

Clearinghouse REVIEW

Shriver
Center 4@

March–April 2008

Volume 41, Numbers 11–12

Journal of
Poverty Law
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The Use of Supplemental Security Income to Maximize Assets and Income for Foster Youths with Disabilities

By Angie Schwartz and Diana Glick

Angie Schwartz
Staff Attorney

Public Interest Law Project
449 15th St. Suite 301
Oakland, CA 94611
510.891.9794 ext. 125
aschwartz@pilpca.org

Diana Glick
J.D., University of California, Davis,
School of Law, 2007
dianaglick@att.net

Supplemental Security Income (SSI) is a federal benefit that provides a monthly cash payment to low-income individuals with physical or mental disabilities. In some states eligibility for SSI also means eligibility for a state supplemental payment and a way to access Medicaid. Congress included children in the SSI program in order to provide additional supports and resources to one of the most disadvantaged groups of Americans—children who are both disabled and poor.¹ For youths in foster care, poverty and disability are compounded by abuse, neglect, and removal from their homes. These youths being quite literally America's most disadvantaged young people, they must gain access to critical resources, such as SSI, to assist them in meeting their staggering individual needs.

Not surprisingly, youths in foster care have high incidences of emotional and behavioral problems, cognitive and developmental delays, and chronic health conditions.² Despite the high rates of disability among foster youths, a very small percentage of them receive SSI.³ Indeed, more than 10 percent of foster youths nationwide are estimated to be eligible for SSI benefits and do not receive them.⁴ These youths are in dire need of resources and support, both while they are in care and upon emancipa-



¹H.R. Rep. No. 92-231, at 147–48 (1971) (“It is [the] committee’s belief that disabled children who live in low-income households are certainly among the most disadvantaged of all Americans and that they are deserving of special assistance in order to help them become self-supporting members of our society.”).

²Laurel K. Leslie et al., *Comprehensive Assessments for Children Entering Foster Care: A National Perspective*, 112 *PEDIATRICS* 134 (2003) (some 35–50 percent of children entering foster care have significant emotional and behavioral health problems; 20–60 percent of young children entering foster care have a developmental disability or delay; 25 percent of children entering foster care have three or more chronic health conditions).

³Nationally only 12.3 percent of the children receiving federally administered Supplemental Security Income (SSI) payments live in a household where neither parent is present. SOCIAL SECURITY ADMINISTRATION, *CHILDREN RECEIVING SSI: 2006*, at 16 tbl. 12 (July 2007), www.ssa.gov/policy/docs/statcomps/ssi_children/2006/ssi_children06.pdf. Notably only a fraction of this group is actually in foster care since this category also includes children residing independently, with other relatives or nonrelatives, or in other institutions.

⁴MICHAEL A. O’CONNOR, *CASEY FAMILY PROGRAMS, A GUIDE TO SSI AND SOCIAL SECURITY BENEFITS FOR CHILDREN AND YOUTH IN OUT-OF-HOME CARE 3* (2001), www.casey.org/NR/rdonlyres/E973E911-6A28-4AD8-BFA4-81F5075857BE/110/casey_ss. (“The number of children and youth in foster care who are also enrolled in the SSI program ranges from 4 percent in the lowest state to more than 20 percent in the highest ranking states.”).

tion, and SSI provides this support for foster youths with serious disabilities. Because SSI eligibility is based on disability and not the dependency status or age of the recipient, SSI is an indispensable resource to youths both while they are in care and once they exit care.⁵

The unique barriers to applying for SSI on behalf of a youth in foster care can be overcome. Because of the U.S. Supreme Court's decision in *Washington State Department of Social and Health Services v. Guardianship Estate of Keffeler*, child welfare agencies have an incentive to work through these barriers and engage in effective SSI advocacy on behalf of the youths in their care.⁶ The Supreme Court in *Keffeler* confirmed that a child welfare agency serving as a representative payee for a foster youth was allowed to use the youth's current SSI benefits to pay the cost of the youth's foster care. While many youth advocates viewed *Keffeler* as a disappointing loss for disabled foster youths, others, including us, recognize the role that child welfare agencies can play in helping youths establish and maintain their eligibility for SSI benefits. The *Keffeler* decision means that states continue to have a financial incentive to establish SSI eligibility on behalf of youths in their care; advocates can use this incentive to promote policies to ensure that SSI benefits are in place for youths in foster care in advance of emancipation.

