



Child Welfare: Social Security and Supplemental Security Income (SSI) Benefits for Children in Foster Care

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Summary

Of the more than 400,000 children in foster care on a given day, as many as 24,000 (about 6%) receive Supplemental Security Income (SSI) or other Social Security benefits. Some research suggests that a greater number of children in foster care might be eligible for SSI benefits if this assistance was sought. SSI benefits are available under Title XVI of the Social Security Act for certain disabled children from families with low incomes and minimal assets. Other Social Security benefits may be paid under Title II of the act to the children of workers who have retired, become disabled, or died.

Federal regulations require that in most cases the Social Security Administration (SSA) select and assign a representative payee—an individual, organization, or government entity—that manages SSI and Social Security payments for children, including those in foster care. Nearly all states designated as the representative payee for a foster child use the child’s benefits to support the child in foster care. In *Washington State Department of Social and Health Services v. Guardianship Estate of Keffeler* (hereafter *Keffeler*), the Supreme Court held that the process used by the state of Washington to keep the Social Security benefits received as a child’s representative payee was not prohibited by the Social Security Act. The Court also concluded that the use of funds for reimbursement for foster care services was consistent with the act’s provisions that such funds be spent for the “use and benefit of the beneficiary” and within the regulatory definition of “current maintenance” (i.e., food, clothing, shelter, medical care, and personal comfort items).

Although the *Keffeler* decision supports states’ practice of using SSI and other Social Security benefits for reimbursement of foster care, some child advocates assert that by using these benefits to reimburse the cost of foster care, the state agency denies the child beneficiaries funding that rightly belongs to them. Advocates also raise concern that child welfare agencies are often automatically assigned as the representative payee for foster children. On the other hand, child welfare agencies and advocates argue that if states were not able to use benefits to pay for a child’s foster care, they would stop screening children to determine their eligibility for these Social Security programs. They further raise the concern that if a foster child’s SSI benefits were allowed to accumulate in a savings account, the child would soon surpass the “means test” for SSI and would lose eligibility for the benefits.

Changes governing how child welfare agencies are assigned as representative payees or how they use the Social Security benefits of foster children would require congressional action. For example, Congress could permit or require states that act as representative payees to “pass through” some or all benefits to eligible foster children and those children could receive a portion of the benefits while in care and/or upon leaving care. Congress could also make changes to the selection of representative payees so that certain individuals, such as the child’s attorney, would have the opportunity to serve as the payee.

In past Congresses, legislation was introduced that would have prohibited using SSI or Title II Social Security benefits to reimburse a state for foster care maintenance payments; required state child welfare agencies to screen foster children for benefits; and for any foster child already receiving benefits, it would have also required the state to develop a plan to “conserve benefits not necessary for the immediate needs of the child” to enable the child to “achieve self-support after leaving foster care.”

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Introduction

On any given day, more than 400,000 children are in foster care due to incidents of abuse, neglect, or other reasons that prevented them from remaining with their parents.¹ Of these children and youth, as many as 24,000 (about 6%) received Supplemental Security Income (SSI) under Title XVI of the Social Security Act or another Social Security benefit (e.g., Survivors benefits) under Title II of that act. Among the children who leave foster care in a given year, some 12,000 (a little more than 4%) were receiving SSI or Survivors benefits at the time of their exit from care and about one in five of these SSI/recipients left care because of their age rather than because of placement in a permanent family (i.e., they “aged out”/ were “emancipated”).²

The Social Security Administration (SSA) may designate a government entity as the representative payee of a foster child if the child’s custodial or non-custodial parents, guardians, relatives, stepparents, or a close friend are not available to serve in that role. As the representative payee, the state (like any other representative payee) is required to manage the child’s benefits and to use the benefits for the current maintenance (food, clothing, shelter, medical care, and personal comfort items) of the child. Nearly all states use SSI and/or other Social Security benefits to pay for foster care. Thirty eight states and the District of Columbia reported on their use of these benefits in state FY2006, and these benefits totaled \$156.6 million.³

In recent years, some child welfare advocates have legally challenged the practice of using foster children’s SSI and other Social Security benefits to reimburse states for the cost of providing their foster care. The most prominent case, *Washington State Department of Social and Health Services v. Guardianship Estate of Keffeler*, reached the U.S. Supreme Court, which, in 2003, upheld this practice.⁴ Nonetheless, the *Keffeler* decision raised questions about the federal government’s role in regulating the use of Social Security and SSI payments to fund foster care, and some advocates remain concerned about the use of these benefits.

This report begins with a discussion of the foster care system and the Social Security benefits available to eligible children, including those in foster care. It then describes the role of representative payees and their responsibilities. The report provides data on the use of Social Security benefits to reimburse states for child welfare, and includes a discussion of the *Keffeler* decision. Finally, the report concludes with proposals supported by some advocates to change the current practice of using SSI and other Social Security benefits to fund foster care.

¹ U.S. Department of Health and Human Services, Administration for Children and Families, *The AFCARS Report #17, Preliminary Estimates for FY2009*, July 2010, http://www.acf.hhs.gov/programs/cb/stats_research/index.htm#afcars.

² Estimate based on the Congressional Research Service’s (CRS) analysis of data reported by 52 jurisdictions (50 states, District of Columbia, and Puerto Rico) for FY2009 to the U.S. Department of Health and Human Services (HHS) via the Adoption and Foster Care Analysis Reporting System (AFCARS, FC2009v.1).

³ Kerry DeVooght, Tiffany Allen, and Rob Geen, *Federal, State, and Local Spending to Address Child Abuse and Neglect in SFY 2006*, Child Trends, December 2008, p. 19, at http://www.childtrends.org/Files/Child_Trends-2009_02_17_FR_CWFinancePaper.pdf. State-level data were provided by Child Trends to the Congressional Research Service, January 2009. (Hereafter Kerry DeVooght, Tiffany Allen, and Rob Geen, *Federal, State, and Local Spending to Address Child Abuse and Neglect in SFY 2006*, Child Trends, December 2008.) These are the most recent data available.

⁴ *Washington State Department of Social and Health Services v. Guardianship Estate of Danny Keffeler* (hereafter, *Keffeler*, 537 U.S. 371 (2003)).

Overview of Foster Care

Children in foster care are children for whom a state (or tribe) has been given formal responsibility for a child's care and placement by a court or by a voluntary placement agreement between the state and a child's parent or legal guardian. Foster care is the round-the-clock care of a child outside the child's home and is typically necessary because of neglect or physical abuse of the child by his or her parents or, less commonly, due to child behavioral issues that make the home unsafe for the child. Children who are removed from their homes may be placed in foster family homes, institutions, or group homes by the state child welfare agency. This section discusses how state child welfare agencies use federal and state dollars to pay for children in care, and how child welfare agencies provide assistance to children likely to emancipate or "age-out" of foster care.

Federal Requirements Applicable to All Foster Care Children

The federal government has established certain requirements related to state provision of foster care that are applicable to all children in foster care. These include that a state has a written case plan detailing, among other things, where the child is placed and what services are to be provided to ensure that a permanent home is re-established for the child. Further, for each child in foster care, this plan must be reviewed on a regular basis, including a review by a judge no less often than every 12 months. For many children who enter foster care, returning to their parents is the way permanence is re-established. For some children, however, it is not safe or possible to reunite with their parents. In those cases states must work to find adoptive parents or legal guardians who can provide a permanent home and family for these children.

Title IV-E Federal Foster Care Program

Title IV-E of the Social Security Act authorizes the federal-state foster care program.⁵ Under this program, a state may seek federal funds for partial reimbursement of the room and board costs needed to support eligible children who are neglected, abused, or who, for some other reason, cannot remain in their own homes. Funding for the Title IV-E foster care program is appropriated out of the general treasury and is available on an open-ended entitlement basis. This means the federal government is obligated to reimburse states for every eligible cost made on behalf of an eligible child.

Of the more than 400,000 children in foster care in the United States on any given day of the year, a little less than half of these are estimated to be eligible for federal foster care support under Title IV-E. To be eligible for Title IV-E, a child in foster care must also (1) meet income/asset tests and family structure rules in the home from which he/she was removed;⁶ (2) have specific judicial

⁵ Throughout this report, references to titles, parts, or sections of the law refer to the Social Security Act, unless otherwise stated.

⁶ With an exception, discussed below, the income and asset tests, as well as family structure/living arrangement rules are identical to the federal/state rules that applied to the now-defunct cash aid program, Aid to Families with Dependent Children (AFDC), as they existed on July 16, 1996. Under the prior law AFDC program, states established specific AFDC income and asset rules (within some federal parameters). The federal AFDC asset limit was \$1,000; however, P.L. 106-169 raised the allowable counted asset limit to \$10,000 for purposes of determining Title IV-E eligibility. In addition to meeting the income/asset criteria in the home from which he/she was removed, a child must (continued...)

determinations made related to reasons for the removal and other aspects of his/her removal and placement; and (3) be placed in an eligible licensed setting with an eligible provider(s).

Foster Care Maintenance Payment

The state child welfare agency is required to use federal Title IV-E funds to provide a “foster care maintenance payment” to the home or institution where the eligible child is placed to provide for their care and safety. Title IV-E defines a “foster care maintenance payment” as “payments to cover the cost of (and the cost of providing) food, clothing, shelter, daily supervision, school supplies, a child’s personal incidentals, liability insurance with respect to a child, reasonable travel to the child’s home for visitation and reasonable travel for the child to remain in the school in which the child is enrolled at the time of placement.”⁷

States are allowed to determine how much the total foster care maintenance payment will be for each child, and even within states the amounts may vary considerably based on factors like the child’s age, special needs, or placement setting (e.g. home vs. institution). The portion of each eligible foster care maintenance payment that is reimbursed by the federal government is determined by the state’s Federal Medical Assistance Percentage (FMAP), which may range from 50%, in states with the highest per capita income, to a maximum of 83%, in the lowest per capita states.⁸ In FY2009, the most recent year for which these data are available, states made foster care maintenance payments on behalf of an average of 186,300 Title IV-E eligible children each month. Those payments cost about \$2.500 billion and states claimed federal reimbursement of \$1.597 billion. For FY2009 then, the average monthly maintenance payment cost per eligible foster care recipient was about \$1,244 and of this amount, the federal government reimbursed states roughly \$786 (about 63% of the total costs).⁹ This federal share of maintenance payment costs is higher than in previous years (when it stood at about 56%) because during FY2009 states received enhanced federal support for foster care maintenance payments under provisions of the American Recovery and Reinvestment Act (P.L. 111-5).¹⁰

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meet the AFDC family structure/living arrangement rules. Those rules granted eligibility primarily to children in single-parent families (parents are divorced, separated, or never-married and one spouse is not living with the child; or the parent is dead). In some cases a child in a two-parent family may be eligible (if one parent meets certain unemployment criteria).

⁷ Section 475(4)(A) of the act (42 U.S.C. § 675(4)(A)). Section 8.3B.1 of the *Child Welfare Policy Manual* of the Children’s Bureau, Administration for Children, Youth and Families (ACYF), Administration for Children and Families (ACF), Department of Health and Human Services (hereafter referred to as the *Child Welfare Policy Manual*) further discusses allowable federal foster care maintenance payment costs and is available at http://www.acf.hhs.gov/j2ee/programs/cb/laws_policies/laws/cwpm/policy_dsp.jsp?citID=46.

⁸ For more information see CRS Report RL32950, *Medicaid: The Federal Medical Assistance Percentage (FMAP)*, by Evelyne P. Baumrucker.

