our agency is better qualified to act as payee than the parents/relatives of the child because the representative of the Department who supervises the child is the person most aware of the child’s or children’s current needs and most qualified to see that the benefits are used properly.²⁰⁵

With the assistance of MAXIMUS, the Illinois agency submitted 3588 requests to be appointed represented payee for foster children from 1994 to 1996, and not a single one of those applications was denied in favor of some other payee despite the agency’s least-preferred status and the duty of the Social Security Administration to try to locate any other more preferred payee.²⁰⁶ As of June 1, 1999, the agency was acting as payee for 2401 of the 2670 disabled children in foster care,

from applying to become representative payee: “If your child receives government benefits or you receive a benefit check for your child as a representative payee, you should notify the social worker or juvenile court officer. The state will be the representative payee while your child is in foster care.”).

²⁰¹ See *supra* note 1.

²⁰² POMS, *supra* note 14, § GN 00502.110(3), available at <http://policy.ssa.gov/poms.nsf/lnx/0200502110>.

²⁰³ The OIG has explained that rather than conducting the required investigation into locating the most preferred representative payee, “[t]he basis for selecting a representative payee is the information supplied by a prospective payee on the application form.” SOC. SEC. ADMIN., OFFICE OF THE INSPECTOR GENERAL, MONITORING REPRESENTATIVE PAYEE PERFORMANCE: ROLL-UP REPORT, AUDIT REPORT A-09-96-64201, at 11, 18 (Mar. 1997), available at http://www.ssa.gov/oig/ADOBEPDF/audit_htms/96-64201.htm; see also Boyer & Matthews, *supra* note 25, at 2 (noting that SSA generally only relies on information in the application form from the state agencies, in which the agencies generally indicate that no other payee is available or suitable to protect the child’s interests).

²⁰⁴ See *supra* notes 6-7 and accompanying text.

²⁰⁵ Plaintiff’s Memorandum in Support of Motion for Summary Judgment, *Willingham v. McDonald*, No. 96 CO 00120, at 7 (Circuit Ct. Cook County, Ill.) (July, 1999).

²⁰⁶ *Id.* at 8.

and representative payee applications from the state agency were pending for each of the remaining 269 children.²⁰⁷

Rather than acknowledging or addressing this automatic selection process, the Supreme Court in *Keffeler* simply pointed to the regulatory scheme as evidence that the state agencies are only chosen as the payees when no one else is available.²⁰⁸ The real practice must be brought to light.²⁰⁹

C. Equal Protection

The Supreme Court in *Keffeler* also did not address the question of whether it is 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. Although the question was addressed by the Supreme Court of Washington when the *Keffeler* case was remanded, the claim was hastily rejected with minimal discussion.²¹⁰ More consideration is warranted.

1. Are Foster Children Treated Equally?

In rejecting an equal protection challenge in *Keffeler* on remand, the Supreme Court of Washington essentially reasoned that because all representative payees must use the benefits according to state and federal laws and regulations, and because the State representative payee

²⁰⁷ *Id.* Similar statistics in the *Keffeler* Joint Appendix also provide evidence of this automatic process. In 1999 there were 1480 children receiving foster care benefits in Washington State and the state agency, DSHS, was appointed as representative payee for 1411 of those children. Thus, a process occurred where DSHS became the representative payee for over 95% of the foster children in its care. Joint Appendix, *supra* note 77, at 136a, 192a.

²⁰⁸ Wash. State Dep't of Soc. & Health Servs. v. Guardianship Estate of Keffeler, 537 U.S. 371, 390-91 (2003).

²⁰⁹ After *Keffeler*, a successful legal challenge to this automatic process by bringing a claim against the Social Security Administration may be difficult. Under the Social Security Act, the Administration is only obligated to reimburse the beneficiary if it is negligent in its selection of a representative payee and the negligence results in misuse of the benefits. 42 U.S.C. § 1383(a)(2)(E) (2000). The *Keffeler* decision will make proving misuse difficult because the Court found the reimbursement practice by state agency payees appropriate under federal regulations and rejected the view that the practice is antithetical to the child's best interests. *Keffeler*, 537 U.S. at 375, 389-90. In at least one jurisdiction, advocates have challenged the automatic selection process by bringing claims against the state agency rather than against the Social Security Administration. Plaintiff's Memorandum in Support of Motion for Summary Judgment, *supra* note 205, at 3-20.

²¹⁰ Guardianship Estate of Keffeler v. Wash. State Dep't of Soc. and Health Servs., 151 Wash. 2d 331 (2004).

uses Social Security benefits in accordance with those laws and regulations, the State is not violating the Equal Protection Clause.²¹¹ Although not directly stated in the opinion, the court apparently concludes that the foster children are being treated equally because it does not reach what would be the next questions in an equal protection analysis, the questions of what level of scrutiny applies and whether the state has a valid reason for differential treatment.

The decision rejects the claim that the state agency practice creates two unequal classes of foster children: those with state agency payees whose Social Security benefits are used to reimburse foster care costs, and those with private payees whose benefits can be used for special needs or be conserved for future use.²¹² Rather, the decision concludes that “there are not two groups of foster children but one group: all foster children receiving social security benefits with appointed representative payees.”²¹³ This characterization misses the point.

As explained in Judge Sanders’ dissent, whether the foster children are categorized into one group or two, unequal treatment is still present: “Even if we were examining ‘one group,’ . . . children *within* the group are treated unequally for no more reason than one has a private and the other a public payee.”²¹⁴ Foster children with state agency representative payees are subject to blanket state rules that require the children’s Social Security benefits to be applied to state costs. Foster children who receive Social Security benefits but have any payee other than the state agency are not required to apply their benefits to state costs. Moreover, another classification not considered by the majority or dissenting opinions is possible: expanding either the single class or multiple classes of foster children to include a comparison to the treatment of those foster children who do not receive Social Security benefits. Foster children receiving Social Security benefits are required to use the resources to reimburse state costs whereas foster children without Social Security benefits are not obligated to repay the cost of care. Under any of these categorizations, the children are not treated equally.²¹⁵ The real question is whether the differential treatment is justified under equal protection scrutiny.

²¹¹ *Id.* at 340-41.

²¹² *Id.*

²¹³ *Id.*

²¹⁴ *Id.* at 350.

²¹⁵ For discussion of classifications in equal protection analysis, see Daniel J. Nusbaum, *The Craziest Reform of Them All: A Critical Analysis of The Constitutional Implications of “Abolishing” the Insanity Defense*, 87 CORNELL L. REV. 1509, 1542-52 (2002); Joseph Tussman & Jacobus tenBroek, *The Equal Protection of the Laws*, 37 CAL. L. REV. 341, 344-53 (1949).