While there has been some attention at the federal level to the unique issues of establishing and managing SSI ben-

efits for foster youths, the work is being done by states. Several states, including New Mexico and North Carolina, have proposed legislation aimed at establishing SSI eligibility for foster youths and ensuring that benefits are properly managed.⁷ With two pieces of legislation signed into law in the past two years, California is at the forefront of this movement.⁸ The new California laws ensure that disabled foster youths who may be eligible for SSI have applications submitted on their behalf well in advance of their exit from foster care so that they can avail of the benefits upon emancipation. With certain modifications, California's model can be duplicated in other states. Here we advise advocates on strategies and considerations for broadening access to SSI at the state level for foster youths with disabilities, particularly for those youths who emancipate and leave the system without permanent placement, and ensuring that child welfare agencies manage SSI benefits according to the best interests of such youths.

Why States Should Apply for SSI for Foster Youths in Their Care: The *Keffeler* Decision and a Perverse Incentive

In *Keffeler* the Supreme Court held, in a unanimous decision, that a child welfare agency serving as a representative payee for a child in foster care did not violate 42 U.S.C. § 407(a), which protects SSI benefits from "execution, levy, attachment, garnishment or other legal pro-

⁵For foster youths, SSI benefits have other advantages, including the following: (1) diagnostic evaluations completed during application improve the likelihood of timely and appropriate treatment; (2) SSI benefits can increase the funds available to meet the youth's needs; (3) SSI benefits follow a youth who is returned home to a lower-income biological family; (4) SSI is often linked to Medicaid, ensuring that the youth receives critical health services; (5) SSI benefits ensure eligibility for federal adoption assistance if a youth cannot be returned to his biological parents. O'CONNOR, *supra* note 4, at 4.

⁶*Washington State Department of Social and Health Services v. Guardianship Estate of Keffeler*, 537 U.S. 371 (2003).

⁷H.B. 890, 46th Leg., 1st Sess. (N.M. 2003) (bill would have required agency to screen youths for eligibility, apply for SSI on behalf of all youths determined likely eligible, and manage SSI benefits in a youth's best interests and in accordance with a written needs assessment; bill also would have required the development of individual transition savings accounts for each youth); S.B. 273, 47 Leg., 1st Sess. (N.M. 2005) (bill would have required agency to screen youths for eligibility, apply for SSI on behalf of all youths determined likely eligible, and manage a youth's SSI benefits in the youth's best interests and in accordance with a written needs assessment). H.B. 1257, Sess. 2007 (N.C. 2007), www.ncga.state.nc.us/Sessions/2007/Bills/House/HTML/H1257v1.html (bill required development of a system to reserve up to \$2,000 of SSI benefits for youths 16–18 in lieu of reimbursing the state for care and maintenance and to disburse the conserved funds to the youths to assist in transition from foster care).

