

Like Taking Candy from a Baby: How the Government Easily and Legally Steals Millions from The Children in Their Care & Why it Needs to Stop

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50 RUTGERS L. REC. 222 (2023)

1. Introduction

As of September 2020, there were approximately 400,000 children in the foster care system; 10% of these children are entitled to some form of Social Security benefits that they do not receive despite it being considered their property.¹ In an investigation by The Marshall Project and NPR, it was found that a majority of the states and Washington, D.C., not only reimburse themselves using the child's benefits but actively seek out youth in the system that may qualify for government benefits, all without letting the child or their legal representation know about these benefits.² Each year, the foster care agencies take at least \$250 million from foster children receiving Supplemental Security Insurance (SSI) and/or Old-Age, Survivors, and Disability Insurance (OASDI)—benefits that are the property of these children.³ The foster care agencies do this all legally under the Social Security Act as the child's representative payee, which was upheld as not in violation of the Social Security Act Anti-Attachment Provision, in the 2003 Supreme Court case *Wash. State Dep't of Soc. & Health Servs. v. Guardianship Estate of Keffeler*.⁴

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¹ U.S. DEP'T OF HEALTH AND HUMAN SERVICES, THE AFCARS REPORT: PRELIMINARY FY 2020 ESTIMATES AS OF OCT. 4, 2021 – NO. 28 (2021).

² Eli Hager & Joseph Shapiro, *State Foster Care Agencies Take Millions Of Dollars Owed to Children In Their Care*, NPR (Apr. 22, 2021), <https://www.npr.org/2021/04/22/988806806/state-foster-care-agencies-take-millions-of-dollars-owed-to-children-in-their-ca>.

³ DANIEL L. HATCHER, THE POVERTY INDUSTRY: THE EXPLOITATION OF AMERICA'S MOST VULNERABLE CITIZENS 80 (2016).

⁴ *Washington State Dep't of Soc. & Health Servs. v. Guardianship Estate of Keffeler*, 537 U.S. 371 (2003).

This note explores the *Keffeler* decision itself, the questions that remain following *Keffeler* regarding the ethics and negative social consequences in continuing to allow child welfare agencies to act as the child's representative payee, and recent federal and state cases. Next, this note will examine the child welfare reform movement, the shift to the privatization of the state and local foster care agencies, and the devastating effects of the privatization on foster youth. Lastly, this note will consider Maryland's recent legislation limiting the amount of money the agencies can take from a child to reimburse themselves, what other states need to do in order to do what is actually in the best interest of the child, and how life changing saving and investing the benefit payments for the foster youth after they age out of the system.

2. Brief Overview of the Social Security Act (SSA)

Before diving into *Keffeler*, exploring how state agencies who are responsible for foster children steal millions of dollars of the child's benefits, and examine the effects of this act on the foster children, it is important to have a surface layer understanding of the Social Security Act, the provisions that are relevant to foster children, and how state agencies are legally able to take a foster child's benefits. The Social Security Act of 1935 originated as a general welfare program designed to act as a continued income for retired workers who attained age sixty-five or older.⁵ Over the past nearly twelve decades, Congress has amended the SSA several times to include other groups of Americans, such as people with disabilities and surviving dependent spouses and children.⁶ Today, the SSA is a relatively expansive social welfare program that provides benefits to qualified Americans under two general categories of programs—Supplemental Security Insurance (SSI) and Old-Age, Survivors, and Disability Insurance (OASDI).⁷

⁵ *Historical Background and Development of Social Security*, SOC. SEC. ADMIN., <https://www.ssa.gov/history/briefhistory3.html> (last visited Mar. 23, 2022).

⁶ *Id.*

⁷ *Id.*

a. Supplemental Security Insurance (SSI)

SSI is a means-based insurance program; to be eligible, a person would have to be over sixty-five and/or blind or other disabilities as well as have limited income and resources.⁸ In the context of foster care, those who are eligible are blind and/or disabled foster children with limited income and resources. SSA defines ‘disabled child’ as

... [Anyone] under 18... [that has] a medically determinable physical or mental impairment...that: results marked and server functional limitations; and can be expected to result in death; or has lasted or can be expected to last for a continuous period of not less than 12 months.⁹

Approximately one-third of the youth in foster care system have disabilities, which can worsen if their specific needs are not meet by the agency or by the foster care placements that the agency entrusts with the child.¹⁰ Additionally, there is a non-means-tested disability benefits program under Old-Age, Survivors, and Disability Insurance. The definition of ‘disabled child’ is the identical.¹¹

b. Old-Age, Survivors, and Disability Insurance (OASDI)

OASDI is not a means-tested program like SSI is, but is open to anyone who qualifies for OASDI benefits and can receive benefits regardless of how much they make or how many resources they have. The two specific programs within OASDI that are applicable to foster children are survivors benefits and disability benefits. A foster youth can theoretically qualify for

⁸ *Understanding Supplemental Security Income SSI Eligibility Requirements*, SOC. SEC. ADMIN., <https://www.ssa.gov/ssi/text-eligibility-ussi.htm>.

⁹ *Id.*

¹⁰ *Foster Children with Disabilities or Medical Issues*, FINDLAW, <https://www.findlaw.com/family/foster-care/foster-children-medical-issues-and-children-with-disabilities.html>. (last updated Dec. 29, 2022).