⁹ Based on Title IV-E expenditure claims submitted by states for FY2009 and as compiled by U.S. Department of Health and Human Services (HHS), Administration for Children and Families (ACF) as of May 2010. The number of Title IV-E eligible children includes children in Florida (statewide) and in two large counties in California (Los Angeles and Alameda). However, under waiver authority those jurisdictions receive Title IV-E funding in a lump sum and so none of their expenditures for foster care maintenance payments are reported separately or shown here. Data from those states was excluded from the calculation of average monthly maintenance payment cost, per recipient, and share of costs reimbursed by the federal government. In addition, maintenance payment costs reimbursed by child support payments are excluded from these calculations.

¹⁰ In FY2009, FY2010, and the first quarter of FY2011, the American Recovery and Reinvestment Act (P.L. 111-5) increased the annually calculated FMAP rate for Title IV-E purposes by 6.2 percentage points in all states (i.e., no state (continued...))

Other Reimbursable Costs

In addition to the maintenance payment, the Title IV-E foster care program reimburses other eligible costs that are related to case management and child placement services, and other foster care program administrative costs, including data collection. In most instances, administrative claims may only be made with regard to costs incurred on behalf of Title IV-E eligible children.¹¹ In FY2009, states spent \$4.250 billion for these broadly defined Title IV-E foster care “administrative” costs and received federal reimbursement for one-half (\$2.125 billion) of these costs. States are also permitted to claim some reimbursement for training costs related to provision of foster care (so long as they are made on behalf of eligible children). For FY2009, states made claims of \$276 million and the federal share of Title IV-E claims for those purposes was about \$207 million. Finally, a number of states receive Title IV-E support under special waiver authority that enables them to use the funds for a broader range of child welfare purposes than would otherwise be possible under the Title IV-E foster care program. For FY2009, \$700 million in Title IV-E foster care funding was distributed to certain states under child welfare waiver demonstration authority.¹²

Support for Foster Children Not Eligible for Title IV-E

Between one-fifth and one-quarter of a million children in foster care—that is, children removed from their homes and given over to the care and placement responsibility of the state—do not meet the federal Title IV-E eligibility criteria. The federal government does not explicitly require that a state make a foster care maintenance payment on behalf of these children. Practically speaking, however, placing such a child in an out-of-home setting without providing some reimbursement for the cost of that child is difficult, and in many circumstances might be considered a questionable exercise of the state’s responsibility for the child. Accordingly all states are believed to provide payments on behalf of children who are placed out of the home and under the responsibility of the state, regardless of the child’s Title IV-E eligibility status. (However, some states do pay lesser amounts to relatives who provide foster care for non-Title IV-E eligible children.)¹³ In general, maintenance payments to support foster children who are not Title IV-E eligible must be supplied by the state (or local) government.

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had an FMAP of less than 56.2%). Under the popularly titled Education jobs and Medicaid funding bill (P.L. 111-226), Congress extended this enhanced support for six months. However, the level of additional support provided is lowered during this time to an additional 3.2 percentage points for the second quarter of FY2011 and to 1.2 percentage points during the third quarter of FY2011.

¹¹ Claims for costs related to specified data collection purposes and for eligibility determination may be made without regard to Title IV-E eligibility status of children.

¹² Based on state Title IV-E foster care claims submitted for FY2009 as compiled by HHS, ACF as of May 2010. Most of this child welfare waiver funding was distributed to three states (California: \$455 million; Florida: \$161 million; and Illinois: \$56 million).

¹³ Under a 1979 U.S. Supreme Court ruling in *Miller v. Youakim* (444 U.S. 125 (1979)), states are not permitted to make a lesser foster care maintenance payment on behalf of a Title IV-E eligible child placed with a relative than the state would pay for that same child if he/she were placed with a non-relative. This rule, however, does not apply with regard to foster care children who are not eligible for Title IV-E foster care support. Under the Temporary Assistance for Needy Families (TANF) block grant, states may provide a “child-only” benefit for relatives (e.g., a grandparent) caring for a child. As long as the grant is solely for the child (no funds are provided for an adult in the household), the income and resources of the relative’s home do not need to be considered. However, TANF child-only benefits are typically less generous than foster care maintenance payments.

To offset the administrative costs (costs related to case management and child placement services, training, data collection, and other administrative costs) of providing foster care to children not eligible under Title IV-E, states may use federal funding provided under the Title IV-B Stephanie Tubbs Jones Child Welfare Services program (which received \$281 million in FY2011 funding). However, these costs for children in foster care who are not federally eligible are largely paid with non-federal (state or local) dollars, as well as some dollars from federal funding streams not solely dedicated to child welfare purposes. These include the Temporary Assistance to Needy Families (TANF) block grant, the Social Services Block Grant (SSBG), and Medicaid.¹⁴

Youth Who “Age Out” of Foster Care

Despite the effort to find a permanent home for all foster children, some children reach the age of majority (18 years of age in most states) and thus “age-out” of foster care before a new permanent home is found for them. An estimated 29,500 children “aged-out” of foster care during FY2009.¹⁵ In general, federal Title IV-E funding has generally been available for foster care youth until their 18th birthday.¹⁶ However, beginning with FY2011, states have the option to seek federal reimbursement for the cost of providing foster care to eligible youth until age 19, 20, or 21—whichever age the state selects.¹⁷ The youth must meet certain criteria to stay in care. They must be completing high school or a program leading to an equivalent credential; enrolled in an institution that provides post-secondary or vocational education; participating in a program or activity designed to promote, or remove barriers to, employment; or employed at least 80 hours per month (i.e., part-time). States may also seek reimbursement for an older youth’s foster care if the youth has a medical condition that makes him or her incapable of participating in the activity, and this incapacity is supported by regularly updated information in the youth’s case plan.

States that wish to extend care must still provide services to help foster youth make the transition to independent adulthood, and they currently receive some funds (through the Chafee Foster Care Independence Program and a related Education and Training Vouchers program, combined FY2010 funding of roughly \$185 million) to continue certain independent living services to youth after they leave foster care.¹⁸ With one exception,¹⁹ these funds may not be used for services or

¹⁴ Kerry DeVooght, Tiffany Allen, and Rob Geen, *Federal, State, and Local Spending to Address Child Abuse and Neglect in SFY 2006*, Child Trends, December 2008

¹⁵ U.S. Department of Health and Human Services, Adoption and Foster Care Analysis Reporting System (AFCARS) Report #16 (Preliminary Estimates for FY2009) (July 2010), available at http://www.acf.hhs.gov/programs/cb/stats_research/afcars/tar/report17.htm.

¹⁶ States may continue to make claims for a youth who has reached his/her 18th birthday only if the youth is still completing high school or a GED and has not reached 19 years of age. See Section 8.3A.2 of the *Child Welfare Policy Manual* available at http://www.acf.hhs.gov/j2ee/programs/cb/laws_policies/laws/cwpm/policy_dsp.jsp?citID=15.

¹⁷ As of April 2011, 12 states submitted Title IV-E plan amendments indicating that they want to exercise the option to extend foster care to youth beyond their 18th birthday. Based on correspondence with HHS, ACF, Children’s Bureau.

¹⁸ These programs are authorized at Section 477 of the act (42 U.S.C. § 677). For further information, see CRS Report RL34499, *Youth Transitioning from Foster Care: Background and Federal Programs*, by Adrienne L. Fernandes-Alcantara.

¹⁹ States may continue to provide an Education and Training Voucher to a youth already using the program, so long as the youth is successfully enrolled in a post-secondary education or training program, until the youth’s 23rd birthday. Education and Training Vouchers may be valued at up to \$5,000/year, and these funds may be used to defray any room or board expense that would be considered a “cost of attendance” under Section 472 of the Higher Education Act (20 U.S.C. § 1087II). In addition, states may spend no more than 30% of their general Chafee funding for room and board costs of youth who have reached their 18th birthday and have not passed their 21st birthday.

activities that assist youth once they have reached their 21st birthday and states are limited in the amount of these funds that may be spent for room and board costs.

The next section of the report discusses Social Security and SSI benefits available to children and explains the process for designating representative payees for children. It goes on to discuss the extent to which eligible children can receive both federal foster care payments and Social Security or SSI benefits.

Social Security and Supplemental Security Income (SSI) Benefits for Children

Titles II and XVI of the Social Security Act provide two types of benefits for children, including those in foster care, who meet certain qualifications. Social Security benefits (formally called Old-Age, Survivors, and Disability Insurance benefits) are authorized under Title II of the act. Social Security benefits may be paid to the children of workers who have retired, become disabled, or died.²⁰ These benefits are paid out of the Social Security Trust Funds. SSI benefits are authorized under Title XVI of the Social Security Act and are available for certain children with disabilities if their families have low incomes and minimal assets. SSI benefits are paid out of general revenues.²¹ Most states supplement the monthly SSI benefit with state or territorial funds.

Table 1 shows the number of children who receive SSI and other Social Security benefits, as well as the total amount of monthly federal and state supplementary benefits paid to these children.

Table 1. All Children Receiving Social Security and SSI Benefits, March 2010

Program	Number of Children (under age 18)	Total Amount of Monthly Benefits (\$; includes federal benefits and federally administered state supplements)
Social Security ^a	3,222,157	1,612,833,310
Supplemental Security Income (SSI)	1,257,045	794,225,000

Source: The Congressional Research Service (CRS). Data on Social Security benefits taken from the website of the Social Security Administration, Office of the Chief Actuary at <http://www.ssa.gov/OACT/ProgData/benefits.html>. Data on SSI benefits taken from Social Security Administration, *SSI Monthly Statistics, March 2010*, Washington, DC, April 2010, Tables 2 and 6.

Note: Numbers may be rounded.

a. Includes children of retired, deceased, or disabled workers only.

²⁰ For more information, see the Social Security Administration (SSA) publication, *Benefits for Children*, available on the website of SSA at <http://www.ssa.gov/pubs/10085.pdf>; and CRS Report RS22294, *Social Security Survivors Benefits*, by Scott Szymendera.

²¹ For more information, see the SSA publication, *Benefits for Children with Disabilities*, available on the website of SSA at <http://www.ssa.gov/pubs/10026.pdf>; and CRS Report RL32279, *Primer on Disability Benefits: Social Security Disability Insurance (SSDI) and Supplemental Security Income (SSI)*, by Umar Moulta-Ali.

Social Security Benefits for Children (Title II)

A child may be eligible for Social Security benefits if he or she is the biological child, adopted child, or dependent stepchild of a person eligible for certain Social Security benefits. In some cases, dependent grandchildren of persons eligible for Social Security benefits may also be eligible for benefits. In order to qualify for benefits, the child must be unmarried and have a parent that meets one of the following conditions:

- the parent is retired or disabled and is entitled to either Social Security old age (i.e., retirement) or disability benefits; or
- the parent is deceased and was fully insured for Social Security benefits based on work history at the time of death.

Social Security benefits for children are intended to replace the household income lost due to retirement, disability, or death that might otherwise have been spent to provide for dependent children unable to care for themselves or earn their own money through work.

Benefit Amounts for Children

Children who qualify for Social Security benefits may receive up to 50% of a living parent's full retirement or disability benefit or 75% of the deceased parent's Social Security benefit. Benefits for children are subject to the family maximum rules, which limit the total amount of benefits available to any one family to between 150% and 180% of the parent's full benefit amount. If the total amount of all family benefits exceeds this maximum amount, then the benefit of each person, except the parent, is reduced proportionately.