2. Minimum Scrutiny

Even if the practice does not warrant heightened scrutiny,²¹⁶ the question remains whether there is a rational reason based upon a legitimate government interest²¹⁷ for state foster care agencies to take Social Security benefits from foster children, when other foster children have no obligation to pay for their care. The interest of states in the practice is clear—saving state money for other purposes. However, while a state's interest in saving money and preserving the fiscal integrity of its programs may be legitimate, the Supreme Court has explained that such a purpose “provides no justification for its decision to discriminate among equally eligible citizens,”²¹⁸ and cannot be accomplished through “invidious distinctions between classes of its citizens.”²¹⁹

In *Gean v. Hattaway*, the Court of Appeals for the Sixth Circuit addressed this specific question of whether a state agency's use of foster children's Social Security benefits violates the Equal Protection Clause.²²⁰ Comparing the practice to a progressive income tax scheme where citizens with higher incomes must contribute a higher percentage of their earnings to the state finances, the court answered the question in the negative.²²¹ The reasoning turns the notion of progressive taxation

²¹⁶ An argument exists that foster children should be considered a “quasi-suspect” class for purposes of equal protection scrutiny. See *Nancy M. v. Scanlon*, 666 F. Supp. 723, 727-28 (1987) (concluding that foster children are a “sensitive class” requiring intermediate scrutiny). For an analysis of the argument that all children as a class should be considered a suspect or quasi-suspect class, see Deana A. Pollard, *Banning Corporal Punishment: A Constitutional Analysis*, 52 AM. U. L. REV. 447, 475-82 (2002); see also Brad Colwell & Brian D. Schwartz, *Homeless and Alien Students: A Duty to Educate*, 165 ED. LAW REP. 447, 452-57 (2002) (providing a summary of the Supreme Court's decisions regarding whether heightened scrutiny to should be applied to various classifications of children). However, the status of being a foster child is not the relevant factor leading to unequal treatment in the practice of state agencies taking foster children's Social Security benefits. The differential treatment does not hinge on the status of being a foster child, but rather on whether the foster child receives Social Security benefits and has a state agency representative payee.

²¹⁷ If state legislation or other official action results in unequal treatment, it is presumed the legislation or action is valid as long as the classification and differential treatment is “rationally related to a legitimate state interest.” *City of Cleburne v. Cleburne Living Ctr.*, 473 U.S. 432, 440 (1985).

²¹⁸ *Saenz v. Roe*, 526 U.S. 489, 507 (1999).

²¹⁹ *Graham v. Richardson*, 403 U.S. 365, 375 (quoting *Shapiro v. Thompson*, 394 U.S. 618, 633 (1969)).

²²⁰ 330 F.3d 758 (6th Cir. 2003).

²²¹ *Id.* at 771-72. In refusing to recognize “a prohibition writ large against making distinctions among ‘equally eligible citizens’ for the purpose of conserving state resources,” the Sixth Circuit explained:

[S]tates with a progressive income tax scheme generally require a citizen, as her income increases, to contribute a higher percentage of her earnings to the state fisc. Such a tax system distinguishes among citizens, all of whom are—in theory—equally eligible to support the state government, in order to improve the state's finances. Also,

on its head. Rather than considering a means to increase revenue for under-funded foster care programs by spreading the cost across society in a reasoned and progressive fashion, states turn to the very children in need of assistance because they have the least ability to complain. Requiring children who have been abused and neglected to pay the bill for their resulting foster care does not fit within the “basic concept of our system that legal burdens should bear some relationship to individual responsibility or wrongdoing.”²²²

Further, even if the *Gean v. Hattaway* decision were correct—that a foster child’s ability to pay is a valid basis for differential treatment—the court ignores the irrational distinction that some children with resources are required to reimburse state foster care costs (those with state agency representative payees) whereas other children with resources are not (those with assets or income other than Social Security and those who receive Social Security benefits but have anyone other than the state agency as representative payee). The Supreme Court has determined that the differential treatment of prisoners from individuals criminally convicted but not incarcerated regarding the responsibility to reimburse state costs, without a rational basis, is unconstitutional.²²³ Children who are abused and neglected, removed from their homes and placed in foster care, and are disabled or have deceased or disabled parents deserve at least the same constitutional protections.

in managing social welfare programs, the state makes distinctions among its citizens based upon a sort of “ability to pay.” Though a state cannot discriminate against a potential welfare recipient based upon how long that individual has been in the state, it can—and does—discriminate against that individual based upon his ability to provide for himself without state assistance.

Id.

²²² Weber v. Aetna Casualty & Surety Co., 406 U.S. 164, 175 (1972); see also Reed v. Campbell, 476 U.S. 852, 854 n.5 (1986) (quoting *Weber*); Pickett v. Brown, 462 U.S. 1, 7 (1983) (same); Plyler v. Doe, 457 U.S. 202, 220 (1982) (same).

²²³ Rinaldi v. Yeager, 384 U.S. 305 (1966). In *Rinaldi*, the Court considered a New Jersey statute that attempted to reduce expenditures by requiring prisoners who took an unsuccessful appeal to reimburse the State for the cost of furnishing a trial transcript, but the statute did not require similar repayments from unsuccessful appellants who were not incarcerated but were given a suspended sentence, placed on probation, or sentenced only to a fine. *Id.* at 307-08. The Court determined the statute was unconstitutional because there was no rational basis for the distinction between unsuccessful appellants who were in prison and those who were not. *Id.* at 308-09. A comparison can also be made to the differential treatment of children classified as illegitimate, addressed by the Supreme Court’s 1974 decision in *Jimenez v. Weinberger*, 417 U.S. 628 (1974). In *Jimenez*, the Supreme Court held that a statute denying Social Security benefits to some illegitimate children does not withstand minimal scrutiny, despite recognizing the government’s legitimate interest in preventing spurious claims for benefits. 417 U.S. at 636. The Court explained that even if children might be rationally classified based upon their illegitimate status, their birth after the onset of the parent’s disability, and other indicia of dependency upon the disabled parent, the creation of two subclasses of illegitimate children was both overinclusive and underinclusive: “[T]he two subclasses of illegitimates stand on equal footing, and the potential for spurious claims is the same as to both; hence to conclusively deny one subclass benefits presumptively available to the other denies the former the equal protection of the laws” *Id.* at 637.

D. *Due Process: Insufficient Notice*

A child is a person under the Constitution.²²⁴ Social Security benefits are statutory entitlements warranting Constitutional due process protection.²²⁵ Accordingly, foster children must be provided with due process protections before actions are taken that may affect their Social Security benefits, including the selection of a representative payee.²²⁶ If provided with proper due process protections, including advance notice and the opportunity to object, the response of a foster child or the child's attorney to the application of a state agency to become the child's representative payee would seem obvious. As Judge Sanders of the Supreme Court of Washington explained in his dissenting opinion in *Keffeler* on remand:

If a foster child were entitled to Supplemental Security Income (SSI) benefits or Old-Age, Survivors, and Disability Insurance (OASDI) benefits, or both, who would *he* rather have as his representative payee, the State or grandma? I posit the answer to the question does not require a degree in rocket science but is well within the comprehension of the average well-informed six-year-old.²²⁷

If Judge Sanders is correct in his description of a child's viewpoint, why are foster children and their lawyers not objecting to the automatic selection state agencies as representative payees? A closer examination of the Social Security Administration's advance notice requirements provides an answer.