¹¹ *Disability Benefits | How You Qualify*, SOC. SEC. ADMIN, <https://www.ssa.gov/benefits/disability/qualify.html>.

both SSI benefits, survivors benefits, and/or disability benefits, though the amounts of the SSI and disability payment under OASDI may affect the amount of the other.¹²

i. Survivors Benefits

Generally, unmarried dependent children of a qualified deceased worker are eligible for survivors benefits if they are under 18 years old, or 19 years old if they are still enrolled in high school full time, or 18 years old and older if they have a qualifying disability that began before the age of 22 and remains the same.¹³ Surviving dependent children have two years following the death of their parent(s) to apply for benefits.¹⁴ In some circumstances, stepchildren, grandchildren, step-grandchildren, and adopted children can also be entitled to benefits.¹⁵ The amount of the monthly benefit payment varies from person-to-person, as the amount depends on the decedent's average lifetime earnings; the monthly benefit will be larger if the deceased had paid more into Social Security.¹⁶ A child of the decedent will get 75% of the worker's benefit amount.¹⁷

c. Representative Payee

In certain circumstances, a person receiving SSI and/or OASDI benefits may need a representative payee to handle the funds and ensure they are used in the best interest of the recipient. Usually, children and folks with disabilities are those who are assigned a representative payee. The Act lists various people to serve as the payee, ranked by who is most encouraged to act on behalf of the beneficiary; at the bottom of the list is a government agency.¹⁸ State

¹² *Can You Get Both SSDI and SSI Disability Benefits?*, AARP, <https://www.aarp.org/retirement/social-security/questions-answers/can-you-get-both-ssdi-and-ssi.html> (last updated Dec. 20, 2022).

¹³ *If You Are the Survivor*, SOC. SEC. ADMIN., <https://www.ssa.gov/benefits/survivors/ifyou.html#h0>.

¹⁴ SOC. SEC. ADMIN., NO. 05-10084, SURVIVORS BENEFITS (2019), <https://www.ssa.gov/pubs/EN-05-10084.pdf>. (last updated September 2022).

¹⁵ *Id.* at 2.

¹⁶ *Id.* at 3.

¹⁷ *Id.* at 6.

¹⁸ 20 C.F.R. § 404.2022 (2019).

agencies can legally be a representative payee for a child in their care and, as the representative payee, are legally able to reimburse themselves for the care of the child without violating 42 U.S.C. § 407(a).¹⁹ As the foster child's representative payee, the agency has a fiduciary duty to assess the best way to use or conserve the child's money on an individual basis, this is rarely done and rather, the agency pockets the money.²⁰

Despite the fact that the agency is allowed to be a representative payee for the children in their care, they are not the last resort with foster children.²¹ Further, the foster youth that are entitled to these benefits do not necessarily need a representative payee; if there is no one to act as a representative payee, the government will put the benefits into an account and given to the child once they reach the age of maturity.²² This is not typically done considering the agencies are statutorily allowed to and highly incentivized to act as the representative payee of the children in their care.²³

3. *Wash. State Dep't of Soc. & Health Servs. v. Guardianship Estate of Keffeler*

In 1995, a class action was filed against the Washington State Department of Social and Health Services alleging that "the department's use of their Social Security benefits to reimburse itself for the costs of foster care violated 42 U.S.C. §§ 407(a) and 1383(d)(1)."²⁴ In the end, the Supreme Court unanimously held that using foster children's Social Security benefits to reimburse themselves was not a violation of 42 U.S.C. §§ 407(a) and 1383(d)(1).²⁵ The Court reasoned that because the agency's act of taking a foster child's Social Security funds to

¹⁹ *Keffeler*, 537 U.S. 371.

²⁰ HATCHER, *supra* note 3, at 81.

²¹ *Id.* at 94-5.

²² *Id.* at 97.

²³ *Id.* at 69.

²⁴ *Keffeler*, 537 U.S. at 379.

²⁵ *Id.*

reimburse themselves is not a legal process nor are they technically a “creditor”, there is no law that mandates a child to repay the agency for their care. Because the agency is not a “creditor”, using a foster child’s Social Security benefits to reimburse themselves did not violate § 407(a), commonly referred to as the anti-attachment provision of the SSA, which prohibits Social Security benefits from garnishment, transfer, assignment, or other legal process.²⁶ The Court heavily deferred to Washington State Department of Social and Health Services in interpreting regulations made under the authority of the Social Security Act, so long as the interpretations are not contrary to the Act, which the Court found they were not.²⁷ While the Court did mention that foster children are under no duty to pay for their care, agencies have used *Keffeler* as a basis to continue serving as a representative payee and funnel foster youth’s benefits into the agency’s pockets.²⁸

While it is not the topic of this Note, it is important to note that despite the Court’s holding in *Keffeler*, the Court did not address the potential equal protection issues that could arise since it is only disabled foster youth and/or foster youth with deceased parents that are in essence forced to pay for their own foster care. The Court has not been posed with this issue nor have they had any opportunity to reconsider the issues that were presented to them in *Keffeler*.

4. The Shift Towards Privatization

The shift towards the privatization of the foster care system is due to continuous underfunding, ongoing understaffing, and overwhelming caseloads, as well as lawsuits about the

²⁶ *Id.* (“Section 407(a), commonly called the Act’s “antiattachment” provision, provides that the right of any person to any future payment under this subchapter shall not be transferable or assignable, at law or in equity, and none of the moneys paid or payable or rights existing under this subchapter shall be subject to execution, levy, attachment, garnishment, or other legal process, or to the operation of any bankruptcy or insolvency law.”) (internal quotations omitted).

²⁷ *Id.* at 382.

²⁸ *Id.* at 378; *See*, Hager & Shapiro, *supra* note 2.

conditions that children face in state care.²⁹ In the 1990's, child welfare agencies throughout the United States began to explore solutions for the long list of issues they faced: privatization.³⁰ In fact, the U.S. Department of Health and Human Services (HHS) and the Officer of the Assistant Secretary for Planning and Evaluation (ASPE) developed what is essentially a how-to-guide for state and local child welfare agencies to use.³¹

Today, more than fifty percent of the states use or permit the use of contracting out some or all of foster care services to private companies.³² These private companies are then financially incentivized to find foster youths and file for their Social Security benefits.³³ The following two sections further explore two private companies that states contract with to manage their foster care system: Maximus Inc. and Public Consulting Group.

a. Maximus Inc.

Maximus Inc. has been contracted by various state, federal, and local governments to automate, streamline, and squeeze money from some of the most vulnerable groups of Americans—specifically children, low-income folks, and the elderly.³⁴ Agencies that outsource their foster care system to Maximus have completely forgotten the purpose that they plaster on their agency website, claiming to “...enhance the health and well-being of all Americans, by providing effective health and human services...” and only allow the concerns of the outsourced

²⁹ *Reform Based on Litigation*, CHILD WELFARE INFORMATION GATEWAY, <https://www.childwelfare.gov/topics/management/reform/litigation/>.