When Children's Benefits Stop

An eligible child may receive Social Security benefits until the child reaches the age of 18, or 19 if the child is still in high school. Benefits may continue during adulthood if the child has a disability that began before he or she turned 22. Children's benefits terminate upon the marriage of the child at any age.

SSI Benefits for Children (Title XVI)

A child who is blind or has a severe disability may be eligible to receive SSI benefits regardless of the work history or benefit status of his or her parents.²² In order to qualify for SSI benefits, the child must meet the statutory definition of blindness or disability, and the income and resources of the family must fall below limits set in Title XVI of the act.

A child is considered blind for the purposes of SSI eligibility if the child has central visual acuity of 20/200 or less in his or her better eye with the use of a correcting lens. A child is considered

²² SSI benefits are not available to residents of Puerto Rico, Guam, or the United States Virgin Islands. Adult residents of these jurisdictions are eligible to receive federal benefits from their commonwealth or territorial government under provisions of Titles I, X, XIV and XVI of the Social Security Act. These benefits are administered by the U.S. Department of Health and Human Services.

disabled for the purposes of SSI eligibility if that child meets each of the following three conditions:

- the child must have a physical or mental impairment that results in “marked and severe functional limitations”;²³
- the child must have a condition that has lasted or is expected to last at least 12 months or result in death; and
- the child must either earn less than the substantial gainful activity amount (\$1,000 per month for 2011) or not work.

Foster care payments provided under Title IV-E of the Social Security Act are not considered earned income (i.e., income earned in exchange for work) and therefore the state (which makes the eligibility determination related to disability) does not count this income for purposes of the disability determination.

Benefit Amounts for Children

If a child is considered disabled for purposes of SSI eligibility, SSA then makes a determination whether the child meets the other eligibility factors, including their total countable (earned and unearned) income. SSI benefits are designed to provide a minimum level of monthly income to disabled persons and families with disabled children who have limited means and limited other options for financial assistance. A child must fall below the income and resources limits established by the SSI program. Since children rarely have income or resources of their own, the Social Security Administration (SSA) uses a process called “deeming” to assign part of the value of the income and resources of the parents to disabled children for the purposes of determining SSI eligibility. In order to qualify for SSI benefits, a child’s countable deemed income and assets must fall below program guidelines.²⁴

Children living in foster care do not have the income of the family they are living with deemed to them and this income is not counted against them when determining whether they are eligible for SSI. However, IV-E payments are considered “income based on need” for the child receiving foster care.²⁵ Income based on need is considered unearned income, and reduces the amount of a child’s monthly SSI benefit on a dollar for dollar basis. Further, income based on need is not subject to the standard \$20 dollar income exclusion.²⁶

SSI income limits vary by state and type of income. The countable resource limit for SSI eligibility is \$2,000 for individuals and \$3,000 for couples. These limits are set by law, are not

²³ 42 U.S.C. § 1382c(a)(3)(C)(I).

²⁴ The rules for deeming of income and resources are complex and can vary by state. For more information see the SSA publication, *Understanding Supplemental Security Income (SSI)*, available on the website of SSA at <http://www.socialsecurity.gov/ssi/spotlights/spot-deeming.htm>.

²⁵ Income based on need, as defined by 20 C.F.R. § 416.1124(c)(12), is assistance that is provided under a program which uses income as a factor of eligibility; and which is funded wholly or partially by the federal government or a non-governmental entity.

²⁶ In most cases, the first \$20 of any earned or unearned income received by a person in a month is not counted for the purposes of determining SSI eligibility or the amount of an SSI benefit. However, per Section 1612(b)(2)(A) of the Social Security Act, this \$20 income exclusion does not apply to income based on need.

indexed for inflation, and have been at their current levels since 1989.²⁷ In most cases, the resources of the family that a child lives with are counted as the child's resources when determining his or her SSI eligibility. However, children living in foster care are considered to be living on their own and the resources and income of the household they are living in are not considered when determining their SSI eligibility. Not all resources are counted for the purposes of determining SSI eligibility. The Social Security Act and federal regulations provide various types of resource exclusions that allow individuals or couples to own certain assets, such as a primary residence and automobile, and not have them counted against their \$2,000 or \$3,000 resource limit.²⁸

The SSI resource rules make it difficult for beneficiaries to accumulate assets while receiving benefits. Children who receive SSI benefits cannot build up savings for use during adulthood or to pay for post-secondary education expenses without jeopardizing their eligibility for SSI benefits. Like other children who receive SSI benefits, foster children beneficiaries cannot retain eligibility for those benefits if they build up a pool of money in excess of \$2,000 to assist in their transition into adulthood and independent living.²⁹

Dedicated Accounts for Children³⁰

A child SSI beneficiary is sometimes owed back SSI benefits, often due to delays in the disability determination process. When a child is owed back benefits of more than six months, his or her representative payee, discussed below, is required to place those benefits in a dedicated account at a financial institution. The representative payee may use the money from the dedicated account for the medical care; education and training needs of the child; personal needs assistance, special equipment, and housing modifications; or therapy for the child based on his or her disability.³¹ Money from a dedicated account cannot be used for the daily expenses, food, clothing, or shelter of the child. Money in a dedicated account for children is not counted as a resource for the purposes of determining the child's SSI eligibility.

When Children's Benefits Stop

Once a child in the SSI program reaches age 18, his or her case is automatically reviewed by SSA to determine if he or she meets the SSI disability standard for adults, which is based on an inability to perform work rather than functional limitations. Redeterminations at age 18 are required by the Personal Responsibility and Work Opportunity Reconciliation Act of 1996.³² Over the period from 1998 through 2005, 42% of SSI child recipients had their benefits cease because

²⁷ 42 U.S.C. § 1382(a).

²⁸ The SSI resource exclusions can be found in Section 1613 of the act (42 USC § 1382b) and in the Code of Federal Regulations at 20 CFR 416.1210-416.1239.

²⁹ Under Section 472(a) of the Social Security Act, foster children who receive Title IV-E foster care maintenance payments and do not receive SSI may accumulate up to \$10,000 in assets. See page 25 for further discussion of this provision.

³⁰ The law does not establish these accounts for children who receive back benefits under Title II.

³¹ Other items, approved in advance by the SSA, may be purchased using money from a dedicated account.

³² PRWORA, P.L. 104-193.

of an unfavorable redetermination at age 18.³³ At age 18, the income and resources of parents are no longer considered available (i.e., deemed) to a child.

Representative Payees in the Social Security System

Although most Social Security and SSI payments are made directly from SSA to the beneficiary, the Social Security Act allows the agency to make payments to a representative payee acting on the beneficiary's behalf. This representative payee may be an individual, organization, or a state/local agency working on behalf of the beneficiary and must meet strict guidelines established in the act.³⁴ Individuals acting as representative payees may not charge a fee for their services. However, organizations serving in this capacity can charge a small fee to cover administrative costs associated with handling payments.

Over 8.2 million Social Security and SSI beneficiaries (of any age) receive payments through representative payees each month. The use of representative payees is more prevalent in the SSI program as 38% of SSI beneficiaries have a representative payee while only 10% of Social Security beneficiaries receive their benefits through a representative payee.³⁵

Representative Payees for Children Receiving Benefits

Federal regulations state that in most cases SSA will assign a representative payee for children who receive Social Security or SSI benefits.³⁶ Exceptions may be made and payments may be given directly to the child if he or she is nearing age 18, serving in the military, supporting himself or herself, or is a parent. In addition, children under 18 who receive Social Security disability benefits because of their own work history and disability may receive benefits without a representative payee.³⁷

Order of Selection of Representative Payees

It is the responsibility of SSA to select the person or organization who will serve as a representative payee. The regulations provide for an order of selection to guide the agency in selecting a payee.³⁸ The order of selection is just a guide and in all cases the best interests of the

³³ Jeffrey Hemmeter and Elaine Gilby, "The Age-18 Redetermination and Postredetermination Participation in SSI," *Social Security Bulletin*, vol. 69, no. 4 (2009), pp. 1-25. An earlier study reported a cessation rate of 52.4% for a cohort of redetermination cases through 2008 (David Axter, William Halloran, and Hugh G. Berry, et al., "The Precarious Safety Net: Supplemental Security Income and Age 18 Redeterminations," *Focus on Autism and Other Developmental Disabilities*, vol. 14, no. 4 (Winter 1999), pp. 194-203). This higher cessation rate among an earlier cohort may be due to changes to the definition of disability for children mandated by the Supreme Court's decision in *Sullivan v. Zebley* [493 U.S. 591 (1990)], which resulted in an overall increase in children entering the SSI program.

³⁴ These guidelines to ensure compliance, as well as procedures used by SSA, are found in Sections 205(j) and 1632(a)(2) of the act (42 U.S.C. §§ 405(j) and 1383(a)(2)).

³⁵ Data are for December 2009. Social Security Administration, *Annual Statistical Supplement to the Social Security Bulletin, 2010*, Washington, DC, February, 2011, Tables 5.L1 and 7.E4.

³⁶ 20 C.F.R. §§ 404.2010 and 416.610.

³⁷ Persons under the age of 24 only need six work credits earned in the previous three years to be eligible for SSDI.

³⁸ This order of selection differs for adults, adults with drug or alcohol problems, and children. The complete orders of selection can be found at 20 C.F.R. §§ 404.2021 and 416.621.

beneficiary are to be considered when assigning a representative payee. The order of selection for children receiving benefits:

- First: A natural or adoptive parent who has custody, or a legal guardian.
- Second: A natural or adoptive parent who does not have custody, but who is contributing to the support of the child and is demonstrating a strong concern for the well being of the child.
- Third: A natural or adoptive parent who does not have custody, and who is not contributing to the support of the child but is demonstrating a strong concern for the well being of the child.
- Fourth: A relative or stepparent who has custody of the child.
- Fifth: A relative or stepparent who does not have custody, but who is contributing to the support of the child and is demonstrating a strong concern for the well being of the child.
- Sixth: A relative or close friend of the child who does not have custody but is demonstrating concern for the well being of the child.
- Seventh: An authorized social services agency or custodial institution.

As shown in **Table 2**, a child’s natural or adoptive parents act as representative payees in nearly 82% of SSI cases. Grandparents and other relatives act as payees for children in nearly 14% of cases while social service agencies act as representative payees for children in the SSI program in 1.4% of cases.

Table 2. Types of Representative Payees for Children in the SSI Program, December 2009

Type of Payee	Number of SSI Children	Percent of All SSI Children
No payee	1,067	0.1
Natural or adoptive parents	985,520	82.1
Spouse	25	0.0
Natural, adoptive, or stepchild	466	0.0
Grandparent	76,894	6.4
Other relative	89,592	7.5
Non-mental institution	6,462	0.5
Mental institution	2,186	0.2
Financial organization	194	0.0
Social services agency	17,373	1.4
Public official	1,259	0.1
Other	18,750	1.6
Total	1,199,788	100.0

Source: Table prepared by Congressional Research Service (CRS) based on Social Security Administration, *SSI Annual Statistical Report, 2009*, Washington, DC, September 2010, Table 7.

Notes: Numbers may not add up due to rounding. The SSA does not define each type of representative payee. Data is for recipients of federally administered payments.