While the Social Security Act and implementing regulations require advance notice in the selection of a representative payee, it is unclear to whom the notice must be provided. The Act explains that in the case of a minor the advance notice "shall be provided solely to the legal guardian or legal representative of such individual."²²⁸ Already, the statutory requirement is constitutionally troublesome. Service upon the child's legal representative is only listed as an option,²²⁹ and service

²²⁴ *In re Gault*, 387 U.S. 1 (1967).

²²⁵ *Mathews v. Eldridge*, 424 U.S. 319, 322-23 (1976).

²²⁶ Advance notice and the opportunity to object to the selection of a representative payee is required. 20 C.F.R. §§ 404.2030, 416.630 (2005).

²²⁷ *Guardianship Estate of Keffeler v. Wash. State Dep't of Soc. and Health Servs.*, 151 Wash. 2d 331, 346 (2004).

²²⁸ 42 U.S.C. §§ 405(j)(2)(E)(ii), 1383(a)(2)(B)(xii) (2000).

²²⁹ The Supreme Court's opinion in *In re Gault* recognized that the Due Process Clause does not merely provide for the child (or the child's attorney) to be an optional person for receiving notice, but demands that the child is a required recipient:

We conclude that the Due Process Clause of the Fourteenth Amendment requires that in respect of proceedings to determine delinquency which may result in commitment to an institution in which the juvenile's freedom is curtailed, the child *and* his parents must be notified of the child's right to be represented by counsel retained by them, or if they are unable to afford counsel, that counsel will be appointed to represent the child.

In re Gault, 387 U.S. at 41(emphasis added).

upon the legal guardian may not be sufficient to protect the child's interest because the legal guardian and the person or institution seeking to become representative payee may be the same.²³⁰ The POMS, the operations manual used by Social Security staff, adds to the concern. Regarding the procedure for sending the advance notice about the selection of a representative payee, the POMS explains that "[i]f the beneficiary is a child, under age eighteen and not legally emancipated, the need for an advance notice depends on many factors."²³¹ Multiple options for possible notice are then listed, including a "legal guardian or authorized representative," the parent in some circumstances, or a "person standing in [the] place of a parent."²³² The POMS does not list the child or the child's attorney as a required recipient of the advance notice, and the language implies that there may be instances in which no notice is required.²³³

With this lack of clear guidance regarding notice requirements, it is not surprising that foster children and their attorneys do not receive the advance notice²³⁴ and therefore do not object to the selection of state agencies as representative payees. The current notice practices are deficient and vulnerable to legal challenge.²³⁵

²³⁰ The Social Security Administration's Philadelphia Region explains that a state foster care agency may be the recipient of the advance notification of a representative payee selection when the state agency is the legal guardian of the child. Email from Bob Murphy, Deputy Assistant Regional Commissioner, Social Security Administration Philadelphia Region, to author, *Info about Rep Payees* (Nov. 24, 2004) (on file with author).

²³¹ POMS, *supra* note 14, § GN 00503.100(E)(2), available at <http://policy.ssa.gov/poms.nsf/lnx/0200503100!opendocument> (last visited Feb. 17, 2006).

²³² *Id.*

²³³ *Id.* Another POMS section provides additional guidance, explaining that "[w]hen you select a payee for a child in foster care, exercise caution and ensure that you follow proper procedures and give due process," but regarding notice, the guidance only explains the need to give advance notice to the parents. Notices to the child, to child's counsel or even to a legal guardian are not mentioned. *Id.* § GN 00502.159, available at <http://policy.ssa.gov/poms.nsf/lnx/0200502159!opendocument> (last visited Feb. 17, 2005). It is also important to note that the form SSA uses for processing applications for potential representative payees does not provide a means to collect information about a foster child's attorney, so it is highly unlikely the Administration would ever be made aware that an attorney has been appointed to represent the child. *Id.* § GN 00502.115, Form SA-11-BK, available at <http://policy.ssa.gov/poms.nsf/lnx/0200502115!opendocument> (last visited Feb. 17, 2005). Further, related to the concern with the notice requirement, the POMS provides an explanation of appeals rights regarding the selection of a representative payee, and provides a list of who may appeal. A non-emancipated child and child's counsel are not listed. Thus, even if the foster children and their attorneys were receiving proper notice, it is not clear if the Social Security Administration would allow their appeals to be processed. *Id.* § GN 00503.110, available at <http://policy.ssa.gov/poms.nsf/lnx/0200502110!opendocument> (last visited Feb. 17, 2005).

²³⁴ Telephone Interview with Joan Little, Chief Attorney, Baltimore City Child Advocacy Unit, Legal Aid Bureau, Inc. (July 18, 2005) (confirming that Maryland Legal Aid attorneys representing children in foster care do not receive notice regarding representative payee applications).

²³⁵ In addition to the concern that foster children are not receiving the advance notice, there is also an argument that the content of the notice is insufficient because it does not inform

E. *Takings Clause*

State agencies obtain access to foster children's Social Security benefits by becoming representative payees and then using the children's benefit payments to reimburse the state coffers for foster care costs that the children have no legal obligation to reimburse. The children receive no financial benefit or additional services from the practice. This public use of foster children's Social Security benefits implicates the spirit of the Takings Clause protections, that "private property" shall not "be taken for public use, without just compensation."²³⁶

To fall within the takings analysis, a "private property" interest must be at stake, and the Supreme Court in *Flemming v. Nestor* refused to "engraft upon the Social Security system a concept of 'accrued property rights'" because Congress specifically reserved for itself "'the right to alter, amend, or repeal any provision' of the Act."²³⁷ If the reasoning in *Flemming* applies to use of foster children's Social Security benefits by state agencies, the takings analysis is at an end.²³⁸ However, such practice does not involve an attempt by Congress to modify rights to Social Security benefits but rather state action to take the benefits after they have already been paid by the federal government. Rather than the type of congressional alteration to Social Security benefits that was ruled outside of the takings analysis in *Flemming*, the practice of state foster care agencies taking foster children's Social Security benefits falls within the hypothetical proposed by Jed Rubenfeld:

And suppose a state seized the checks the federal government had sent to *A*, or passed a law directing the relevant banks to forward all such money to a state account. Putting aside any other issues raised by such state action, surely it will be conceded that the state has deprived *A* of property in every constitutional sense of that term.²³⁹

If *Flemming* does not act as an obstacle, the Supreme Court's *Penn Central Transportation Co. v. New York City* decision provides three factors to be applied in a regulatory takings analysis: "the economic impact of the regulation on the claimant, . . . the extent to which the

individuals that state agency representative payees may use the Social Security benefits to reimburse state costs but that any other representative payee cannot be forced to do so. A similar argument was rejected by the Seventh Circuit. See *Mason v. Sybinski*, 280 F.3d 788, 794 (7th Cir. 2002).

²³⁶ U.S. CONST. amend. V.