³⁰ *Child Welfare Privatization Initiatives – Assessing Their Implications for the Child Welfare Field and for Federal Child Welfare Programs*, OFFICE OF THE ASSISTANT SECRETARY FOR PLANNING AND EVALUATION, <https://aspe.hhs.gov/child-welfare-privatization-init>.

³¹ OFF. OF THE ASSISTANT SEC’Y FOR PLAN. AND EVALUATION, CHILD WELFARE PRIVATIZATION INITIATIVES – ASSESSING THEIR IMPLICATIONS FOR THE CHILD WELFARE FIELD AND FOR FEDERAL CHILD WELFARE PROGRAMS.

³² Robert Fellmeth & Sandy Santana, *Privatization of foster care has been a disaster for children*, THE HILL (Mar. 25, 2021, 12:00 PM), <https://thehill.com/opinion/civil-rights/543963-privatization-of-foster-care-has-been-a-disaster-for-children>.

³³ See, Elizabeth Brico, *The Government Spends 10 Times More on Foster Care and Adoption Than on Reuniting Families*, TALK POVERTY (Aug. 23, 2019), <https://talkpoverty.org/2019/08/23/government-more-foster-adoption-reuniting/>.

³⁴ See generally, HATCHER, *supra* note 3.

companies to be the bottom-line.³⁵ The agencies are solely concerned with whether their products, referring to the vulnerable human beings that depend on these systems, are continuing to increase their profits.³⁶ In all, contracts with Maximus throughout the country have cost taxpayers an estimated \$2.5 billion.³⁷ Maximus denies any responsibility in the key role their services play in stealing Social Security benefits from foster youth, claiming that:

[T]he company's success in helping connect foster children with these benefits is not only a success for the child, but also for the caseworkers who are freed up to focus on the day-to-day well-being of these vulnerable children, and for the state or government agency paying for services that keep foster children safe, secure and care for. . . Maximus does not take possession of kids' Social Security funds; the money all goes to the state agencies.³⁸

Yet, foster children are rarely notified that they are entitled to Social Security funds and are not told that companies are applying for these funds likely due to caseworkers being unbelievably overburdened. In the meantime, company executives continue to profit with each new contract they make with state child welfare agencies.³⁹ Additionally, despite the fact that Maximus does not *technically* take possession of a foster child's Social Security funds, they are typically paid by state child welfare agencies after the company has obtained a child's benefits.⁴⁰

Maximus has a long history of failure, not only in relation to their foster care work but in many of the other government industries that they have been contracted in order to maximize

³⁵ *About HHS*, U.S. DEP'T OF HEALTH & HUM. SERVS., <https://www.hhs.gov/about/index.html>.

³⁶ *See, e.g.*, HATCHER, *supra* note 3.

³⁷ Tracie McMillan & Evan Malmgren, *Maximus Inc.'s Safety Net Contracts*, TYPE INVESTIGATIONS (Feb. 21, 2020), <https://www.typeinvestigations.org/project/2020/02/21/maximus-inc-s-safety-net-contracts/>.

³⁸ Hager & Shapiro, *supra* note 2.

³⁹ *Id.*

⁴⁰ *Id.*

revenue. Most notably, in 2008 Maximus quietly agreed to pay \$30.5 millions dollars after it was discovered by the Office of Inspector General that Maximus has falsified Medicaid claims on behalf of children in the care of the department, regardless of whether the child had actually used the service or not.⁴¹

b. Public Consulting Group

For over three decades, Public Consulting Group (PCG) has worked as a consultant in the public sector. PCG describes their work in the human services industry of the government as “building stronger communities,” but what they actually build is higher revenues for the state at the expense of children.⁴² PCG treats vulnerable foster children as sources of unlimited profitably and similarly to Maximus, PCG refuses to take any accountability in their participation in stealing foster children’s Social Security benefits.⁴³ By completely deferring any blame to the state child welfare agencies, PCG claims to simply just doing as directed by the agency, stating that:

[O]btaining kids’ Social Security dollars is a service requested by the state agencies and is consistent with federal regulations. How children’s money is spent is the responsibility of each said . . . not the company . . . PCG is proud of the work it does to effectively support child welfare agencies and the children who depend on them . . .⁴⁴

⁴¹ OFF. OF PUB. AFF., NO. 07-535, VIRGINIA COMPANY ENTERS INTO DEFERRED PROSECUTION AGREEMENT & AGREES TO PAY \$30.5 MILLION (Jul. 23, 2007), https://www.justice.gov/archive/opa/pr/2007/July/07_civ_535.html.

⁴² PUBLIC CONSULTING GROUP, <https://www.publicconsultinggroup.com> (last visited Mar. 23, 2022).

⁴³ See Hager & Shapiro, *supra* note 2. (“In a status report to Florida in 2012 [PCG]...discussed using data-mining techniques...to more efficiently “target” and “score” children in order to maximize Social Security dollars...[in] PCG proposal submitted in 2018 to Delaware said the company has made millions for child welfare agencies — which it referred to as “customers” — by applying for benefits for children with physical and emotional disabilities.”).

⁴⁴ *Id.* (internal quotations omitted).

Of all these institutions that are supposed to be protecting the foster child, none of them truly advocate for what is actually for the best interest of the child. They essentially see these children as products, hypothetically assigning a SKU number to each of them. Whoever is most vulnerable, most eligible for the largest amount of Social Security benefits is their ‘best seller.’ Not only are the practices of both Maximus and PCG grossly unethical, but they also strip the children of one of the only things they have left: their humanity. These companies and agencies do not see these children as humans, but as profit streams.