The SSA's Program Operations Manual System (POMS), which provides internal guidance for SSA employees, specifies that when a social service agency is awarded custody of a child who is removed from the custody of a parent, the agency retains custody regardless of whether the child is placed in a foster home or group living household.³⁹ The POMS advises that the social service agency should not be routinely appointed as representative payee, and that SSA employees should consider a number of factors in assigning a payee:

- how the social services agency became responsible for the child;
- whether the child is expected to return to the custody of a parent, and if so, when;
- the source of the child's support;
- who has physical custody of the child;
- the nature and extent of the child welfare agency's care;
- whether the agency has temporary or permanent custody;
- whether parental rights have been terminated; and
- whether there are concerned relatives and friends.

Responsibilities of Representative Payees

The responsibilities of child welfare agencies serving as representative payees for child beneficiaries are the same as those of other types of payees. The representative payees' major statutory and regulatory obligations involve how the beneficiaries' benefits are managed.

Statutory Responsibilities

Sections 205(j)(1)(A) and 1632(a)(2)(A)(I) of the Social Security Act specify that SSA may assign a representative payee to a beneficiary if the agency determines the "interest of the individual" beneficiary would be served by such an assignment. The act further specifies that the payment to the representative payee must be used for the "use and benefit" of the beneficiary.⁴⁰

Regulatory Responsibilities

Federal regulations require that a representative payee "use the payments he or she receives only for the use and benefit of the beneficiary in a manner and for the purposes he or she determines ... to be in the best interests of the beneficiary."⁴¹ The regulations then define the concept of "use and benefit of the beneficiary" by stating:

³⁹ POMS GN 00502.159.

⁴⁰ 42 U.S.C. §§ 405(j)(1)(A) and 1383(a)(2)(A)(I).

⁴¹ 20 C.F.R. §§ 404.235(a) and 416.635(a).

We 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. Current maintenance includes costs incurred in obtaining food, shelter, clothing, medical care, and personal comfort items.⁴²

Special Rules Concerning Creditors and Debts

Sections 205(j)(2)(C)(i)(III) and 1631(a)(2)(B)(iii)(III) of the act prohibit creditors who provide goods and services to the beneficiary from serving as that beneficiary's representative payee.⁴³ However, Sections 205(j)(2)(C)(iii)(III) and 1631(a)(2)(B)(v)(III) of the act make an exception to this provision if the creditor is "a facility that is licensed or certified as a care facility under the law of a State or a political subdivision of a State."⁴⁴

The regulations also include rules regarding the payment of debts to creditors and specify that

A payee may not be required to use benefit payments to satisfy a debt of the beneficiary, if the debt arose prior to the first month for which payments are certified to a payee. If the debt arose prior to this time, a payee may satisfy it only if the current and reasonably foreseeable needs of the beneficiary are met.⁴⁵

Children in Foster Care Receiving or Potentially Eligible for SSI

In December 2009, 1.2 million children, or 1.6% of the total child population in the United States, received SSI.⁴⁶ To be eligible for SSI, a child must have a physical or mental impairment that results in "marked and severe functional limitations," the limitations are expected to last at least 12 months or result in death, and the child's family is low income and has minimal assets. Just under two-thirds of all children who received an SSI benefit were diagnosed with a "mental disorder" (53.3% with an "other" mental disorder and 12.7% with "mental retardation").⁴⁷ Nearly all of the remaining recipients were diagnosed with serious health conditions, such as a disorder of the nervous system and sense organs or congenital abnormalities, among other conditions.

Compared to children in the general population, children in foster care have greater physical and mental health and developmental needs. Researchers studying a nationally representative sample of children placed in out of home care (following an investigation for child abuse or neglect) estimated that more than 20% had physical or mental health conditions that—given the severity

⁴² 20 C.F.R. §§ 404.2040(a) and 416.640(a).

⁴³ 42 U.S.C. §§ 405(j)(2)(C)(i)(III) and 1383(a)(2)(B)(iii)(III).

⁴⁴ 42 U.S.C. §§ 405(j)(2)(C)(iii)(III) and 1383(a)(2)(B)(v)(III).

⁴⁵ 20 C.F.R. §§ 404.2040(d) and 416.640(d).

⁴⁶ Social Security Administration, *SSI Annual Statistical Report, 2009*, Washington, DC, September 2010, Table 7 In 2009, there were and estimated 74,548,215 children under age 18. U.S. Census data from 2009 are available at http://factfinder.census.gov/servlet/DTTable?_bm=y&-state=dt&-ds_name=PEP_2009_EST&-CONTEXT=dt&-mt_name=PEP_2009_EST_G2009_T008_2009&-redoLog=false&-geo_id=01000US&-format=&-_lang=en.

⁴⁷ Social Security Administration, *SSI Annual Statistical Report, 2009*, Washington, DC, September 2010, Table 19. For 2.3% of the children, their disability was unknown. The primary function of the SSA's disability determination process is to determine an individual's eligibility for benefits, and not make any specific diagnosis. For research purposes, the SSA groups SSI applicants and recipients based on its own diagnostic classifications which are loosely based on the *International Classification of Diseases: 9th revision, Clinical Modification*, 4th ed., more commonly referred to as the ICD-9 codes.

of the condition and the length of the condition or risk of death—would likely make them eligible for SSI. Among children who had been in out of home care for at least one year this percentage rose slightly to 21%. The researchers based these findings on direct assessments of children and standardized questionnaires administered to caregivers about the child’s social skills, behavior, or health status. Slightly more than half of the children in out of home care the researchers assumed would be eligible (i.e., the 20% that had the physical or mental health condition), scored significantly lower than the mean across these domains. Because of the survey methodology, the researchers deemed their estimate of SSI eligibility among children in out of home care as “modest,”⁴⁸ however, it is considerably higher than the estimated 6% of children in foster care who are reported as receiving SSI (or other Social Security benefits).⁴⁹

The study also compared eligibility for SSI across age, race and ethnicity, locality, and gender.⁵⁰ Of the sample of children in out of home care, the estimated rate of SSI eligibility was significantly higher among those ages six through 10 (compared to children younger than age six and older than age 10) and those in rural settings (compared to urban settings), but there was no significant differences on the basis of race, ethnicity, or gender. Among children who were in care for at least one year, age was not a significant factor in predicting possible SSI eligibility; however, a much greater share of black children (compared to white children) and boys would likely qualify, and a slightly higher share of children in urban settings would likely qualify.

Given their health and mental health needs—and the fact that most foster children would be expected to meet the income and resources requirements for SSI receipt—it is possible that at least some foster children who would be eligible for SSI are not receiving benefits. This may be attributable to two factors. First, not all children in foster care may have been screened for SSI eligibility. Among the 25 states that responded to a 2006 American Public Human Services Association (APHSA) survey of state child welfare agencies regarding their SSI screening practices, 18 reported “routinely” screening foster children for SSI eligibility while the remaining seven indicated that screening might be done but was not routine.⁵¹ An agency may also decide

⁴⁸ National Survey of Child and Adolescent Well-Being. “Estimates of Supplemental Security Income Eligibility for Children in out of Home Placements.” Research Brief No. 12. Available online at http://www.acf.hhs.gov/programs/opre/abuse_neglect/nscaw/reports/est_suppl/est_suppl.pdf. See also U.S. Department of Health and Human Services, Administration for Children and Families, National Survey of Child and Adolescent Well-being (NSCAW), *One Year in Foster Care, Wave 1 Data Analysis Report*, (Washington: GPO 2003), pp. 13, 20. See also Susan dos Reis, et al, “Mental Health Services for Youths in Foster Care and Disabled Youths.” *American Journal of Public Health*, July 2001, pp.1094-1099; and Susan Kools and Christine Kennedy, “Foster Child Health and Development: Implications for Primary Care,” *Pediatric Nursing*, January-February 2003, pp. 39-46.

⁴⁹ Under the Adoption Foster Care Analysis and Reporting System (AFCARS), which is the administrative data source for numbers of children in foster care receiving these benefits, no distinction is made between children receiving SSI benefits and those receiving other Social Security benefits. Most of the children reported by states as receiving such benefits are believed to be SSI recipients. However, the actual number of children receiving SSI versus other Social Security benefits is not known. In addition, little is known about the number of children in foster care who may be eligible for other Social Security benefits. The report, *Federal, State, and Local Spending to Address Child Abuse and Neglect in SFY 2006*, also does not differentiate between state child welfare agency use of SSI benefits versus other Social Security benefits.

⁵⁰ National Survey of Child and Adolescent Well-Being. “Estimates of Supplemental Security Income Eligibility for Children in out of Home Placements.” Research Brief No. 12. Available online at http://www.acf.hhs.gov/programs/opre/abuse_neglect/nscaw/reports/est_suppl/est_suppl.pdf. See also U.S. Department of Health and Human Services, Administration for Children and Families, National Survey of Child and Adolescent Well-being (NSCAW), *One Year in Foster Care, Wave 1 Data Analysis Report*, (Washington: GPO 2003).

⁵¹ Informal survey conducted by the American Public Human Services Association (APHSA) in 2006. Data provided to CRS in personal communications. Most states said that the procedures used to make applications were applicable on a statewide (as opposed to county level) basis and, at least nine states said that the child’s expected length of stay in (continued...)

not to pursue SSI eligibility for a given foster child, if the agency determines receipt of a Title IV-E federal foster care benefit better serves the child. On the other hand, SSI eligibility, once determined, may be maintained into adulthood (with re-determinations) where eligibility for a foster care maintenance payment ceases generally at, or soon after, a youth's 18th birthday (in most states).⁵²

Concurrent Receipt of Benefits

The *Child Welfare Policy Manual*, which discusses official guidance (including law, regulations, and policies) on the Title IV-E foster care program, states that there is no prohibition against claiming both an SSI benefit and a Title IV-E supported foster care maintenance payment.⁵³ However, the policy manual notes that the amount of the foster care maintenance payment received will reduce a child's SSI benefit, dollar for dollar. Thus if a child's total monthly foster care maintenance payment is \$500—and that maintenance payment is in part paid with federal Title IV-E dollars—then the child's SSI benefit would be reduced by \$500.⁵⁴

If the amount of a child's foster care maintenance payment under Title IV-E exceeds the amount of a child's SSI benefit, then his or her benefit is reduced to zero and his or her SSI benefits are suspended for that month. For 2011, the federal SSI benefit is \$674 per month before any income-related reductions.⁵⁵ However, a majority of the states add a small supplement to this monthly benefit in some cases. Thus, a child's SSI benefits would be suspended when his or her Title IV-E foster care maintenance payment exceeds the amount of his or her federal SSI benefit plus any state supplement. An SSI recipient who has been suspended may begin receiving payments again if his or her countable income is reduced. However, after 12 consecutive months of suspension, a person is removed from the SSI program and must reapply to become eligible for benefits.

For children in foster care who do not qualify for Title IV-E foster care support, states must find other sources of funding to pay for that child. Most non-Title IV-E eligible children in foster care must be supported with state or local dollars. Such payments generally do not reduce an SSI-eligible foster child's federal SSI benefit because they are not counted as income.⁵⁶ Typically, however, a state, acting as the child's representative payee, is believed to use SSI or Social Security benefits to provide a foster care maintenance payment to the child (or to reimburse itself for that payment).

(...continued)

foster care was a factor in the procedures.

⁵² As noted earlier, beginning with FY2011, states are given the option to provide federally supported (Title IV-E) foster care maintenance payments to eligible youth who remain in foster care until their 19th, 20th or 21st birthday as the state elects).

⁵³ The *Child Welfare Policy Manual* is issued by the U.S. Department of Health and Human Services, Administration for Children and Families.