⁸Assembly Bill 1633, Sess. 2005–2006 (Cal. 2005), www.leginfo.ca.gov/pub/05-06/bill/asm/ab_1601-1650/ab_1633_bill_20051007_chaptered.pdf (Chapter 641), CAL. WELF. & INST. CODE § 13750 (2007); Assembly Bill 1331, 2007–2008 Leg. Reg. Sess. (Cal. 2007) (Section 1(d) to be chaptered as CAL. WELF. & INST. CODE § 13757). Assembly Bill 1633 (Evans) was signed into law on October 7, 2005, and Assembly Bill 1331 (Evans) on October 11, 2007.

cess,” when it used the child’s current SSI benefits to reimburse itself for the cost of caring for the child.⁹ The decision generated a split among advocates. Many decried the Court’s decision and argued that state agencies acting as representative payees for foster youths “will continue to use the children’s benefits to replenish the state coffers rather than to meet the children’s needs.”¹⁰ These advocates cite the enormous potential for abuse on the part of child welfare agencies as well as actual abuses documented in SSA audit reports, which have indicated malfeasance in the handling of SSI benefits for foster youths.¹¹

While the potential negative effects of *Keffeler* should be addressed through advocacy, litigation, and legislation, the decision underscored the incentive of states to become SSI advocates for the youths in their care. In ruling in the agency’s favor, the Court acknowledged that “without [child welfare] agencies to identify children eligible for federal benefits and to help them qualify, many eligible children would either obtain no Social Security benefits or need some very good luck to get them.”¹² In order to be successful in obtaining SSI benefits, foster youths need assistance from someone who is dedicated to the outcome of the application and who has the resources and knowledge necessary to see the process through to completion. Without the state’s participation, many foster youths with disabilities would have difficulty obtaining benefits.

The reason the state has such a powerful incentive to engage in SSI advocacy

is that SSI benefits are funded with 100 percent federal financial participation.¹³ Moreover, “for those children who are not in higher-end placement settings, an SSI payment is typically higher than a foster care payment,” which should result in the accumulation of funds on behalf of the youths.¹⁴ Thus ensuring that a youth is determined eligible for SSI while in foster care can often be a win-win situation for both the youth and the state. If the state were not allowed to use any of the SSI benefit to offset the cost of foster care, then the state would likely forgo the benefit altogether, resulting in the youth’s termination from the SSI program.

While the incentive created is somewhat perverse, the *Keffeler* decision benefits foster children by encouraging states to engage in SSI advocacy, creating a funding stream that not only meets the children’s needs while they are in care but also continues to provide for them after they leave care. While the *Keffeler* decision might have increased the risk that child welfare agencies would shirk their duties as a child’s representative payee and instead use the child’s SSI benefits to create a new funding stream for the state, this risk can be mitigated through advocacy, litigation, and enforcement of existing laws.¹⁵ In order for the potential of the *Keffeler* decision to be realized, child welfare agencies need to be well versed in the SSI application process and their duties as a representative payee.

How to Apply: SSI for Foster Youths

In order to ensure that foster youths realize all of the benefits of SSI, advocates

⁹*Keffeler*, 537 U.S. at 371.

¹⁰Daniel Hatcher, *Foster Children Paying for Foster Care*, 27 *CARDOZO LAW REVIEW* 1797, 1802–3 (2006).

¹¹See, e.g., OFFICE OF THE INSPECTOR GENERAL, SOCIAL SECURITY ADMINISTRATION, A-13-00-10066, FINANCIAL-RELATED AUDIT OF THE BALTIMORE CITY DEPARTMENT OF SOCIAL SERVICES—AN ORGANIZATIONAL REPRESENTATIVE PAYEE FOR THE SOCIAL SECURITY ADMINISTRATION (Sept. 2001), www.ssa.gov/oig/ADOBEPDF/A-13-00-10066.pdf; OFFICE OF THE INSPECTOR GENERAL, SOCIAL SECURITY ADMINISTRATION AUDIT REPORT, SAN FRANCISCO DEPARTMENT OF HUMAN SERVICES—AN ORGANIZATIONAL REPRESENTATIVE PAYEE FOR THE SOCIAL SECURITY ADMINISTRATION (2003), www.ssa.gov/oig/ADOBEPDF/A-09-03-13011.pdf.