5. Federal and State Legislation

a. Federal Legislation

i. Achieving Better Life Experience Act (ABLE)

The Achieving Better Life Experience Act (ABLE) was enacted in 2014 as a means of addressing the financial struggles by disabled Americans. ABLE allows for disability benefits to be deposited in a 529A ABLE account and the first \$100,000 of the funds in this account will be exempt from being considered as a resource of the disabled person.⁴⁵ While the funds can only be used for certain ‘qualified disability expenses’, the list of expenses is pretty expansive to include not only medical costs but also housing costs and basic living expenses, education costs, and transportation costs.⁴⁶ Each state establishes its own regulations for a 529A ABLE account regarding opportunities for state tax deductions and the option for beneficiaries to have a debit or purchasing card linked to the account to easily make purchases for qualified items and services.⁴⁷

b. State Legislation

⁴⁵ SOC. SEC. ADMIN., SPOTLIGHT ON ACHIEVING A BETTER LIFE EXPERIENCE (ABLE) ACCOUNTS (2022), <https://www.ssa.gov/ssi/spotlights/spot-able.html?tl=6%2C9>.

⁴⁶ *Id.*

⁴⁷ 529 ABLE Accounts, SAVING FOR COLLEGE, <https://www.savingforcollege.com/529-able-accounts/> (last visited Mar. 26, 2022).

Maryland has been the only state to successfully enact a statute that protects the Social Security funds of foster youth, which is examined in further detail below. In March of 2021, Texas House of Representatives member Steve Toth introduced a bill that was nearly identical to Maryland's statute, but since April 2021, the bill has not proceeded and remains in Stage 1 of Texas's legislative process.⁴⁸ It has been reported that Maryland was assisting Illinois in drafting similar legislation to protect foster child's Social Security funds, but still there seems to be no update on the status of this.⁴⁹

i. Maryland's Approach

In 2018, Maryland Legislatures enacted Protecting Resources for Children in State Custody, which provides some protection for the resources and assets of youth in state custody.⁵⁰ Starting at age 14, the state agency is prohibited from using a certain percentage of a child's benefits to reimburse themselves.⁵¹ From age 14 through 15, at least 40%; from age 16 through 17, at least 80%; and from age 18 through 20, 100% must be conserved for the child.⁵²

Prior to the enactment of Protecting Resources for Children in State Custody, the state at one time did have a contract with Maximus.⁵³ One of the main goals of this contracted relationship was to increase the percentage of disabled children by 18% in order to increase the amount of disability benefit funds from the children in their care.⁵⁴ Fortunately for youth receiving Social Security funds who are in the care of Maryland will have a large portion of their benefits conserved — unfortunately for the rest of the foster youth throughout the United States, child

⁴⁸ H.B. 4244, 87(R) Legis. Sess. (Tex. 2021), <https://capitol.texas.gov/BillLookup/Text.aspx?LegSess=87R&Bill=HB4244>.

⁴⁹ Hager & Shapiro, *supra* note 2.

⁵⁰ MD. CODE ANN., FAM. LAW § 5-527.1.

⁵¹ *Id.*

⁵² *Id.*

⁵³ HATCHER, *supra* note 3, at 82-4.

⁵⁴ *Id.* at 83.

welfare agencies continue to take advantage of these vulnerable children, who wholly depend on these agencies to act in their best interests, by stealing their benefits.

6. Arguments for Taking Foster Youth's Benefits and the Privatization of the Foster Care System

a. Incentive to Get Qualified Foster Youth Benefits

One of the most common arguments for allowing the government to systematically take foster children's benefits to reimburse themselves for their care is that it acts as a way of incentivizing actively finding qualified foster youth, who without the state's help would apparently never know they were entitled to various government benefits. Proponents frame the taking of benefits, benefits that the foster youth are *entitled* to, as something that is being done as a favor or as the state actually acting in the child's best interest rather than the state quite frankly using the child as a pure revenue stream.⁵⁵ Either way, the foster children who qualify for benefits go without them—either because they do not apply for them or because the agency takes it. The use of foster kids as a profit source has only amplified with the expansion of privatization of the foster care system.⁵⁶ Foster children are not viewed as children, but as profitable products that line a store shelf.

Despite this argument being framed as the agency, and their consultant, putting the foster child's best interest first in terms of making sure eligible foster youth are applied for benefits, this is truly false. First, the consultants commonly use data analytic programs that rate the foster youth on various aspects and then rank them by who is most likely to qualify for the highest number of benefits for the government to take.⁵⁷ In a Maximus proposal to Maryland, they

⁵⁵ See, e.g., Daniel L. Hatcher, *States Diverting Funds from the Poor*, in HOLES IN THE SAFETY NET 151 (Ezra Rosser, ed., 2019).

⁵⁶ *Id.*

⁵⁷ HATCHER, *supra*, note 3, at 99.

described their strategy of ranking foster youth as a means to “...Ensure the Department gets the greatest positive financial impact from SSI advocacy operations, the Maximus team evaluates all foster children who are ineligible for Title IV-E benefits first...”⁵⁸ It is obvious by this strategy statement allow that the primary interest is completely misplaced in increasing revenue and not in acting in the best interest of the child. Eligible children for SSI benefits are passed up if they are eligible for Title IV-E benefits, even if they are eligible for SSI benefits for the sole reason that it will provide less of a revenue for the agency and private company.⁵⁹

b. Increase in Agency Resources to be Used on Foster Care

Another popular argument is that by contracting with private consultants who are able to find, apply, and take foster children’s government benefits, the state agencies will be able to increase resources available to the state for foster children. This argument fails on two major points: only a small percentage of foster children are eligible for SSI/SSDI benefits and the states that take the benefits allocate them to their general revenue accounts rather than actually using the funds for the foster care system.⁶⁰ This claim has yet to be proven and in fact has been disproven in several states that once privatized their foster care systems, which has led to either consistent or worse conditions of the overall foster care system.⁶¹ In fact, the agency will attempt to essentially “double dip”; state and local child welfare agencies will both take foster children’s benefits and then file for reimbursement from the federal government for expenses relating to

⁵⁸ *Id.*

⁵⁹ *Id.* (under Title IV-E of the Social Security Act, state and local agencies are entitled to partial federal reimbursements for the cost of providing foster care to child who meet certain criteria. The reason that ineligible foster children are evaluated first is because Title IV-E benefits and SSI benefits count against each other as a child’s resources. Due to this, they receive less in total benefits.)