⁵⁴ Section 8.4D - Question 1 of the *Child Welfare Policy Manual*. At the same time, a state may make Title IV-E administrative claims on behalf of a child who is Title IV-E eligible but who is also SSI-eligible and receives only an SSI benefit and this federal program support will *not* reduce the SSI benefit. (See Question 3 of the same Section.)

⁵⁵ The federal SSI benefit amount is adjusted annually using the Social Security Cost of Living Allowance (COLA), which is based on changes in the Consumer Price Index for Urban Wage Earners and Clerical Workers (CPI-W). There was no COLA for 2010 or 2011. The current SSI federal benefit is \$674 per month for an individual and \$1,011 per month for an eligible married couple. Additional information on the SSI federal benefit rate can be found on the website of the SSA Office of the Chief Actuary at <http://www.ssa.gov/OACT/COLA/SSI.html>.

⁵⁶ POMS (Program Operations Manual System) SI 00830.410.

Addressing the question about whether to apply for either or both Title IV-E and SSI benefits, the *Child Welfare Policy Manual* counsels careful review of benefits available under each program “so that an informed choice can be made in the child’s best interest.” It adds that “to achieve this goal, Title IV-E agencies should exchange information regarding eligibility requirements and benefits with local Social Security district offices and establish formal procedures to refer clients and their representative to the local Social Security district office for consultation and/or application when appropriate.”⁵⁷ The dollar value of the respective benefit is often a consideration.⁵⁸ At the same time, even if the interaction of Title IV-E and SSI payments appears to negate the benefit of applying for SSI, establishing SSI eligibility for a child whose permanency plan is to reunite with his or her parents may help those parents (or other family members) better meet the child’s needs when this goal is reached. Further, if the child was receiving benefits, SSA would automatically determine whether the child is eligible to continue to receive these benefits upon reaching age 18, and therefore the child would not need to reapply.

The eligibility for and amount of Title II benefits are not affected by receipt of foster care. Social Security benefits are paid under Title II to the children of workers who have retired, become disabled, or died. Their eligibility is determined by their parents’ participation in the workforce. Because both SSI and Title IV-E foster care have income- and resources-related eligibility criteria, children who are recipients of Title II Social Security benefits may be less likely to qualify for either of the means-tested programs.

Use of SSI and Other Social Security Benefits by Child Welfare Agencies

Most, if not all, states use Social Security and/or SSI benefits of children in foster care as a source of federal funds for their foster care programs. Exactly how much child welfare funding is derived from these benefits is uncertain. The Casey Child Welfare Financing Survey, conducted by Child Trends, found that for state fiscal year (SFY) 2006, 37 states and the District of Columbia were able to provide some data on the amount of SSI and Title II benefits (including Survivors and Social Security Disability (SSDI) benefits)⁵⁹ used by the state child welfare agency.⁶⁰ These states represented roughly 61% of the FY2006 foster care caseload.⁶¹

Among the states that provided data to Child Trends, Social Security benefits (SSI and Title II) made up \$156.6 million in funding for child welfare. **Table 3** shows the reported data by the reporting states. (Assuming all states spent these funds at roughly the same rate as those that reported data, total use of Social Security benefits by state child welfare agencies would be roughly \$258 million.⁶²)

⁵⁷ Section 8.4D - Question 2, *Child Welfare Policy Manual*.

⁵⁸ Informal survey conducted by the American Public Human Services Association (APHSA) in 2006. Data provided to CRS in personal communications.

⁵⁹ SSDI and Survivors benefits are based on a disabled or deceased individual’s past average monthly earnings. Benefits are provided to dependents (such as spouses or children), subject to certain maximum family benefit limits.

⁶⁰ Kerry DeVooght, Tiffany Allen, and Rob Geen, *Federal, State, and Local Spending to Address Child Abuse and Neglect in SFY 2006*, Child Trends, December 2008, p. 19.

⁶¹ The total foster care caseload data includes the 50 states and the District of Columbia for FY2006 as provided by the U.S. Department of Health and Human Services (HHS) to the Congressional Research Service, February 2009.

⁶² This estimate was made by the Congressional Research Service by calculating the average annual dollar amount per (continued...)

Although not insignificant, spending of Social Security benefits on child welfare represents a relatively small share of the \$25.7 billion in total spending reported by child welfare agencies for SFY2006 (roughly half of these expended funds, \$12.4 billion, were federal dollars). On average, among the state child welfare agencies that reported data on the use of Social Security benefits, these benefits represented 1.26% of the federal dollars spent and less than 1% (0.61%) of their total spending.

Table 3. Social Security (SSI and Title II) Benefits as Funding Stream for Child Welfare Spending, SFY2006

State	Social Security Spending (\$)	Benefits Used as Share of State Child Welfare Agencies—	
		Total Spending (%)	Federal Spending (%)
Alabama	\$5,500,000	1.84	3.33
Alaska	818,500	0.76	1.78
Arizona	890,000	0.20	0.35
Arkansas	2,661,478	2.60	4.25
Colorado	5,157,020	1.14	2.32
Connecticut	906,137	0.13	0.23
District of Columbia	750,000	0.28	0.75
Delaware	408,880	0.77	3.33
Florida	10,146,518	1.01	2.03
Hawaii	262,777	0.23	0.49
Illinois	18,733,102	1.51	3.11
Iowa	3,627,848	1.04	1.91
Kansas	3,572,042	1.24	4.64
Kentucky	6,768,992	1.64	4.03
Louisiana	3,093,027	1.39	2.34
Maine	1,808,278	1.49	4.89
Massachusetts	6,687,044	0.93	2.60
Michigan	7,504,132	0.90	1.50
Missouri	7,462,631	1.81	3.35
Montana	2,000,000	3.24	6.43
Nebraska	3,997,857	2.17	4.32
Nevada	627,587	0.62	1.15
New Hampshire	1,245,869	1.53	2.58

(...continued)

child in foster care that was spent from Social Security benefits among states reporting data (\$514) and applying that dollar amount to the number of children in foster care from non-reporting states (excluding Puerto Rico).

State	Social Security Spending (\$)	Benefits Used as Share of State Child Welfare Agencies—	
		Total Spending (%)	Federal Spending (%)
New Jersey	1,490,000	0.21	0.59
New Mexico	1,584,061	2.17 ^a	2.90 ^a
Oklahoma	4,487,425	1.81	3.26
Oregon	4,997,717	1.22	1.97
Pennsylvania	13,737,700	0.85	3.53
Rhode Island	1,857,103	0.89	2.14
South Dakota	773,042	1.37	2.45
Tennessee	5,178,585	0.99	2.19
Texas	9,962,658	0.98 ^a	1.53 ^a
Utah	768,271	0.56	1.24
Vermont	1,376,948	1.58	2.71
Washington	10,591,342	2.20	4.53
West Virginia	1,872,703	1.01	2.14
Wisconsin	3,037,596	0.92	1.79
Wyoming	288,679	1.07	2.60
Total	156,633,548	0.61	1.26

Source: Congressional Research Service (CRS) table based on revised data provided by Child Trends from the Casey Child Welfare Financing Survey, which examined state child welfare agency spending for SFY2006.

Note: The following 13 states indicated that data on the use of Social Security benefits were unavailable: California, Georgia, Idaho, Indiana, Maryland, Minnesota, Mississippi, New York, North Carolina, North Dakota, Ohio, South Carolina, and Virginia.

- a. New Mexico and Texas reported child support dollars in their response for Social Security benefits. These dollars are included as part of the total calculation, as reported by Child Trends.

Keffeler Decision

In recent years, some child welfare advocates have legally challenged states' practice of using foster children's SSI and Title II benefits to reimburse the cost of providing foster care to those children. The most prominent case, *Washington State Department of Social and Health Services v. Guardianship Estate of Keffeler*, reached the U.S. Supreme Court in 2002. The Supreme Court ruled unanimously (in 2003) that the state of Washington could, as the representative payee for a foster child receiving Social Security or SSI benefits, use the child's benefits to reimburse itself for the cost of that child's foster care.⁶³ This case reached the U.S. Supreme Court on the appeal

⁶³ *Keffeler*, 537 U.S. 371 (2003).

of the state of Washington, which was seeking to overturn the previous ruling of the Washington State Supreme Court (discussed below).

The Decision of the Washington State Supreme Court

In 2001, the Washington State Supreme Court ruled in *Guardianship Estate of Danny Keffeler v. Department of Social and Health Services* that the state of Washington's service as a representative payee for children in foster care violated the anti-attachment clause of the Social Security Act.⁶⁴ In its decision, the Washington State Supreme Court stated that "the facial logic of DSHS's reimbursement scheme demonstrates a creditor relationship, a relationship involving creditor-type acts, vis-à-vis foster children and their SSA benefits." The Washington State Supreme Court also cited, among other cases, the decision of the Ninth Circuit in *Brinkman v. Rahm* that prohibited the state of Washington from deducting Social Security payments as reimbursement for the costs associated with the care of persons with mental illnesses involuntarily confined to state hospitals.⁶⁵

While the Washington State Supreme Court did not directly rule on whether the actions of the Washington Department of Social and Health Services as a representative payee violated other sections of the Social Security Act, it did discuss whether the state was acting in the best interest of the child entitled to benefits. The Washington State Supreme Court stated that a child in foster care is "better off with any payee other than the state because the state must provide foster care under state law regardless of whether it receives reimbursement" and that "we seriously doubt using the SSA benefits to reimburse the state for its public assistance expenditure is in all cases, or even some, 'in the best interests of the beneficiary.'"

The Opinion of the Supreme Court

Justice Souter wrote the unanimous opinion of the U.S. Supreme Court, which sided with the Washington State Department of Social and Health Services and overturned the decision of the Washington State Supreme Court. The U.S. Supreme Court held that the state could not be a foster child's creditor since the foster child did not have an obligation to pay for his or her foster care.⁶⁶ Instead, the question raised by the case, the Court stated, was "whether the department's efforts to become a representative payee, or its use of respondents' Social Security benefits when it acts in that capacity amounts to employing an 'execution, levy, attachment, garnishment or other legal process,'" to gain control of the children's Social Security benefits.⁶⁷ On the question of this alleged violation of what is commonly called the "anti-attachment clause"—the Court held that neither the process used by Washington State to become a representative payee for children in foster care who were recipients of SSI or Social Security benefits, nor its use of those benefits to reimburse the cost of their foster care, violated the anti-attachment clause.⁶⁸ The Court further

⁶⁴ 145 Wn.2d.1 (2001). The anti-attachment clause is at Section 207(a) of the act (42 U.S.C. § 407(a)). This section of the act is commonly referred to as the anti-attachment clause because it protects Social Security benefits from "execution, levy, attachment, garnishment, or other legal process."

⁶⁵ 878 F.2d. 263 (9th Cir. 1989).

⁶⁶ *Keffeler*, 537 U.S. 371 (2003), pp. 8-10.

⁶⁷ *Ibid.*, p. 9, which cites Section 207(a) of the act (42 U.S.C. § 407(a)). This section of the act is commonly referred to as the anti-attachment clause.