²³⁷ *Flemming v. Nestor*, 363 U.S. 603, 610-11 (1960) (citing Elmer F. Wollenberg, *Vested Rights in Social-Security Benefits*, 37 OR. L. REV. 299, 359 (1958); 42 U.S.C. § 1304).

²³⁸ For a discussion of the importance and concerns with the *Flemming* decision, see Charles A. Reich, *The New Property*, 73 YALE L.J. 733, 768-69 (1964).

²³⁹ Jed Rubenfeld, *Usings*, 102 YALE L.J. 1077, 1109 (1993).

regulation has interfered with distinct investment-backed expectations, . . . [and] the character of the governmental action.”²⁴⁰

In 1987, the Supreme Court applied the *Penn Central* factors in *Bowen v. Gilliard*, concluding no regulatory taking occurs when a family is required to assign children’s child support rights to the state in order for a family to be eligible for welfare benefits.²⁴¹ *Bowen* provides a comparable analysis in considering whether a regulatory taking occurs when a state agency follows state statutes, regulations, or policies directing it to use foster children’s Social Security benefits to reimburse state costs. The Court in *Bowen* addressed the first *Penn Central* factor, “[t]he economic impact of the regulation on the claimant,”²⁴² and found little economic impact on the child from the trade-off of assigning his child support rights in order to receive welfare payments,²⁴³ or what has been described as a “rough exchange.”²⁴⁴ Contrary to what was described as an equal exchange in *Bowen*, when a state foster care agency becomes representative payee and takes children’s Social Security benefits to reimburse the state, the children gain nothing while losing the opportunity to use their benefits to purchase items necessary for personal and special needs, to provide extra health care, therapeutic and educational services not normally provided by the state foster care program, and to conserve unused funds for future needs. Whereas the children required to assign their child support rights in *Bowen* received the benefit of increased welfare payments and \$50 per month of passed through child support,²⁴⁵ foster children receive no financial benefit

²⁴⁰ Penn Cent. Trans. Co. v. New York City, 438 U.S. 104, 124 (1978).

²⁴¹ Bowen v. Gilliard, 483 U.S. 587, 606-08 (1987).

²⁴² Penn Cent., 438 U.S. at 124.

²⁴³ The Court in *Bowen* concluded that the economic impact of the requirement to assign the child’s child support rights to the state was mitigated by three benefits the child received: 1) the \$50 of child support “passed through” back to family, 2) the increase in AFDC benefits resulting from the inclusion of the additional child in the assistance unit, and 3) that the State used its own enforcement power to collect the support payments, and therefore bore the risk of nonpayment of the child support. *Bowen*, 483 U.S. at 606-07.

²⁴⁴ Williams v. Humphreys, 125 F. Supp. 2d 881, 888 (2000). In *Humphreys*, the Court addressed the practice in Indiana of requiring assignment of child support rights for children who do not receive any welfare benefits because of the state’s family benefit cap, and concluded the practice violates the takings clause because there was no “rough exchange” as in *Bowen*. *Id.* at 888, 891.

²⁴⁵ The \$50 pass through requirement previously required under federal law was eliminated in 1996. Barbara Glesner Fines, *From Representing “Clients” to Serving “Recipients”*: Transforming the Role of the IV-D Child Support Enforcement Attorney, 67 FORDHAM L. REV. 2155, 2158 n.15 (1999) (explaining that the Personal Responsibility and Work Opportunity Reconciliation Act of 1996 eliminated the “pass through” requirement). Without this federal requirement, new constitutional challenges could be brought under the *Bowen* analysis against states that do not voluntarily pass through any assigned child support back to the families. For a survey of state policies regarding the pass through of assigned child support since the elimination of the federal requirement, see PAULA ROBERTS & MICHELLE VINSON, STATE POLICY REGARDING PASS-THROUGH AND DISREGARD OF CURRENT MONTH’S CHILD SUPPORT COLLECTED FOR FAMILIES RECEIVING TANF-FUNDED CASH ASSISTANCE (2004),

from giving up their Social Security benefits. The only benefit the children arguably receive is the increased likelihood that the state agency will help those foster children who are not already eligible apply to receive Social Security benefits.²⁴⁶ This is not a “rough exchange.”²⁴⁷

Addressing the second *Penn Central* factor, “the extent to which the regulation has interfered with distinct investment-backed expectations,”²⁴⁸ the Court in *Bowen* explained that a child receiving child support payments in North Carolina “holds no vested protectable expectation that his or her parent will continue to receive identical support payments on the child’s behalf,” and the prospective right to support payments “are clearly subject to modification by law, be it through judicial decree, state legislation, or congressional enactment.”²⁴⁹ The *Flemming* decision concluded that because Congress reserved the right for itself to modify, restrict, or terminate the benefits, a congressional restriction on Social Security benefits is not a taking.²⁵⁰ However, Social Security benefits are entitlements warranting constitutional due process protections,²⁵¹ and although Congress is free to modify or terminate the benefits, states are not. Although foster children may not have a “vested protectable expectation” that their Social Security benefits will not be altered by Congress, the children do have a protectable expectation that their benefits will not be altered, terminated, or taken by the actions of a state government.

The Supreme Court in *Bowen* analyzed the third *Penn Central* factor, “the character of the governmental action,”²⁵² and noted the “hard choices” the government must make in deciding how to allocate benefits in a welfare program.²⁵³ The Court concluded that the decision to include child support as part of family income and require assignment of the rights to child support as a condition of eligibility for welfare benefits is not “an enactment that forces ‘some people alone to bear public burdens which, in all fairness and justice, should be borne by the public as a whole.’”²⁵⁴ Significance was placed on the notion of choice, with the Court explaining that the “law does not require any custodial

http://www.clasp.org/publications/pass_thru3.pdf.

²⁴⁶ See *supra* notes 120-121 and accompanying text.

²⁴⁷ Another important distinction from *Bowen* is that federal law requires that states have children assign their child support rights in order to receive welfare assistance. 42 U.S.C. § 608(a)(3) (2000). There is no federal requirement that states take foster children’s Social Security benefits in exchange of the children’s care.

²⁴⁸ *Penn Cent. Trans. Co. v. New York City*, 438 U.S. 104, 124 (1978).

²⁴⁹ *Bowen v. Gilliard*, 483 U.S. 587, 607 (1987).

²⁵⁰ *Flemming v. Nestor*, 363 U.S. 603, 610-11 (1960).

²⁵¹ *Matthews v. Eldridge*, 424 U.S. 319, 322-23 (1976).

²⁵² *Penn Cent.*, 438 U.S. at 124.

²⁵³ *Bowen*, 483 U.S. at 608.

²⁵⁴ *Id.* (citing *Armstrong v. United States*, 364 U.S. 40, 49 (1960)).

parent to apply for AFDC benefits,” and that a parent deciding to apply for welfare benefits does so because she must have decided that the family as a whole will be better off by receiving the welfare benefits.²⁵⁵ Thus, the Court reasoned, the family is receiving “just compensation” for making the choice to apply for benefits and assign the child support rights in exchange.²⁵⁶

For a child in foster care, there is no choice. The child does not choose to be abused and neglected. The child does not choose to be taken from her home, she does not choose to give up her Social Security benefits, and she does not receive “just compensation” when forced to do so. If the test is whether foster children do not have a choice and whether the practice of state agencies taking the children’s Social Security benefits forces foster children “to bear public burdens which, in all fairness and justice, should be borne by the public as a whole,”²⁵⁷ that test is met.