⁶⁰ HATCHER, *supra* note 3, at 94. (“...[E]ven if the Social Security benefits were actually used to increase foster care agency revenue, foster children as a class would receive little benefit.... Social security benefits taken from foster children amount to less than 1 percent of the total funds reported by the states for foster care agency cost...”)

⁶¹ In Florida, their child welfare system has been privatized beginning in 2005, the conditions of the foster care system have remained essentially the same. See Christopher O’Donnell, *Florida child welfare system underperforming for foster kids, study finds*, TAMPA BAY TIMES (Jan. 20, 2017).

daily care of foster children, a practice that even the private companies will feel uncomfortable doing.⁶²

c. Prevent Reaching the Resource Limit

Per the Social Security Act, a person receiving certain Social Security benefits may lose their benefits if their total resources exceed a certain amount. For SSI, those with \$2,000 or more in resources will lose their benefits.⁶³ A ‘resource’, according to the Social Security Administration, is “money as well as something that you own and can turn into cash,” which includes most property and bank accounts.⁶⁴ Some state child welfare agencies also take assets of foster children in their custody to pay for their care, including burial spots and household goods; even in states that do not take every single asset from a child, children in state custody typically do not come close to reaching the resource limit set in SSI with any assets they may have.⁶⁵

Since OASDI is not means-based, there is no resource limit, and the amount a recipient receives does not take the resources that they have into account. The amount a recipient does receive under OASDI does take into account how much they work and the income they receive; for example, recipients of disability benefits under OASDI must not be able to participate in substantial, gainful activity caused by their disability.⁶⁶

⁶²Brico, *supra* note 33. (these types of funds are Title IV-E of the Social Security Act which allow states to receive reimbursement from the federal government. They do not receive full reimbursement, but rather receive from 50 – 76 cents for each dollar spent on daily childcare and supervision, agency administrative costs, training and recruitment costs, and data collection. One interesting thing to point out in relation to Title IV-E funds is that the funds are essentially unlimited whereas Title IV-B funds, which go toward reunification programs, do have a cap. Because of this, it is obvious why state agencies would rather get reimbursed for most of the care of a foster child than to encourage reunification.)

⁶³ SOC. SEC. ADMIN., SPOTLIGHT ON RESOURCES (2022), <https://www.ssa.gov/ssi/spotlights/spot-resources.htm>.

⁶⁴ *Id.*

⁶⁵ 479 Neb. Admin. Code, ch. 2 § 001.08.

⁶⁶ SOC. SEC. ADMIN., *No. 05-10069, How Work Affects Your Benefits* (Jan. 2022), <https://www.ssa.gov/pubs/EN-05-10069.pdf>.

While losing SSI benefits because of reaching the resource limit is a concern, in no logical way can this be solved by stealing a foster child's benefits as they are still left without their benefits or any resources. The agency uses the fact that the existence of the resource limit almost to make it seem as if they are obligated to steal these funds from the foster child so that the child will continue to receive them, but the agency does not have to do this. In fact, the disability benefits can be deposited in a 529A ABLE accounts, where Social Security funds up to \$100,000 that are deposited into the account are not counted as resources for purposes of qualifying for Social Security benefits.⁶⁷

7. What a Foster Child Could Do With the Funds

By having their SSI/OASDI funds set aside for use once they have been emancipated, foster youth would be able to experience at least some financial stability. With these funds, an aged-out foster youth can be better prepared to stop the potential domino effect of negative consequences after they age-out of the foster care system — the conserved funds can be used to find a place to rent, obtain higher education, commute to a job, and potentially avoid incarceration and the risk of becoming involved in human trafficking.

a. Homelessness

Once a foster youth turns eighteen, (or twenty-one in some states), they are legally emancipated, and the state is no longer responsible for them. National Foster Youth Institute, an organization that provides support and advocacy for foster youth throughout the country, reported that more than 25% of former foster care children become homeless within four years after leaving the system.⁶⁸ 20% of aged-out foster youth become homeless the same day they age

⁶⁷ SOC. SEC. ADMIN., *supra* note 57.

⁶⁸ *Housing & Homelessness*, NATIONAL FOSTER YOUTH INSTITUTE, <https://nfyi.org/issues/homelessness/> (last visited Mar. 23, 2022).

out.⁶⁹ Nationally, 50% of the homeless population were in the foster care system at one point in their lives.⁷⁰ Having some sort of savings when a foster child ages out would allow for them to afford housing until they figure out the rest of the new “adult” responsibilities that have just been thrown at them.

b. Unemployment

Due to lack of resources, inadequate support, and inability to gain employment⁷¹, foster youth are at a higher risk of homelessness compared to non-foster youth.⁷² Only 50% of foster youth graduate high school.⁷³ Aged-out foster youth have little-to-no assets; no one has usually put money aside for them in a college-fund nor do aged-out foster youth have much access to any other financial assistance to ease the transition period following their departure from the foster care system. In fact, less than 3% of aged-out foster youth earn a college degree by 26.⁷⁴ Only half of aged-out foster youth will be employed by age 24.⁷⁵ While a savings might not inherently mean someone is less likely to be unemployed, being able to have money to get a college degree or vocational training, as well as professional clothing for interviews, transportation to interviews, childcare, and the various other costs that exist in relation to trying to gain employment definitely helps.

c. Incarceration

⁶⁹ *Id.*

⁷⁰ *Id.*

⁷¹ Elisabeth Balistreri, *What happens to kids who age out of foster care?*, HOUSE OF PROVIDENCE (Mar. 8, 2022), <https://www.thehofp.org/articles/what-happens-to-kids-who-age-out-of-foster-care>.

⁷² HOMELESSNESS POL'Y RSCH. INST., UNIV. OF S. CAL. PRICE, FOSTER YOUTH AND HOMELESSNESS 1 (2021), <https://socialinnovation.usc.edu/wp-content/uploads/2021/05/Foster-Youth-and-Homelessness-final-1.pdf>.

⁷³ *Higher Education for Foster Youth*, NAT'L FOSTER YOUTH INST., <https://nfyi.org/issues/higher-education/> (last visited Mar. 23, 2022).