⁶⁸ *Keffeler*, 537 U.S. 371 (2003), pp. 12-13.

noted that the use of funds to reimburse the Washington State Department of Social and Health Services for foster care was consistent with the regulatory requirement that such funds be spent for the “use and benefit of the beneficiary” and with the regulatory definition of “current maintenance” that includes “costs incurred in obtaining food, shelter, clothing, medical care, and personal comfort items.”⁶⁹

The U.S. Supreme Court further asserted that the “real basis” of the respondent’s objection in the case (and the previous Washington State Supreme Court’s holding in the case) was the “view that allowing a state agency to reimburse itself for the costs of foster care is antithetical to the best interest of the beneficiary foster child.”⁷⁰ Responding to this issue, the Court first relied on the settled principle of administrative law that an open-ended and potentially vague term, such as “best interest” is “highly susceptible to administrative interpretation subject to judicial deference.”⁷¹ Thus, it noted that SSA has the authority to determine, through regulation, how it will interpret this part of the law. The Court then concluded that SSA’s regulations on this issue are consistent with the basic objectives of the law authorizing the SSI and Social Security programs. Specifically, those are to provide a minimum level of income, and the basic objective of the Social Security program is to provide income required for ordinary and necessary living expenses.⁷² The Social Security Commissioner, the Court wrote, “has decided 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.”⁷³

Should SSI and Other Social Security Benefits Be Used to Pay for Foster Care?

The *Keffeler* decision affirmed the right of states (under current law) to both act as representative payees for children in foster care who are recipients of federal Social Security and SSI benefits and further to use those benefits to reimburse the cost of foster care. State child welfare agencies and many child welfare advocates applauded the decision; other advocates remain concerned that the practice of states using foster children’s SSI or Social Security benefits to pay for foster care does not serve these children’s best interests.⁷⁴

Benefits Should Not be Used for Foster Care

Some legal advocates argue that the state agency is more interested in gaining federal funds than it is in ensuring that a child’s benefits serve his/her best interests, and that a child’s benefits are

⁶⁹ *Ibid.*, pp. 13 -14, referencing, 20 C.F.R. § 404.2040 and 20 C.F.R. §416.640(a).

⁷⁰ *Ibid.*, p. 16.

⁷¹ *Ibid.*, p. 17.

⁷² As provided in federal regulations, the stated purpose of the SSI program is to “assure a minimum level of income for people who are age 65 or over, or who are blind or disabled and who do not have sufficient income and resources to maintain a standard of living at the established Federal minimum income level” (20 C.F.R. § 416.110). The stated purpose of the Social Security benefit programs is to provide beneficiaries with “income required for ordinary and necessary living expenses” (20 C.F.R § 404.508(a)).

⁷³ *Keffeler*, 537 U.S. 371 (2003), p. 17.

⁷⁴ For a summary of the arguments made by the opposing sides in this case see Elizabeth Oppenheim, “Funding for Children in Foster Care: The Keffeler Case,” *Policy & Practice of Public Human Services*, March 2003, pp. 22-28.

not necessarily used to benefit just the child but may simply defray child welfare or foster care expenses for the state generally.⁷⁵ They point out that states lack a deliberative process to assess the individual needs of a child. As evidence of this, at least a few states and localities do not keep the funds for these children separate from other funds that are available to the child welfare agency.⁷⁶

Proponents of reserving Social Security benefits for children in care further argue that even the practice of applying the benefits solely for the beneficiaries' foster care costs amounts to asking children to pay for their own stay in foster care, while other children in care (including those with assets or income other than Social Security or those who receive Social Security benefits but have a representative payee other than the child welfare agency) are not required to repay the costs.⁷⁷ Additionally some advocates are concerned that child welfare agencies may be automatically assigned as the representative payee for children in foster care, even though (under SSA's own regulations) the agencies should be the least preferred representative payee. Related to this concern, some advocates suggest that SSA does not perform adequate investigations to determine whether a more suitable payee is available,⁷⁸ and agencies that have received a poor review by SSA or fail to submit payee accounting reports to SSA continue to serve as payees.⁷⁹

Rather than paying for a child's foster care, these advocates argue that any SSI and other Social Security benefits that a child is eligible to receive should be invested or otherwise saved for the child's future use (e.g., education, housing). Youth who leave foster care without a permanent home, typically at age 18, often have a difficult time securing housing and income sufficient to shelter and support themselves. SSI-eligible foster care youth who exit foster care would arguably have an even more difficult time and thus may need additional resources that SSI provides (albeit some youth may continue to be eligible for SSI at age 18 and beyond).⁸⁰ Providing benefits to eligible youth upon leaving care could ease the transition to adulthood for these youth at a time

⁷⁵ Patrick Gardner, "Keffeler v DSHS: Picking the Pockets of America's Neediest Children," *Youth Law News*, July-September, 2002, p. 12. (Hereafter "Picking the Pockets.") In its *Keffeler* opinion, the U.S. Supreme Court noted that Keffeler charged the state with "failing to exercise discretion in how it uses benefits, periodically 'sweeping' beneficiaries' accounts to pay for past care and 'double dipping' by using benefits to reimburse the state for costs previously recouped from other sources." These charges, the Court noted were "far afield" of the issue on which it had agreed to hear the case. It noted, however, that these alleged improper uses of payments were concerns that could be brought to the Commissioner on Social Security "who bears responsibility for overseeing representative payees or elsewhere as appropriate." Subsequently, the Washington State Supreme Court, in *Guardianship Estate of Danny Keffeler v. The Department of Social and Health Services* (151 Wn. 2d. 331 (2004)), a case that looked at certain constitutional claims made by *Keffeler*, concurred with the U.S. Supreme Court.

⁷⁶ First Star and Children's Advocacy Institute, University of San Diego School of Law, *The Fleecing of Foster Children: How We Confiscate Their Assets and Undermine Their Financial Security*, 2011, pp. 16-18, <http://www.cachildlaw.org/Fleecing.htm>. (Hereafter First Star and Children's Advocacy Institute, University of San Diego School of Law, *The Fleecing of Foster Children*.)

⁷⁷ Daniel L. Hatcher, "Foster Care Children Paying for Foster Care," *Cardozo Law Review*, vol. 27, no. 4 (2006), p. 1835. (Hereafter Hatcher, "Foster Care Children Paying for Foster Care"). Lawyers on behalf of Keffeler argued that differences between foster children with private representative payees and those with agency representative payees amounted to a violation of the Constitution's equal protection clause. Those claims were addressed in the 2004 decision, by the Washington Supreme Court (145 Wn. 331). The court disagreed noting that the duties of the representative payees were the same in any case.

⁷⁸ Jim Moye, "Get Your Hands Out of Their Pockets: The Case Against State Seizure of Foster Children's Social Security Benefits," *Georgetown Journal on Poverty Law & Policy*, Winter 2003, p. 5. See also "Foster Care Children Paying for Foster Care," p. 1814.

⁷⁹ *Ibid.*, p. 1814.

⁸⁰ "Picking the Pockets," p. 10.

when they are expected to become financially independent. According to advocates, the resource limits for SSI eligibility of \$2,000 may discourage youth leaving foster care from accumulating income and assets to assist in this transition.⁸¹

Benefits Should Be Used for Foster Care

State child welfare agencies and many child welfare advocates, however, assert that SSI and Title II funds are critical for child welfare agencies operating on tight budgets and that use these benefits to pay for the cost of current maintenance, is consistent with the federal purpose for providing those funds. (Further, the use of these child-specific funds to reimburse foster care costs is consistent with federal policy for use of child support paid on behalf of the child by the non-custodial parent(s), as further discussed below.) Some child welfare advocates argue that states have expended benefits for allowable purposes in good faith, just as a parent serving as a representative payee would. Thus, states should not be held to a different standard than parents or other representative payees.⁸² In addition, state child welfare agencies and advocates argue that returning benefits to children that were already used to pay for their maintenance could cost states up to hundreds of millions of dollars.⁸³ In *Keffeler*, the Supreme Court cited the *Amici Curiae* briefs filed by the Children's Defense Fund (along with Catholic Charities USA, the Child Welfare League of America, and the Alliance for Children and Families), the State of Florida (along with 38 additional states, Puerto Rico and the territories of American Samoa and the Virgin Islands), and the United States which claimed that without the ability to use Social Security and SSI benefits to reimburse the costs of foster care, states would be discouraged from serving as representative payees because of the administrative costs involved.⁸⁴

Some child welfare advocates express the concern that if states were not able to use SSI or Title II benefits to pay for a child's foster care room and board, then states would simply stop screening children to determine their eligibility for these programs. Screenings by child welfare staff can help to determine an individual child's needs and to secure extra benefits and services not normally available in foster care, such as housing modifications.⁸⁵ Eliminating these screenings would do a disservice to potentially qualified children, these advocates argue, because a child's eligibility for SSI or another Title II Social Security benefit may extend beyond his/her stay in foster care, and the benefit could provide crucial support for the child outside the system. (For instance, the benefit could offset the cost of therapeutic care to the families of children who leave care due to adoption or reunification.)⁸⁶ The *Keffeler* Court relied on this argument in its decision, asserting that absent this state assistance, "many eligible children would either obtain no Social Security benefits, or need some very good luck to get them."⁸⁷

⁸¹ Hatcher, "Foster Care Children Paying for Foster Care," p. 1846; and First Star and Children's Advocacy Institute, University of San Diego School of Law, *The Fleecing of Foster Children*, p. 12.

⁸² Brief by Children's Defense Fund, et. al, as Amici Curiae Supporting Petitioners (August 2, 2002) p. 14 in *Washington State Department of Social and Health Services v. Guardianship Estate of Danny Keffeler*, (No. 01-1420). (Hereafter referenced as "Brief by Children's Defense Fund et al.")

⁸³ Brief by the State of Florida et al. as Amici Curiae Supporting Petitioners (August 2, 2002), p. 7 in *Washington State Department of Social and Health Services v. Guardianship Estate of Danny Keffeler* 537 U.S. 371 (2003) (No. 01-1420).

⁸⁴ *Keffeler*, 537 U.S. 371 (2003), p. 18.

⁸⁵ Brief by Children's Defense Fund, et al., pp. 20-24.

⁸⁶ *Ibid.*, p. 22.

⁸⁷ *Keffeler*, 537 U.S. 371 (2003), p. 19.

In addition, these advocates argue that if child SSI beneficiaries were given all of their benefits while in foster care, they might accumulate assets in the form of savings and could soon find themselves above the maximum SSI resource level of \$2,000.⁸⁸ This might also be the case if another type of representative payee preserved some of the child's benefits for non-maintenance expenses (not paid for out of a dedicated account), including the future costs associated with the transition to adulthood (i.e., rent deposit, vocational training, educational expenses, etc.).

Possible Legislative Changes

The decision of the Supreme Court in 2003 upholds states' use of SSI and Social Security benefits for reimbursement of current maintenance for children in foster care. Federally enforceable changes to this practice would require congressional action.⁸⁹

Policy changes might include screening children in foster care to determine eligibility for SSI or Title II benefits, passing through some of the benefits to foster children who receive such benefits, making best effort attempts to find alternative representative payees, increasing the asset limit for youth who receive SSI, and enabling youth in foster care to apply for SSI benefits before aging out of care.

Screening Children in Foster Care

Policymakers could consider whether to require states to automatically screen children in care. As discussed above, 18 of 25 states reported, as part of a 2006 survey, that they routinely screen children in care for SSI benefits. Screening for benefits can be useful for state child welfare agencies if, in fact, states seek to use those funds for reimbursing the cost of providing foster care. Children in foster care may also gain from screenings because presumably, the child welfare agency would go on to help the child apply for benefits and appeal any decisions regarding the benefits. For children who receive benefits, they would continue to receive the benefits even after leaving care (assuming they are under the age of 18), and upon reaching the age of 18, SSA would automatically review their cases to determine if they meet the SSI disability standard for adults. Receipt of SSI can also be beneficial because most recipients are automatically eligible for certain other federal (and state) benefits, including Medicaid.