F. *Double Dipping and Improper Reimbursement Practices*

In addition to the several legal questions discussed above, additional concerns exist regarding state agency accounting and reimbursement practices. For example, states may be double dipping by paying themselves back more than once for the same foster care costs, and some states may be ignoring the federal requirement to establish dedicated accounts for children’s lump-sum benefit awards that can only be used for special needs.

Under current practices, states seek to recoup foster care costs from at least three sources: the parents, the children, and the federal government. Parents are required to reimburse the state for foster care costs by establishing child support obligations that are then paid to the state rather than to the children.²⁵⁸ Children reimburse state costs through the practice of state agencies taking their Social Security benefits. The federal government partially reimburses state foster care costs through the IV-E program.²⁵⁹

Due to lax accounting practices,²⁶⁰ the possibility exists for states to double dip by reimbursing themselves from more than one of these sources. For example, the Office of Inspector General has noted multiple instances where foster care agencies have improperly claimed

²⁵⁵ *Id.* at 608-09.

²⁵⁶ *Id.* at 609.

²⁵⁷ *Armstrong*, 364 U.S. at 49.

²⁵⁸ See *supra* note 58 and accompanying text.

²⁵⁹ See *supra* notes 146-147 and accompanying text.

²⁶⁰ See *supra* Part II.F.

IV-E reimbursement for children who are simultaneously receiving SSI, which is also being used to reimburse state costs.²⁶¹ Also, a failure to coordinate cross-agency accounting systems could allow states to receive duplicate reimbursement from children's SSI benefits and from child support payments for the same foster care costs. This would likely occur if a state agency uses a child's Social Security benefits to reimburse itself for a specific month and then makes no re-designation of the child support obligation for that same month. If the child support stays on the books as owed to the state rather than being re-designated as owed to the child after the child's SSI is taken, double payment is possible.²⁶²

In addition to the concern with possible double dipping, some states may be taking foster children's Social Security benefits that should be placed in protected dedicated accounts. In 1996, Congress required that retroactive lump-sum payments of SSI benefits exceeding six times the monthly benefit amount must be deposited into dedicated interest-bearing bank accounts which can only be used for certain special needs of the beneficiaries.²⁶³ Contrary to the normal rule regarding Social Security benefits, there is an explicit prohibition against using benefits in dedicated accounts for current maintenance. Thus, if a child receives a retroactive SSI award that must be placed in a dedicated account, such benefits should be off-limits from the state practice of using benefits to reimburse state costs as current maintenance.

However, some states have been side-stepping this rule. For example, Maryland has apparently used the same "Interim Assistance Reimbursement" program²⁶⁴ to take foster children's lump sum SSI awards that is normally used to seek reimbursement from adults who receive interim state cash assistance until their SSI applications are successful.²⁶⁵ The legality of the practice is suspect.

²⁶¹ See, e.g., BALTIMORE CITY DEPARTMENT OF SOCIAL SERVICES AUDIT REPORT, *supra* note 157, at 6-7; SAN FRANCISCO DEPARTMENT OF SOCIAL SERVICES AUDIT REPORT, *supra* note 165, at 4-5.

²⁶² In *Keffeler*, the state agency admitted that in some cases the agency might be using child support and Social Security benefits to pay for the same foster care expenses. Reply Brief for Petitioners at 19, Wash. State Dep't of Soc. & Health Servs. v. Guardianship Estate of Keffeler, 537 U.S. 371 (2003) (No. 01-1420), 2002 WL 31527638.

²⁶³ 42 U.S.C. § 1383(a)(2)(F) (2000).

²⁶⁴ 20 C.F.R. § 416.1901 (2005); 42 U.S.C. § 1383(g) (2000); POMS, *supra* note 14, § SI 02003.001, available at <http://policy.ssa.gov/poms.nsf/lnx/0502003001>.

²⁶⁵ See Wicomico County Dep't of Soc. Servs., Memorandum from Pat Davis, Finance, to Shelley Vitell, IV-E Specialist (Apr. 23, 2003) ("I have enclosed the most current policy for SSI lump sum distribution. Since we are using the 340 form (Interim Payment Reimbursement Authorization) there will be very few cases where we will need a Dedicated Account set up.") (on file with author); Washington County Dep't of Soc. Servs., Memorandum from Rosalind Martin to Bob McEnroe, *DEAP Meeting of January 19, 2000 Regarding Dedicated Accounts for SSI Children in Foster Care* (Jan. 19, 2000) ("Policy now requires that when any local department of

The Social Security Administration can only reimburse states out of an individual's retroactive SSI award through the federal "Interim Assistance Reimbursement" program.²⁶⁶ States can seek this reimbursement when they provide "interim assistance" to an individual during the pendency of the individual's SSI eligibility determination process.²⁶⁷ "Interim assistance" or "IA" is vaguely defined and intended to include what several states have termed "general assistance" or minimal cash assistance to disabled adults.²⁶⁸ It is questionable whether state foster care assistance provided to children can be considered "interim assistance."²⁶⁹ If it can, states still cannot seek reimbursement from retroactive SSI awards unless they first obtain written consent to reimbursement from the individuals who received the interim assistance, in this case the foster children.²⁷⁰

The California Department of Social Services initially overcame this challenge of obtaining consents from foster children by simply signing the consent reimbursement agreements on the children's behalf. The agency then indicated it was ceasing the practice in 1999, explaining that the change in policy was "the result of SSA's determination that there exists a potential conflict of interest" between the financial interests of foster children and the state agency "when the agency's representative is permitted to sign the IAR agreement on behalf of both parties."²⁷¹ It is unclear how many other state agencies may be using the same questionable practice.

social services applies for SSI benefits for a child that is placed in Foster Care an Interim Payment Reimbursement Authorization Form (DHR/FIA 340) must be completed in order for the State to be able to reimburse for lump sum payments that are posted to back cost of care. Because of this procedure, the number of Dedicated Accounts that we will process will be very few.") (on file with author).

²⁶⁶ See *supra* note 264.

²⁶⁷ POMS, *supra* note 14, § SI 02003.001, available at <http://policy.ssa.gov/poms.nsf/lnx/0502003001> (last visited Feb. 17, 2006).

²⁶⁸ *Id.* ("Terms like general relief, general assistance, welfare payments, etc. . . . are often used interchangeably with IA or Interim Assistance Reimbursement (IAR).").

²⁶⁹ The POMS explains that such interim assistance (IA) "must be in the form of cash or vendor payments for meeting basic needs," that the IA "does not include assistance the State gives to or for any other person," and that "IA is not payable to the States for assistance payments related to programs like Medicaid and Temporary Assistance to Needy Families." *Id.*

²⁷⁰ 20 C.F.R. § 416.1901 (2005).