⁷⁴ Christina Dronen, *Aging Out of Foster Care Statistics*, FINALLY FAMILY HOMES (Oct. 17, 2022), <https://finallyfamilyhomes.org/the-problem/>.

⁷⁵ Balistreri, *supra* note 71.

Foster youth are swallowed by one system of trauma to another: incarceration. 25% of aged-out foster youth will be incarcerated within two years after release from the foster care system.⁷⁶ Former foster youth are more likely to commit a crime. It has been found that when compared to the general public, male former foster youth are four times more likely to commit a crime while female former foster youth are ten times more likely to commit a crime.⁷⁷ This, of course, is in no way to suggest that former foster youth are criminals, but reflect that mostly likely due to the trauma and lack of support, both by family and financially, generally increases the chance of adverse life circumstances.

Similar to the factors that play into the high rate of homelessness, the so-called “foster-care to prison pipeline” is a result of a lack of a support system, including a lack of an adult mentor and inadequate treatment for their immense trauma.⁷⁸ Incarceration also limits possible employment opportunities, as well as some non-employment opportunities, once released.

Again, while having an adequate savings fund does not guarantee a person will not commit a crime or become incarcerated, it will certainly help mitigate this risk. In fact, sustained unemployment tends to increase the crime rate and there is a positive relationship between robbery rates and unemployment rates.⁷⁹ More generally, it has been found that “high violent crime rates can be attributed to structural linkages among unemployment, family disruption, and economic deprivation” — for aged-out foster youth, having a savings of funds that belong to

⁷⁶ *Id.*

⁷⁷ 29 *Surprising Foster Care Facts*, ALTERNATIVE FAMILY SERVICES, <https://www.afs4kids.org/blog/29-surprising-foster-care-facts/#:~:text=Around%20184%2C000%20households%20in%20the%20U.S.%20have%20a,a%20crime.%20Females%20are%2010%20times%20more%20likely.>

⁷⁸ *Id.*

⁷⁹ Abhijeet Bhattacharya, *Analysis of the Factors Affecting Violent Crime Rates in the US*, 10 INT’L J. OF ENG’G & MGMT. RESCH. 106 (Oct. 2020), <https://ssrn.com/abstract=3732028>.

them could mean a decreased chance of not only being unemployed but also of becoming incarcerated.⁸⁰

d. Human Trafficking

Foster youth are especially vulnerable to human trafficking, specifically because of the high run-away rate and increased risk of homelessness and incarceration. There are two major subcategories of human trafficking: sex trafficking and labor trafficking. The National Center for Missing & Exploited Children reported that 19% of children in the care of the state that were reported missing were likely to be victims of child sex trafficking.⁸¹ Human traffickers prey on vulnerable folks — folks who are in need of money, community, housing, or employment.⁸² Money alone will not enable an aged-out foster youth to be invincible from the risk of human trafficking; but it will act as a means of financial protection that would make them less vulnerable and less likely to be preyed on by human traffickers.

e. Substance Use

Folks that had some level of involvement with the foster care system have also been found to have a higher rate of developing a substance use problem.⁸³ In fact, according to the National Conference of State Legislatures, former foster youth experience more than seven times the rate of drug dependency and two times the rate of alcohol dependency.⁸⁴ Just to reiterate, having a savings does not mean an aged-out foster youth will not develop a substance use problem, but it could help allow the former foster youth to have access to mental health treatment that could

⁸⁰ *Id.*

⁸¹ *Child Sex Trafficking Overview*, NATIONAL CENTER FOR MISSING & EXPLOITED CHILDREN <https://www.missingkids.org/theissues/trafficking> (last visited Mar. 23, 2022).

⁸² *Love and Trafficking: How Traffickers Groom & Control Their Victims*, POLARIS PROJECT (Feb. 11, 2021), <https://polarisproject.org/blog/2021/02/love-and-trafficking-how-traffickers-groom-control-their-victims/>.

⁸³ NATIONAL CONFERENCE OF STATE LEGISLATURES, *Mental Health and Foster Care* (Nov. 1, 2019), <https://www.ncsl.org/research/human-services/mental-health-and-foster-care.aspx>.

⁸⁴ *Id.*

decrease the chance that they turn to substances to deal with any sort of trauma they experienced.⁸⁵ Substance use can also result in a revolving door of negative consequences that aged-out foster youth already experience at a higher rate than the general population like financial instability, legal issues, and difficulty in maintaining employment.⁸⁶

f. Other Benefits

i. Financial Benefits

Limiting, or outright forbidding, the amount of government benefits that the state agencies are allowed to take from the foster youths will lessen the many stresses that come with adulthood alone. Even prior to aging-out of the system, if the benefits were instead deposited into an account, and only used for purposes that are in the best interest of the child, it would set up the foster youth with an easier transition once they age-out. Funds from the foster child's benefits could be used to buy them a computer, buy supplies for a skill or hobby, or other resources that the system does not provide. This could help the child emotionally and mentally at the time as well as potentially financially in the future if they gain marketable skills.

An example to illustrate how much can be saved if the monthly benefits were invested would be helpful to understand just how much is being taken from the government. A child's parent dies, and they are placed into foster care at age 6. The average monthly survivor benefit payment for a child of a deceased worker is \$815.97, which is the amount this child receives.⁸⁷ If the monthly benefit is placed into an trust of some sort that is similar to the 529A ABLER accounts,

⁸⁵ MAYO CLINIC, *Drug addiction (substance use disorder)*, <https://www.mayoclinic.org/diseases-conditions/drug-addiction/symptoms-causes/syc-20365112> (last visited Mar. 26, 2022) (there are many factors that increase the likelihood of developing a substance use problem in addition to mental health disorders, including: family history of addiction, peer pressure, and lack of family involvement. For the other risk factors, since they also affect mental health, access to therapy to cope without substance abuse would still be life-changing.).

⁸⁶ *Id.*

⁸⁷ Dan Caplinger, *The Average American Gets This Much in Survivor Benefits From Social Security. How Do You Compare?*, THE MOTLEY FOOL (last updated Oct. 3, 2019, 11:19 AM), <https://www.fool.com/retirement/general/2015/01/31/average-american-social-security-survivor-benefits.aspx>.

the foster youth would have approximately \$117,500, given that none of the money is spent.⁸⁸

Even if the state agency were to use half of the benefit or three-quarters of the benefit payment to reimburse themselves for the child's care, the child would still have an adequate amount of money to get themselves on their feet.