A bill in the 111th Congress, the Foster Children Self-Support Act (H.R. 6192), would have required the state child welfare agency, as a condition of receiving federal foster care funding, to develop and implement procedures to screen all children in care (regardless of their eligibility for Title IV-E foster care) for SSI benefits or other Social Security benefits under Title II and to assist such children in applying for the benefits. The bill would have directed the agency to ensure that the screenings occur for each child who remained in foster care for six to eight months and after "any material change" in the child's circumstances that could affect their eligibility for such

⁸⁸ Brief by the counties of California—Los Angeles, San Bernardino, Santa Clara, Contra Costa, Alameda, Modoc, Napa, Nevada, Riverside, San Diego, Tulare—and the California State Association of Counties, as Amici Curiae Supporting Petitioners, pp. 16-18 in *Washington State Department of Social and Health Services v. Guardianship Estate of Danny Keffeler* 537 U.S. 371 (2003) (No. 01-1420).

⁸⁹ The Social Security Protection Act (P.L. 108-203) provided additional safeguards for Social Security and SSI beneficiaries with representative payees and enhanced program protections. However, the legislation did not address selection of representative payees for foster children.

benefits. The agency would have been responsible for appealing decisions about the benefits and applying to become the representative payee if no other suitable candidate was available (H.R. 6192 did not address how the state would make this determination, although the bill would have required the Government Accountability Office to study how the state implemented procedures to identify other candidates, among other related procedures).

Requiring such screenings could impose a cost burden on states (particularly for those that do not already routinely screen children in care) and the federal government. The costs for screening children who are not IV-E eligible would be borne entirely by the state. Because the screenings would be required under Title IV-E, state child welfare agencies could seek open-ended federal reimbursement for any costs they incur for screening IV-E eligible children for SSI or other Social Security Act benefits. In either case, however, actual eligibility determinations would be made by the federal Social Security Administration. If the screenings resulted in more children applying for benefits, SSA may need to designate more staff for eligibility determinations.

Passing Through Benefits

Congress could permit or require states that act as representative payees to “pass through” some or all of the SSI and Title II benefits to eligible foster children and those children could receive a portion of the benefits while in care and/or upon leaving care. Such a proposal might include a maximum amount of money available to eligible youth. For example, a maximum level could be established at \$2,000 because children receiving SSI are not permitted under current law to accumulate more than that amount.

A California law (A.B. 1633) requires the state to consider the feasibility and cost-effectiveness of reserving an amount up to \$2,000 to assist youth as they “age out” of foster care.⁹⁰ The law requires that counties serving as representative payees establish a no-cost, interest-bearing maintenance account, with the county maintaining an itemized current account of all income and expense items. (This type of account is not required under federal law, and some California counties established such an account, or a similar type of account, prior to the passage of AB 1633.) The counties must establish procedures for dispensing money from the account to pay for expenditures that are used by, and for the benefit of, the child, and for purposes determined by the county to be in the child’s best interests.⁹¹ Procedures must also be established for disbursing any balance when the youth is released from care.

The Foster Children Self-Support Act (H.R. 6192; 111th Congress) would have required states, for any foster child receiving an SSI or other Social Security Act benefit (under Title II), to develop a plan specific to the needs of that child and that would conserve benefits not necessary for the immediate needs of the child to enable the child to “achieve self-support after leaving foster care.” The plan would have needed to be developed and implemented in collaboration with the child (on an age-appropriate basis), and the child’s social worker, representative payee, and attorney/guardian ad litem. The benefits would be placed in an account that is similar to one required for children who receive SSI benefits if there are any past-due monthly benefits or in an

⁹⁰ 2005 Cal. Stat. 641. A copy of the legislation (AB 1633) can be found on the website of the California Assembly at http://www.leginfo.ca.gov/pub/05-06/bill/asm/ab_1601-1650/ab_1633_bill_20051007_chaptered.pdf.

⁹¹ The definition of “best interests” is consistent with the Social Security Act’s regulations that define the best interest of the beneficiary payments as those used for current maintenance, or the costs incurred in obtaining food, shelter, clothing, medical care and personal comfort items. See 20 C.F.R. §§ 416.635 and 416.640.

account established by the state under the Chafee Foster Care Independence Program.⁹² The benefits would be reserved (except for certain expenses) for specific purposes when the child reaches age 18 or ceases to be under the responsibility of the state, whichever comes later. Any assets set aside could be accessible to the child for expenses related to maintaining housing, pursuing education opportunities, purchasing a vehicle, and paying for employment-related costs, medical or health-related expenses, or expenses “reasonably expected” to assist the child in becoming self sufficient.

Temporary Assistance for Needy Families (TANF)

The Temporary Assistance for Needy Families (TANF) program provides an example of how federal legislation could make more Social Security and SSI benefits available to beneficiaries in foster care. Under current law, as amended by the Child Support Provision of the Deficit Reduction Act of 2005 (P.L. 109-171), families that participate in TANF must assign their child support rights to the state. Child support payments collected by the state (from non-custodial parents) on behalf of these TANF families are used by the state and federal governments as partial reimbursement for the welfare benefits that are provided to the family in much the same way as Social Security and SSI benefits are used to reimburse state governments for child welfare spending.⁹³ With respect to TANF families, states may choose to *pass through* some of their share of child support payments collected on behalf of the families (up to \$100 per family per month or \$200 per month if the family has two or more children) to the family. Currently, 24 states provide some sort of pass through of child support payments for families receiving TANF.⁹⁴ This type of federal initiative, used for Social Security and SSI benefits, could result in children in foster care receiving part of those benefits instead of the benefits being kept by the states as reimbursement for foster care expenses. However, such a program would result in costs to the states.

Child Support Enforcement

Child Support Enforcement is a federal-state program, authorized under Title IV-D of the Social Security Act, which collects payments from non-custodial parents for the support of their children.⁹⁵ Unlike TANF, the program requires states to use the payments only to reimburse the cost of providing foster care to children who receive the payments. However, a proposal by the

⁹² This program provides services to assist youth likely to age out of foster care in making the transition from care. It does not specifically authorize the state to establish accounts for eligible youth; however, a bill in the 110th Congress, the Foster Youth Financial Security Act (H.R. 6193) would have established individual development accounts for eligible youth.

⁹³ The practice of passing through child support payments to families was originally enacted under the Aid to Families with Dependent Children (AFDC) program in 1975 (P.L. 93-647). The purpose of this practice was to fill the gap between the needs standard established by a state (or the amount the state determined that a family of a certain size would need to subsist) and the actual amount needed to subsist, if necessary.

⁹⁴ CRS Report RL34105, *The Financial Impact of Child Support on TANF Families: Simulation for Selected States*, by Carmen Solomon-Fears and Gene Falk; and Center for Law and Social Policy, “State Child Support Pass-Through Policies,” by Michelle Vinson and Vicki Turetsky, June 12, 2009.

⁹⁵ The CSE program provides seven major services on behalf of children: (1) parent location, (2) paternity establishment, (3) establishment of child support orders, (4) review and modification of child support orders, (5) collection of child support payments, (6) distribution of child support payments, and (7) establishment and enforcement of medical support. For more information, see CRS Report RS22380, *Child Support Enforcement: Program Basics*, by Carmen Solomon-Fears.

Obama Administration, discussed below, would require states to pass the benefits through to eligible children in foster care.

States are required under the Title IV-E foster care program to, “where appropriate,” take all steps necessary to ensure that the rights to any child support payments of a foster child who receives a Title IV-E foster care maintenance payment are assigned to the state.⁹⁶ Rules for the distribution of any child support collected on behalf of a child eligible for Title IV-E foster care maintenance payments are included in Title IV-D.⁹⁷ Any support payments received must first be used to reimburse the state for the cost of a foster care maintenance payment. However, the state must also use that money to reimburse the federal government for its share of the foster care payment. If the monthly child support payment exceeds the amount needed to reimburse the monthly foster care maintenance payment, then the additional funds are to be paid to the state child welfare agency, which must use the funds “in the manner it determines will serve the best interests of the child.”⁹⁸ The statute suggests that this might include “setting aside amounts for the child’s future needs or making all or part of the amount available to the person responsible for meeting the child’s daily needs to be used for the child’s benefit.” Third, if any amounts collected exceed these first two required distributions, the remaining amount is again to be distributed to the state for reimbursement (to the state and the federal government) of any past foster care maintenance payments (or Temporary Assistance for Needy Families support) provided on the child’s behalf.

The Office of Child Support Enforcement, within the Department of Health and Human Services’ Administration for Children and Families, reported that for FY2008 (the most recent year data are available), \$108 million in child support was collected on behalf of children in foster care who receive Title IV-E foster care maintenance payments (as well as children who formerly received Title IV-E foster care maintenance payments). Separately, state child welfare agencies reported that they returned \$48 million of child support collected to the federal government in FY2008 as reimbursement for Title IV-E foster care maintenance payments.⁹⁹

As part of the FY2012 budget, the Obama Administration seeks legislation that would require states to use any child support payments received for children in foster care in the best interest of the children rather than as general revenue for the state or to reimburse the federal government for a part of its cost of providing this support. Because it would end federal “cost recovery” of Title IV-E foster care maintenance payments, the proposal is estimated to increase the federal cost of the Title IV-E foster care program by \$370 million over the 10-year budget period (FY2013-FY2022). The Administration proposes to make this legislative change effective in conjunction with several other proposals that intend to ensure that a greater share of all child support payments made by noncustodial parents reach the children on whose behalf they are paid and to encourage fathers who are noncustodial parents to take a more active part in their children’s lives.

⁹⁶ Section 471(a)(17). Among other reasons, a state may determine that seeking child support payments is not “appropriate” for a foster child, if it might impede efforts to reunite the child with the parent. See *Child Welfare Policy Manual*, Section 8.4C, Question 2.

⁹⁷ Section 457(e). See, also, 45 CFR 302.52.

⁹⁸ Section 457(e)(2) provides that a state “may” use the funds in this manner. However federal regulations (45 CFR 302.52(b)(2)) provide that the funds “must” be used in this manner.

⁹⁹ Table 12 of HHS, Administration for Children and Families, Office of Child Support Enforcement, Child Support Enforcement FY2008 Annual Report to Congress reports total distributed child support for children receiving (or formerly receiving) Title IV-E foster care maintenance payments; the amount of these funds returned to federal government is based on FY2008 Title IV-E foster care maintenance payment claims as compiled by HHS, Administration for Children and Families.

The proposed changes with regard to the Title IV-E foster care program would become effective in FY2013.

Identifying Alternative Representative Payees

Some child advocates have proposed changes to the selection of representative payees because of the perceived automatic process by which child welfare agencies are named as the payees for foster care children. First, they suggest that the current practice of providing advance notice in the selection of a representative payee for a child should be clarified because improved notice can assist SSA's efforts to name a payee other than the state.¹⁰⁰ Social Security regulations currently do not list the child or the child's attorney or *guardian ad litem* (an attorney appointed by the judge on behalf of the child) as recipients of the advance notice. According to advocates, the notice should be sent to individual(s) who represent the child in judicial proceedings, as well as the child's parents, current and past foster care or relative caretakers, other parties in the juvenile proceedings, and the juvenile court judge.¹⁰¹ The attorney or GAL could help to identify others who might better serve the child's interest, inform the child welfare agency and court about the child's needs, and inform the child about the benefits, including the redetermination process for benefits upon reaching adulthood and the process for becoming his or her own payee (and assist children in navigating these processes).¹⁰² (H.R. 6192 in the 111th Congress would have required SSA to send this notice to a foster child's attorney or guardian ad litem.)