²⁷¹ Letter from Wesley Beers, Acting Deputy Director, Children and Family Services Division, California Department of Social Services, to All County Welfare Directors (Sept. 24, 1999), available at <http://www.dss.cahwnet.gov/getinfo/acl99/99-73.PDF>. An unreported California opinion noted the practice but did not express any concern despite two Social Security Administration audits that determined the county agency failed to obtain the required written authorizations from the SSI beneficiaries. *In re Michael A.*, No. A098510, 2003 WL 1844089 (Cal. Ct. App. Apr. 9, 2003).

IV. RECOMMENDATIONS FOR REFORM

In addition to the need for increased litigation efforts to challenge the current practices of state foster care agencies, foster children need a deliberative policy debate that can lead to reasoned policies replacing ad-hoc practices. Below are some possible suggestions for consideration.²⁷²

A. *Improving Selection of Representative Payees*

While the Social Security Administration's responsibility for approximately 7.6 million beneficiaries requiring representative payees²⁷³ ensures a level of continued bureaucratic failings, significant improvements to the system are possible, beginning with the selection process. Several steps should be taken to improve the selection process so that when a state agency is selected as representative payee, it is truly because no other more preferred payee is available.

First, the current practices of providing advance notice prior to the selection of proposed representative payees for foster children are inadequate and must be improved.²⁷⁴ Improved notice can increase the opportunity for objecting to proposed payees and provide additional information to aid the Social Security Administration's investigation into other possible choices.

The content of the advance notice form should be clarified to explain the ramifications of the decision, including an explanation that if a state agency is selected as payee, then the agency may decide to apply the benefits to state costs, but that any other payee cannot be required to do so. Once the content is clarified, the vague and inconsistent practices regarding service of the notice must be replaced with clear requirements. The notice should always be provided to the child and to the attorney or guardian *ad litem* appointed to represent the child in judicial proceedings.²⁷⁵ Also, the notice should be sent to both

²⁷² This is not an exhaustive list of possible reforms, but examples of changes that could be considered in improving the current policies and practices surrounding foster children's Social Security benefits.

²⁷³ SOCIAL SECURITY ADMIN., OFFICE OF THE INSPECTOR GENERAL, AUDIT REPORT A-02-03-13032: SUITABILITY OF INDIVIDUALS ACTING AS REPRESENTATIVE PAYEES 1 (2003), available at <http://www.ssa.gov/oig/ADOBEPDF/A-02-03-13032.pdf>.

²⁷⁴ See *supra* notes 228-234 and accompanying text.

²⁷⁵ The Child Abuse Prevention and Treatment Act (CAPTA) requires that every foster child must have an attorney or guardian *ad litem*. 42 U.S.C. § 5106a(b)(2)(A)(xiii) (2000). In those jurisdictions where the child is represented by a guardian *ad litem* or an attorney that provides representation under the "best interests" model, and depending on the age of the child and other factors, it may also be necessary to provide notice directly to the child. For discussion of the concerns regarding the "best interests" model of providing legal representation to children, see

parents, the child's current and past foster care or relative caretakers, to other parties in the juvenile proceedings, and to the juvenile court judge. As an option to reduce the burden on the Social Security Administration, the obligation to provide the advance notice could be shifted to individuals or agencies when they apply to become representative payees.

Second, rather than the current application form used by all prospective representative payees,²⁷⁶ an application specific to foster children should be created. The form should be improved to collect additional information about the child's status and to aid the investigation for more preferred payees, including additional fields for obtaining required information that would facilitate the additional notice requirements suggested above. For example, the form should include a field in which a state agency applicant must provide contact information for the child's attorney or guardian *ad litem*. State agency applicants should also be required to serve a copy of the application form to all persons required to receive the advance notice form.

Third, other options for possible representative payees should be explored. Non-profit organizations that already provide representative payee services to adults could be encouraged to offer the same services to foster children.²⁷⁷ Also, non-profit pooled trusts could be established with the dual purpose of providing representative payee services for foster children and establishing trust accounts and independence plans that conserve children's Social Security benefits in a manner that avoids the SSI resource limits and that help the children plan for their transition out of foster care.²⁷⁸

generally David R. Katner, *Coming to Praise, Not to Bury, the New ABA Standards of Practice for Lawyers Who Represent Children in Abuse and Neglect Proceedings*, 14 GEO. J. LEGAL ETHICS 103 (2000); Proceedings of the Conference on Ethical Issues in the Legal Representation of Children, *Recommendations of the Conference*, 64 FORDHAM L. REV. 1301 (1996).

²⁷⁶ SOC. SEC. ADMIN., FORM SSA-11: REQUEST TO BE SELECTED AS PAYEE, available at <http://www.ssa.gov/online/ssa-11.pdf> (last visited Feb. 17, 2006).

²⁷⁷ See *supra* note 117 and accompanying text. Serious caution should be taken in exploring this option, as there have been instances of misuse of beneficiary funds by organizations providing representative payee services. See *Inviting Fraud: Has the Social Security Administration Allowed Some Payees to Deceive the Elderly and Disabled?*, before S. Spec. Comm. on Aging, 106th Cong. (2000) (statement of John Huse, Jr., Inspector General, Social Security Administration), available at <http://aging.senate.gov/public/events/hr50jh.htm> (describing examples of organizational representative payees misusing beneficiary funds).

²⁷⁸ See *supra* notes 140-144 and accompanying text. Several states already have nonprofit pooled trusts that allow disabled individuals to conserve resources that are exempt from the SSI resource limit. See, e.g., The Florida Pooled Trust, <http://www.firstpooledtrust.org/Pooled%20Trust.htm> (last visited Feb. 17, 2006); The Arc of Texas, Master Pooled Trust, http://www.thearcoftexas.org/Master%20Pooled%20Trust/mpt_home_page.htm (last visited Nov. 1, 2005); Pooled Advocate Trust, Inc., <http://www.pooledadvocatetrustinc.com> (last visited Feb. 17, 2006) (nonprofit pooled trust serving South Dakota).

B. *Improving Federal Guidance*

The questions of whether and how a state foster care agency can use children's Social Security benefits have never been specifically addressed through federal policies. The answers—reached through federal legislative or regulatory process that includes the opportunity for public comment and criticism—are long overdue. If true to the principles of fiduciary obligations and promotion of the best interests of foster children, the answers should halt current practices. If not, and state agencies are allowed to continue the practice of reimbursing themselves with foster children's Social Security benefits, additional clarifications will be necessary.

1. Prohibiting Agency Rules that Restrict Fiduciary Discretion

Federal guidance should explain that fixed rules requiring state agencies to use foster children's benefits to reimburse state costs are in violation of the Social Security Act's requirements for representative payees to exercise individualized discretion. The guidance should explain that a child's benefits should only be used to reimburse state costs when it is determined that the child has no other current or future needs toward which the benefits could be better applied.²⁷⁹

2. Providing Strategies to Aid Transition to Independence

To help address the barriers children face as they age out of foster care, states should be provided with suggested strategies and tools to aid the transition while also avoiding the \$2000 asset limit for SSI. For example, a regulatory addition to the Plan for Achieving Self Support (PASS)²⁸⁰ program could be developed that outlines a preferred program where foster children's SSI benefits are conserved as part of individually developed plans for the children's transition out of care.