As of December 2021, the national-average total cost of attendance at a community college is \$7,460.⁸⁹ If a prospective student decides to go to a 4-year college, the average cost endured per year jumps to \$35,720, as of November 2021.⁹⁰ The average monthly rent for a one-bedroom apartment in 2020 ranged from \$725 to \$1,617 or \$8,700 to \$19,404 annually, depending on which state a person resides in.⁹¹ The average yearly expenses for one person is \$38,266.⁹² Foster youth do not want or expect to leave the foster system enriched, but they do expect to be able to survive and become self-sustainable.

This is exactly what happened to Mateo Jaime, a young man and former foster child, who had his benefits taken from him by the agency entrusted to put his best interests as their first priority. Mateo was in the Alaskan foster care system after his mother had been murdered by his

⁸⁸ Investment Accumulation Calculation, CALCULATOR.NET, *Investment Calculator*, <https://www.calculator.net/interest-calculator.html> (starting with "Starting Principal" enter "\$0", for "Annual Contribution" enter "\$0", for "Monthly Contribution" enter "\$815.97" (this is the average monthly survivor benefit payment for a child of a deceased worker, *Id.*), keep the defaulted "Contribute at the beginning of each compounding period" selected, for "Interest Rate" enter ".01%" (this is the interest rate for 529A ABLE accounts, FIFTH THIRD BANK, *Fifth Third ABLE Checking*, <https://www.53.com/content/fifth-third/en/personal-banking/bank/checking-accounts/able-checking.html> (last visited Mar. 26, 2022)), set "After" to "12" (typically, at age 18, the surviving child will no longer receive benefits unless they meet other requirements previously discussed), for purposes of keeping this calculation relatively simple, for "Tax Rate" and "Inflation Rate" enter "0%". It is acknowledged that this would change the figure used in this hypothetical (approximately \$117,500" but this is just to illustrate that if a foster child's Social Security benefits were saved in a special account rather than stolen and used by the child welfare agencies that are not in the best interest of the child.).

⁸⁹ Melanie Hanson, *Average Cost of Community College*, EDUCATION DATA INITIATIVE, <https://educationdata.org/average-cost-of-community-college> (last updated Dec. 27, 2021).

⁹⁰ Melanie Hanson, *Average Cost of College & Tuition*, EDUCATION DATA INITIATIVE, <https://educationdata.org/average-cost-of-college/> (last updated Jan. 27, 2022).

⁹¹ Sydney Temple, *America's 2020 Rental Market in Review*, RENTABLE BLOG (Dec. 29, 2020), <https://www.rentable.co/blog/annual-rent-report/>.

⁹² U.S. BUREAU OF LABOR STATISTICS, CONSUMER EXPENDITURE SURVEY (2019), <https://www.bls.gov/cex/tables/calendar-year/mean-item-share-average-standard-error/cu-size-2019.pdf>.

father and his father went to jail.⁹³ Prior to becoming taken into the foster care system, he was a talented cellist but could not take his cello with him due to it being at the crime scene of his mother's murder.⁹⁴ The state agency took over \$20,000 of his survivors benefits.⁹⁵ Not only did he have to stop practicing a talent he was extremely passionate about, but he suffered financial ramifications until the agency, without explanation, decided to pay him back in 2020.⁹⁶ With these funds he was enabled to change his life—he opened a bank account, bought a car, and a new cello to continue his passion of playing music.⁹⁷ Mateo has a newly found hope for his future, a hope that every child in the foster care system should have the opportunity to experience.⁹⁸ Unfortunately, many do not get to experience Mateo's hopefulness due to their present or future financial instability that could be easily resolved if the state and local agencies did not take their benefit payments.

Additionally, there are financial benefits to all if aged-out foster youth are financially stable. According to the National Foster Youth Institute, after aging out of the foster system, 75% of women and 33% of men were receiving government benefits.⁹⁹ For foster youth who are having their benefits taken by the foster care system, if they were able to keep their benefits they could likely be on more stable footing financially and not need other government benefits after they age out of the system.

ii. Emotional Benefits

⁹³ Hager & Shapiro, *supra* note 2.

⁹⁴ *Id.*

⁹⁵ *Id.*

⁹⁶ *Id.*

⁹⁷ *Id.*

⁹⁸ Hager & Shapiro, *supra* note 2.

⁹⁹ Brandon Gaille, *51 Useful Aging Out of Foster Care Statistics*, NATIONAL FOSTER YOUTH INSTITUTE (May 26, 2017), <https://nfyi.org/51-useful-aging-out-of-foster-care-statistics-social-race-media/>.

Aside from the financial stability that comes with a foster youth being able to conserve their government benefits, it has been argued that there would be an emotional benefit specifically for those receiving survivor benefits.¹⁰⁰ A monthly survivor benefit to a foster child who has suffered the death of a parent may be the last bit of connection they have with the parent; it can be a continuation of a parent-child bond. These foster care agencies take essentially everything from the children in their care; all the children get in return is additional life-long trauma.¹⁰¹ In fact, 80% of foster children have significant mental health issues in comparison to 18-22% of the general population.¹⁰² Moreover, former foster youth are nearly five times more likely to develop Post Traumatic Stress Disorder (PTSD), compared to the general public.¹⁰³ While the funds alone will not necessarily stop or prevent mental illness for foster youth, having adequate funds to seek professional mental health treatment will allow the former foster youth to receive help or to simply ease the additional stress that comes with adulthood.

8. Recommendations

a. Prohibit HHS from Renewing Contracts with Private Companies

Just as current-President Joe Biden did in his Executive Order prohibiting the Department of Justice from renewing their contracts with private prisons, he must do the same with the Department of Health and Human Services in relation to their contracts with private consultants.¹⁰⁴ Unfortunately, this is unlikely to happen at this time due to typical political forces

¹⁰⁰ HATCHER, *supra* note 3, at 106.