Second, alternative payees not listed in the SSA preference list¹⁰³ could be considered as possible payees. These alternative payees might include volunteer representative payee programs developed by non-profit organizations and local government agencies for adult beneficiaries requiring the service.¹⁰⁴ Court Appointed Special Advocates (CASA) could also serve as payees.¹⁰⁵ CASA volunteers are sworn in by local court systems to provide advocacy services on behalf of abused and neglected children. These volunteers may be in the optimal position to report to the court the child's needs because they advocate for the child regardless of changes in their placement goal (i.e., family preservation, family reunification, or adoption) or where the child is placed (i.e., kin and/or foster families). California law requires counties to apply to become the representative payee if no other appropriate party is available to serve while the child is in foster care, although "appropriate party" includes only those individuals currently permitted by SSA. Similarly, the Foster Children Self-Support Act (H.R. 6192) from the 111th Congress would have required states to apply to become the foster child's representative payee "if there is no other suitable candidate available." Although the California law does not provide any further requirement to the counties or the state about the procedures for notifying interested parties about the representative payee selection process, H.R. 6192 would have required notification to a foster child's attorney or guardian ad litem.

¹⁰⁰ *Hearing to Review Proposals to Improve Child Protective Services before the House Committee on Ways and Means, Subcommittee on Human Resources*, 109th Cong., 2nd sess., 2006 (statement of Daniel L. Hatcher).

¹⁰¹ "Foster Care Children Paying for Foster Care," p. 1845.

¹⁰² First Star and Children's Advocacy Institute, University of San Diego School of Law, *The Fleecing of Foster Children*, pp. 12-13.

¹⁰³ See 20 C.F.R. §§ 404.2021 and 416.521.

¹⁰⁴ Hatcher, "Foster Care Children Paying for Foster Care," p. 1845.

¹⁰⁵ For additional information about the CASA Program, see CRS Report RL32976, *Child Welfare: Programs Authorized by the Victims of Child Abuse Act of 1990*, by Emilie Stoltzfus.

Proposals to expand the list of representative payees or to provide advance notice of selecting a representative payee to additional parties may burden SSA. Auditing individuals or non-profit organizations that serve as representative payees—rather than a large organization such as a state child welfare agency—could also strain the administrative capacity of the agency.

Changing Asset Levels

Individuals who receive SSI may not accumulate more than \$2,000 in resources. This resource limit level has been fixed since 1989, and is not indexed for inflation.¹⁰⁶ Some child advocates argue that increasing the asset level for children receiving SSI would aid those youth as they left foster care.¹⁰⁷ For children aging out of foster care, this additional support could be useful. A study of young adults ages 23 and 24 who aged out of foster care in three states found that they generally earned far less than their peers—\$12,064 compared to \$20,349, in 2008 dollars.¹⁰⁸ (They were also far less likely to have graduated from high school or to have completed one or more years of college than young adults in the general population.)

On average, parents give their children an estimated \$38,000—or about \$2,200 a year (in 2001 dollars)—between the ages of 18 and 34 to supplement wages, pay for college tuition, and help with housing costs, among other types of financial assistance.¹⁰⁹ Parents also provide support by allowing their adult children to live with them. The study of former foster youth in three states suggests that foster youth are less likely to receive this same level of material support from their families.¹¹⁰ Just slightly over one-third (35.5%) of the foster care alumni received money from a family member in the past year (although comparable data were not reported for youth generally). Compared to their peers generally, foster care alumni were less likely to live with their parents or relatives (21.1% vs. 32.8%).

As proposed, H.R. 6192 from the 111th Congress would have exempted assets accumulated by a foster child (under an approved plan) from the SSI eligibility determination. Under current HHS guidance (as of April 6, 2010) the \$10,000 resource limit related to Title IV-E foster care eligibility is tied only to a determination of resources when a child *enters* foster care. No redetermination of resources is necessary while a child is in care. Therefore, any accumulation of assets during the stay in foster care should not affect eligibility.¹¹¹ Previously, both the initial and continuing eligibility for these payments was based on whether the children’s original families would qualify for AFDC, as it was in effect on July 16, 1996. Under those rules, children could not remain eligible for Title IV-E services if they accumulated assets of more than \$1,000. However, in 1999 (P.L. 106-169) Congress raised that resource limit to \$10,000. In its report recommending this change, the House Ways and Means Committee noted

¹⁰⁶ 42 U.S.C. § 1382(a).

¹⁰⁷ Hatcher, “Foster Care Children Paying for Foster Care,” p. 1846.

¹⁰⁸ Mark E. Courtney et al., *Midwest Evaluation of the Adult Functioning of Former Foster Youth: Outcomes at Ages 23 and 24*, Chapin Hall Center for Children, University of Chicago, 2010.

¹⁰⁹ Bob Schoeni and Karen Ross, “Material Assistance Received from Families During the Transition to Adulthood.” In Richard A. Settersten, Jr., Frank F. Furstenburg, Jr., and Rubén Rumbaut, eds., *On the Frontier of Adulthood: Theory, Research, and Public Policy*, pp. 404-405. Chicago: University of Chicago Press, 2005.

¹¹⁰ *Ibid*, pp. 12-13.

¹¹¹ See HHS, ACF,ACYF, Children’s Bureau’s *Child Welfare Policy Manual*, Question 24, Section 8.4A. New policy source date is April 6, 2010.

Children in foster care have a special need for resources. Unlike children reared in families, these children often have little or no support from relatives.... The Committee believes children in foster care should be allowed to accumulate a much higher level of assets to prepare for the day when they must support themselves. Thus, we are increasing the asset limit to \$10,000.¹¹²

By contrast, under the SSI program individuals are generally no longer eligible once they attain \$2,000 in countable resources. However, two current initiatives allow eligible recipients to accumulate assets above that limit. These are the SSI initiative Plans for Achieving Self Support (PASS) and Individual Development Accounts (IDAs). Either one of these might be modified to include provisions that target recipients in foster care.

Plans for Achieving Self-Support (PASS)

A Plan for Achieving Self-Support (PASS) is an individual plan for employment designed by an SSI beneficiary with the assistance of a state vocational rehabilitation agency, disability service organization or Ticket to Work Employment Network and approved by the SSA. A PASS must include a specific goal for employment, such as a specific job type desired or a plan for setting up a small business and must include a time line for achieving the employment goal. The PASS must also include a list and cost of any goods, such as assistive devices or job-specific tools, or services, such as schooling, that will be needed by the beneficiary to achieve his or her goal.

Resources included in an approved PASS are not counted against the SSI resource limits. There is no limit to the amount of resources that can be excluded as part of a PASS and these resources can include money set aside to pay for elements of the PASS such as training or items purchased as part of the PASS such as assistive technology devices.

Individual Development Accounts (IDAs)

Individual Development Accounts (IDAs) are matched savings accounts that allow families and persons with low incomes to set aside money for education, the purchase of a home, or the creation of a business.¹¹³ An individual may place money from his or her earnings into an IDA and have that amount of money matched by the state with funds from the state's Temporary Assistance for Needy Families (TANF) block grant or by certain state and local government agencies or non-profit organizations.¹¹⁴

Money saved in a qualified IDA, including the state contribution and any interest earned, is not counted as a resource for the purposes of determining SSI eligibility.¹¹⁵ There is no limit to the

¹¹² U.S. Congress, House Committee on Ways and Means, *Foster Care Independence Act of 1999*, report to accompany H.R. 1802, 106th Cong., 1st Sess., H.Rept. 106-182, (Washington: GPO 1999), p. 29.

¹¹³ For additional information on IDAs, see CRS Report RS22185, *Individual Development Accounts (IDAs): Background and Current Legislation for Federal Grant Programs to Help Low-Income Families Save*, by Gene Falk.

¹¹⁴ Under the provisions of the Assets for Independence Act, P.L. 105-285, non-profit organizations and state, local, or tribal governments may compete for grants to fund IDAs for low-income households. IDAs funded through this program are often called Demonstration Project IDAs while IDAs funded through the TANF program are often referred to as TANF IDAs.

¹¹⁵ There are other types of IDAs that are targeted to specific groups, including refugees and persons living in assisted housing. However, only TANF and Demonstration Project IDAs are exempt from the SSI resource rules.

amount of money in an IDA that can be excluded from the SSI resource calculation. However, there are limits to the amounts states and other entities can contribute to IDAs.¹¹⁶

Assisting Youth “Aging Out” Apply for SSI

Youth receiving a Title IV-E payment that exceeds the SSI payment and who are soon emancipating from foster care may wish to apply for SSI so that they can begin receiving the SSI payment upon transitioning from care. However, this is complicated by the rules for applying for SSI. SSA will not grant eligibility for SSI benefits until the month before the month that an individual is eligible to receive the SSI payment (SSA determines the SSI benefit amount for a month based on the income from an earlier month).¹¹⁷ Therefore, applications for these young people would be denied as long as their receipt of IV-E exceeds the SSI payment. To become eligible, the applicants would be required to temporarily stop receiving IV-E payments.¹¹⁸ During this time, states would need to cover the cost of foster care with state (and possibly other federal) dollars. Alternatively, these youth could continue to receive the IV-E payments and wait to apply for SSI when they emancipate and are no longer eligible for federal foster care. However, they may not receive SSI benefits for several months after emancipating. According to SSA, the agency generally processes an application for SSI in three to five months.¹¹⁹ Although benefits are retroactive, without having the benefits immediately upon aging out, emancipating youth could be vulnerable to going without housing and basic provisions.

To ensure that foster youth have access to SSI benefits upon aging out, Congress could require SSA to process applications for these youth even if they are receiving IV-E payments that exceed SSI payments. SSI benefits would then be available beginning in the month that the young person ages out of foster care. Alternatively, Congress could require states to assist youth in applying for SSI upon emancipating. For example, in California the state has provided guidance to counties on helping youth apply for SSI.¹²⁰ This guidance suggests that counties can help youth with the SSI application process, including appeals; involve a responsible adult in the youth’s application process to provide guidance to the youth; make arrangements with local legal service agencies to provide counsel to the youth on SSI matters; and refer the youth to appropriate adult social services.

¹¹⁶ For additional information on these limits, see CRS Report RS22185, *Individual Development Accounts (IDAs): Background and Current Legislation for Federal Grant Programs to Help Low-Income Families Save*, by Gene Falk.

¹¹⁷ 20 C.F.R. 416.203(b).

¹¹⁸ SSA requires that applicants meet all the factors of eligibility in one month during the life of the application without having to file a new application. POMS SI 00601.009; POMS SI 00601.010. Therefore, these children could not receive IV-E benefits for at least one month.

¹¹⁹ SSA, *Disability Benefits*, August 2010, <http://www.ssa.gov/pubs/10029.html>.

¹²⁰ California Department of Social Services, “Best Practice Guidelines for Screening and Providing for Foster Children with Disabilities,” All County Letter No. 07-10, February 28, 2007, <http://www.dss.cahwnet.gov/lettersnotices/entres/getinfo/acl07/pdf/07-10.pdf>.

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