²⁷⁹ Such guidance would then be consistent with current regulations restricting a representative payee's ability to use Social Security benefits to pay beneficiary debts. 20 C.F.R. §§ 404.2040(d), 416.640(d) (2005).

²⁸⁰ See *supra* note 141 and accompanying text.

3. Preventing Double Dipping and Inappropriate Reimbursement Practices

To address possible “double dipping” and inappropriate reimbursement practices, state agencies should be directed that if they use a child’s Social Security benefits to pay foster care costs for a specific month, child support owed by the child’s parents to the state for the same month must be redirected as an obligation now owed to the child.²⁸¹ Also, agency practices that ignore or bypass the requirement to place foster children’s retroactive SSI awards in protected dedicated accounts should be explicitly prohibited.²⁸²

C. Coordination with Juvenile Courts

The Social Security Administration has an overwhelming task in administering the representative payee system, and could use some help. While the nation’s juvenile court systems are likely even more overburdened,²⁸³ the two systems could assist one another through improved communications and coordinated actions. For example, the additional notice requirements for proposed representative payees, as suggested above, would require that the advance notice be sent to all parties in the juvenile court proceedings as well as to the judge. This additional notice would provide additional opportunities to object and to provide information to the Social Security Administration in its investigation for the most preferred payee. Also, the notice would serve as a trigger for possible additional investigation and questioning in the juvenile court proceedings regarding the foster child’s resources and plans for the child’s transition to independence.

Improved coordination could also be employed as an additional

²⁸¹ See *supra* notes 58, 262 and accompanying text.

²⁸² See *supra* notes 263-271 and accompanying text. Of concern, new proposed rules from the Social Security Administration could increase the likelihood of inappropriate use of children’s benefits. One of the proposed changes would provide an exception to the current rule that requires representative payees to keep beneficiaries’ funds separate from the payees own funds and ensure the beneficiaries ownership is indicated on the accounts. Under the new rule, state or local government agencies could request exceptions that would allow the agencies to place the children’s benefits into state accounts. Representative Payment Policies and Administrative Procedure for Imposing Penalties for False or Misleading Statements or Withholding of Information, 70 Fed. Reg. 60,251 (proposed Oct. 17, 2005) (to be codified at 20 C.F.R. pts. 404, 408 & 416).

²⁸³ See, e.g., Bruce A. Boyer, *Jurisdictional Conflicts Between Juvenile Courts and Child Welfare Agencies: The Uneasy Relationship Between Institutional Co-Parents*, 54 MD. L. REV. 377, 377 (1995) (“Juvenile courts, particularly in large urban areas, have been swamped by increasing caseloads that challenge their ability to provide effective oversight of dependent, neglected, and abused children.”).

means of monitoring whether a state agency payee is properly considering the individual needs of foster children before deciding how to use the children's Social Security benefits. Foster care agencies are required to provide progress reports in court review hearings at least every six months.²⁸⁴ If detailed information about the agencies' use of children's Social Security benefits were required in such reports, the judge, the children and their attorneys, the parents, and other parties in the juvenile court case could take a more active role in monitoring the agencies' actions. Then, the enhanced progress reports could also be filed with the Social Security Administration to provide additional information not gathered through the Administration's flawed accounting system.²⁸⁵ Also, were the juvenile court orders submitted to the Social Security Administration, the additional information could aid the Administration in tracking the status of the beneficiaries.²⁸⁶ Such information, for example, could assist in reducing the number of cases in which state agency payees have continued to receive Social Security benefits on behalf of children no longer in state care.²⁸⁷

D. *Realigning the Interaction Between IV-E and SSI*

Currently, IV-E benefits are considered "income based on need" to foster children and accordingly result in a dollar-for-dollar reduction in children's SSI benefits.²⁸⁸ A realignment of IV-E and SSI would help the children as well as the state foster care agencies. If IV-E benefits were no longer treated as income to the foster child but simply a federal payment to assist state foster care agencies, dually eligible children could receive the full amount of SSI benefits while the states received their needed reimbursement from the IV-E program. States would then no longer be placed in the conflict situation of picking between the two benefits based upon the states' fiscal interests rather than the best

²⁸⁴ Federal law requires review hearings for children in foster care at least every six months. 42 U.S.C. § 675(5)(B) (2000); 45 C.F.R. § 1355.34(c)(2)(ii) (2005). Many states have enacted legislation mandating the foster care agencies to provide detailed written progress reports at the review hearings. *See, e.g.*, ARIZ. REV. STAT. § 8-516(E) (2005); KY. REV. STAT. ANN. § 620.240 (2005).

²⁸⁵ *See supra* notes 170-175 and accompanying text.

²⁸⁶ Procedures would need to be implemented in order to preserve confidentiality.

²⁸⁷ *See supra* notes 160-161, 169 and accompanying text. For additional analysis and suggestions regarding the need for improved coordination between the Social Security Administration's representative payee system and the juvenile court system, see ABA COMM. ON LEGAL PROBS. OF THE ELDERLY & CENTER ON CHILDREN AND THE LAW, ENHANCING COORDINATION OF STATE COURTS WITH THE FEDERAL REPRESENTATIVE PAYMENT PROGRAM: FINAL PROJECT REPORT (2001).

²⁸⁸ *See supra* note 150 and accompanying text.

interests of the children.²⁸⁹ Then, if a foster child's eligibility to receive SSI acted as a trigger for categorical eligibility for IV-E benefits, the simplified eligibility would result in significant cost savings to states.²⁹⁰ Also, the concerns that state agencies would no longer act as the representative payees of last resort or help children apply for SSI if the agencies cannot take the resulting benefits would be reduced.²⁹¹ State agencies would be incentivized to provide the services to ensure that all eligible children receive SSI benefits, thereby resulting in greater federal reimbursement of state costs through the categorical IV-E eligibility. The states would receive reimbursement through the IV-E benefits, leaving the SSI benefits available to better address the foster children's current needs, or as a future resource to help the children in their struggle for independence as they transition out of care.

E. *An Example of Legislative Progress*

Advocates in California have had recent success in promoting state legislation, Assembly Bill 1633 (AB 1633), designed to increase the number of foster children receiving Social Security benefits and to reign in agency practices regarding the use of those benefits.²⁹² The legislation, signed by the Governor on October 7, 2005, aims to increase screening of foster children to determine possible eligibility for Social Security benefits, to provide children leaving foster care with up to \$2000—the federal SSI resource limit—in conserved benefits to aid in the transition to independent living, and to better inform youth of their eligibility for benefits and the ways in which they can establish and retain eligibility after leaving foster care.²⁹³ Preferably, the specifics of the legislation would go even further to protect foster children's Social Security benefits. However, the new law is a very important step in the right direction.