¹⁰¹ See Caitlin Papovich, *Trauma & Children in Foster Care: A Comprehensive Overview*, FORENSIC SCHOLARS TODAY (Jul. 10, 2019), <https://www.csp.edu/publication/trauma-children-in-foster-care-a-comprehensive-overview/>. (“...It is estimated that half (50 percent) of children and youth in the child welfare systems are at a 2.5 times heightened risk in developing mental health disorders compared to children not involved in the child welfare system”) It is important to note that there are many factors that play into the reason children in state custody are more at risk of mental health disorders, including factors that are not in relation to the agency’s acts or omissions.

¹⁰² NATIONAL CONFERENCE OF STATE LEGISLATURES, *supra* note 81.

¹⁰³ *Id.*

¹⁰⁴ Fellmeth & Santana, *supra* note 32.

and the fact that campaigning for reelection is coming up relatively soon. It will be an immense challenge to change the narrative of what is actually happening when child welfare agencies are stealing Social Security funds; the agency has done a great job in convincing folks that what is being done is moral and what is best for the children in state custody. Without a more aggressive call of action that was present for prohibiting contracts with private prisons, child welfare agencies will continue to contract with private companies and continue stealing Social Security funds that do not belong to them.

b. Adopt Legislation that Requires the Conservation of Social Security Funds

Either the federal government, the states, or both could adopt similar legislation to Maryland's Protecting Resources for Children in State Custody Act. This would still allow for the government to use some of the foster youth's benefits while conserving funds to make the transitional period after aging-out of the system financially easier. In fact, there was a proposed federal legislation in Congress that would prohibit taking foster youth's resources to cover the expenses of their care, require regular notification about the youth's benefits to both the youth and their lawyer, and provide protected trust accounts to deposit the benefit payments until the youth reaches the age of majority.¹⁰⁵ Further, the bill commands state agencies to continue screening all foster youth for eligibility of Social Security benefits despite not having a financial incentive to do so.¹⁰⁶

c. Implement Better Oversight and Accountability Practices

There is no disputing that the federal, state, and local child welfare agencies are extremely underfunded and are often the first department that has their budget cut. It has been argued that absolutely cutting funding to the state and local foster agencies would be more devastating;

¹⁰⁵ Hager & Shapiro, *supra* note 2.

¹⁰⁶ *Id.*

rather than further cutting their funding, the agencies should have to better oversight and accountability practices within the agency and by the federal government.¹⁰⁷ Giving full discretion to companies has resulted in little-to-no transparency of practices to the public, resulted in fraud, and has allowed the harm to be done to folks that completely depend on these systems, specifically vulnerable foster children. By implementing actual and effect oversight and accountability practices in the various child welfare agencies, Social Security funds are more likely to be used for the appropriate purpose: to serve the best interest of the child.

At the very least, regulating the agencies and implementing effective oversight procedures is easily one of the most simple and important change that can be done if the federal Executive and Legislative branches decide not to outright prohibit state child welfare agencies to outsource their foster care system to private companies or limit/prohibit states from stealing the Social Security benefits of foster children to reimburse themselves for services they are required to supply foster children.

When Texas legislatures passed a bill that privatized their foster care system, former Texas district judge and former head of the Center of Public Policy Priority, F. Scott McCown expressed explicit concern over the harm that can be done to foster children in Texas. He pointed out the many other public systems that utilized private consultants has been devastating to those involved due to the lack of accountability that the government asserts over these private consultants, arguing:

Almost anything in the human service area that's been privatized has ultimately given you a worse system than you already had—private prisons, private mental

¹⁰⁷ Hatcher, *supra* note 55, at 153.

health hospitals instead of public systems. You don't have the accountability, you don't have the transparency, and you don't get the results.¹⁰⁸

Often, the consultants that a state contracts with will then subcontract with other companies.¹⁰⁹ The lack of oversight by the foster care agency itself, as well as the complete overlooking of the misapplication of benefits by the Social Security Administration, has allowed the foster care system to continue to transform from a system meant to protect the children in their care and to act in the child's best interest into a system focused on wringing the most vulnerable children of the little resources they still have. In an audit conducted by the SSA Office of the Inspector General, it was found that one local social service department was continuing to collect benefits from youth no longer in the foster care system.¹¹⁰ Adequate and effective oversight, auditing, and enforced policies will not only protect the interests of the children in foster care, but also the interests of the nation as a whole. The state child welfare agencies who outsource and privatize their foster care system do not only harm the individual foster children they steal the Social Security benefits from, but harm us all in some way.

9. Conclusion

Allowing a foster child to conserve their benefits until they age-out of the system is not only in the best interest to them alone—everyone can benefit from this in some way. If foster children who age-out of the system are able to become self-sustaining, they will be less likely to need to utilize other government welfare programs. Simply put—When a foster child is harmed, we are

¹⁰⁸ Roxanna Asgarian, *In Texas, Trepidation as Child Welfare Privatization Moves Forward*, THE IMPRINT (Oct. 31, 2019, 6:48 AM), <https://imprintnews.org/child-welfare-2/in-texas-trepidation-as-child-welfare-privatization-moves-forward/38516>. Though, it depends on what “results” the agency is after, better lives for the foster children or more money in their pockets? If it is the latter, the agency is getting exactly the result they want. Agencies need to go back to the purpose they claim to work for, to enhance the wellbeing of Americans.

¹⁰⁹ HATCHER, *supra* note 3.

¹¹⁰ HATCHER, *supra* note 3, at 97. (“In more than 25 percent of the cases reviewed, the children were no longer in agency care, but BCDSS [Baltimore City Department of Social Services] continued to take the children’s benefits.”).

all harmed.¹¹¹ It is up to us as individuals and as a collective to address this issue, advocate for these extraordinarily vulnerable foster youth, and demand action. Whether it be urging the Executive branch to sign an Executive Order prohibiting the privatization of foster care agencies or the Legislative branch to pass federal legislation similar to the one Maryland enacted, anything is better than allowing these agencies to continue to steal from children.

¹¹¹ *See generally*, Hatcher, *supra* note 55.