AB 1633 establishes a "Foster Care Social Security and Supplemental Security Income Assistance Program" and includes

²⁸⁹ See *supra* notes 151-152 and accompanying text.

²⁹⁰ The Pew Commission on Children in Foster Care provide other important recommendations, including "de-linking" IV-E eligibility so that federal foster care assistance is provided to assist states in caring for *all* children in foster care. PEW COMMISSION ON CHILDREN IN FOSTER CARE, FOSTERING THE FUTURE: SAFETY, PERMANENCE AND WELL-BEING FOR CHILDREN IN FOSTER CARE 23-24 (2004), available at <http://pewfostercare.org/research/docs/FinalReport.pdf>.

²⁹¹ See *supra* notes 103-104, 120-121 and accompanying text.

²⁹² See Press Release, National Center for Youth Law, Governor Signs National Center for Youth Law Bill to Help Foster Youth Leaving Care (Oct. 7, 2005), available at http://www.youthlaw.org/downloads/AB1633_PressRelease.doc.

²⁹³ Cal. State Assembly Bill 1633 (Oct. 7, 2005), available at http://www.leginfo.ca.gov/pub/bill/asm/ab_1601-1650/ab_1633_bill_20051007_chaptered.pdf.

clarifications of agency responsibility.²⁹⁴ For example, the legislation requires county child welfare offices to apply to be appointed as representative payee for foster children “when no other appropriate party is available to serve.”²⁹⁵ While essentially tracking existing federal regulations explaining that state agencies should be the last option for representative payees, restating this hierarchy in state statute may help to eliminate the practice of selecting the state agency as representative payee through a virtually automatic process.²⁹⁶ The state agency is also required to establish interest-bearing maintenance accounts for each child’s benefits and to establish procedures for disbursing money from the accounts. The agency is further directed that it may use benefits from the accounts “only for the following purposes: (1) For the use and benefit of the child. (2) For purposes determined by the county to be in the child’s best interest.”²⁹⁷ While it is not clear whether the language will provide any limit on the ability of the agency to use the benefits to reimburse state costs, these requirements may provide additional authority for the principle that the agency must apply individualized discretion in deciding upon the best use of benefits for each child. Moreover, the legislation includes an important clarification that the agency must adhere to federal law by placing certain back-awards of Social Security benefits into dedicated accounts, the funds in which can be used only for special needs and cannot be used for current maintenance costs (and therefore cannot be used to reimburse state foster care costs).²⁹⁸ This clarification is especially important in California, as the state agency had a past practice of by-passing the dedicated account rules.²⁹⁹

Further, AB 1633 requires the state agency to convene a workgroup of agency staff, advocates, stakeholders, and current and former foster youth.³⁰⁰ The workgroup is charged with developing best practice guidelines for county agency offices regarding foster children’s Social Security benefits.³⁰¹ The future guidelines must establish procedures for screening foster children for potential eligibility for Social Security benefits, and for assisting in the application and appeals process.³⁰² This required subject of the future guidelines is important to

²⁹⁴ *Id.* at § 4.

²⁹⁵ *Id.*

²⁹⁶ *See supra* notes 200-207 and accompanying text. There is possible limitation with the use of “party” in the requirement, and any further clarification through regulation or the “best practice guidelines” should ensure that the possible persons and organizations that can be considered as representative payees should not be limited to parties in the juvenile court proceedings.

²⁹⁷ Cal. State Assembly Bill 1633, § 4.

²⁹⁸ *Id.*

²⁹⁹ *See supra* notes 263-271 and accompanying text.

³⁰⁰ Cal. State Assembly Bill 1633, § 4.

³⁰¹ *Id.*

³⁰² *Id.*

address the policy goal of ensuring that all eligible foster children receive Social Security benefits.³⁰³ The workgroup is also charged with making recommendations “regarding the feasibility and cost-effectiveness of reserving an amount, not to exceed the federal SSI resource limit, of foster children’s social security . . . benefits in lieu of reimbursing the county and the state for care and maintenance.”³⁰⁴ The critically important stated purpose of these recommendations is to “assist[] the child in his or her transition to self-sufficient living upon leaving foster care”³⁰⁵ Ideally, the recommendations should not be limited to suggesting a reserve amount less than the “federal SSI resource limit” of \$2000, as there are multiple ways in which the benefits can be used as part of a plan for the transition to independence in which the resource limit would not apply.³⁰⁶ Also, the workgroup is to address the “feasibility and cost-effectiveness” of establishing reserve amounts so there does not appear to be a mandate for the state to follow the future recommendations.³⁰⁷ Mandatory implementation would clearly be preferred.

While the legislation could provide stronger protections for foster children’s Social Security benefits, the required workgroup recommendations, along with the other provisions in AB 1633, provide a framework for significant improvement over past agency practices. The new law provides for the deliberative policy discussions that foster children have needed, and that will hopefully serve as a model for similar discussions in other states.

CONCLUSION

The foster care system is “unquestionably broken.”³⁰⁸ The representative payee system is “fundamentally flawed.”³⁰⁹ At the convergence of these two failing systems are children with unmet needs

³⁰³ See *supra* notes 120-121 and accompanying text.

³⁰⁴ Cal. State Assembly Bill 1633, § 4.

³⁰⁵ *Id.*

³⁰⁶ See *supra* notes 140-144 and accompanying text. It is certainly possible for the workgroup recommendations to recognize such exceptions to the resource limit and include strategies to utilize those available options without contradicting the statutory language.

³⁰⁷ Cal. State Assembly Bill 1633 at § 4. However, with the workgroup including participation of directors of county child welfare offices, arguments for acceptance of the future recommendations should certainly be bolstered, even without mandatory implementation.

³⁰⁸ Press Release, Pew Comm’n on Children in Foster Care, Pew Commission on Children in Foster Care Releases Sweeping Recommendations to Overhaul Nation’s Foster Care System (May 18, 2004), <http://pewfostercare.org/docs/index.php?DocID=47>; see also Guggenheim, *supra* note 4; Ramsey, *supra* note 49; Gordon, *supra* note 97.

³⁰⁹ SOC. SEC. ADMIN., OFFICE OF THE INSPECTOR GENERAL, MONITORING REPRESENTATIVE PAYEE PERFORMANCE: MANAGEMENT AND STAFF SURVEY, A-09-96-64212, at 4 (Feb. 1997), <http://www.ssa.gov/oig/ADOBEPDF/A-09-96-64212.pdf>.

who are being used as a source of state revenue. The children's current needs are not met while in foster care, and they are not provided with services and resources necessary for a successful transition out of foster care. Rather than using the children's Social Security benefits as an opportunity to provide additional services to meet the children's current needs, or as an opportunity to conserve the funds as part of a plan for the children's transition to independence, the benefits are funneled into the coffers of the state bureaucracies. This practice is not the result of clear federal guidance or thorough policy discussions—with the exception recently initiated in California—but is simply the ad-hoc reaction of state agencies to an available source of funds. Foster children deserve better.