¹²*Keffeler*, 537 U.S. at 391 (the Supreme Court also noted that many youths who are eligible for SSI would risk losing that eligibility if child welfare agencies were barred from using the SSI to pay for foster care because many youths do not have anyone available to serve as a representative payee and “many States would be discouraged from accepting appointment as representative payees by the administrative costs of acting in that capacity”).

¹³States have the option of supplementing the SSI payment with a State Supplemental Payment.

¹⁴O’CONNOR, *supra* note 4, at 28.

¹⁵See the discussion below under the heading “Managing a Foster Youth’s SSI Benefits: Ensuring that Benefits Are Used in the Youth’s Best Interest.”

must know when and how to submit an application for a youth in care and understand the funding mechanisms operating at the federal, state, and local levels.

As advocates familiar with SSI know, applying for SSI is often long and arduous, and this may explain why so few foster youths obtain SSI benefits. The crux of SSI advocacy is establishing that the youth meets the disability criteria. Social Security Administration regulations indicate what factors, including medical evidence, test scores, school records and the combined effects of medical impairments, are considered in determining disability for youths.¹⁶

Evaluating whether a youth is likely to meet the SSI disability criteria and completing an application that documents the youth's disability and need for SSI require some training and specialized knowledge of the SSI program. In order to ensure that foster youths receive SSI and that child welfare employees are adept in assisting youths in applying for SSI, California established the Foster Care Social Security and Supplemental Security Income Assistance Program in October 2005.¹⁷ The SSI assistance program protects foster youths receiving SSI while in foster care and requires the California Department of Social Services to convene a work group to develop best practice guidelines for ensuring that foster youths

with disabilities receive all of the federal benefits to which they are entitled. The SSI assistance program, recognizing that SSI is "an important resource in making the transition out of the state's custody," focuses specifically on transition-aged youths.¹⁸ The best practice guidelines, released in February 2007, cover screening foster youths for SSI, applying for SSI, and pursuing an appeal.¹⁹

When to Apply: Special Considerations for Foster Youths with Disabilities

The best practice guidelines give information on timing an SSI application for foster youths.²⁰ Pursuant to Title IV-E of the Social Security Act, foster youths who receive federal foster care maintenance payments in excess of the SSI benefit may not be able to apply for SSI while they are in foster care unless the state ensures that the application is processed. While federal law permits foster youths to receive SSI benefits and Title IV-E foster care benefits concurrently, SSI benefits are offset dollar for dollar by the amount of Title IV-E benefits that a youth receives.²¹ A youth may receive both SSI and Title IV-E foster care only if the SSI benefit exceeds the IV-E payment.²² In this situation the dollar-for-dollar offset results in the youth receiving the entire IV-E payment and an SSI benefit equal

¹⁶20 C.F.R. §§ 416.924, 416.924a, 416.924b (2000).

¹⁷CAL. WELF. & INST. CODE §§ 13750 *et seq.*

¹⁸Assembly Bill 1633, Sess. 2005–2006 (Cal. 2005), www.leginfo.ca.gov/pub/05-06/bill/asm/ab_1601-1650/ab_1633_bill_20051007_chaptered.pdf (Chapter 641); CAL. WELF. & INST. CODE § 13750 (2007).

¹⁹California Department of Social Services, All-County Letter No. 07-10, Feb. 28, 2007, Best Practice Guidelines for Screening and Providing for Foster Children with Disabilities, www.dss.cahwnet.gov/lettersnotices/entres/getinfo/acl07/pdf/07-10.pdf [hereinafter Best Practice Guidelines]. A simple set of key questions can be used by the social worker to identify a youth who is entering care and may be eligible for SSI. Questions include whether the youth has an obvious physical disability and whether the youth has a current IEP (Individualized Education Program). See an example of an SSI Screening Guide at www.dss.cahwnet.gov/getinfo/acl07/pdf/07-10.pdf.

²⁰"Pursuant to federal policy, children receiving federal foster care benefits may not be able to apply for SSI until one month prior to termination of those benefits. Because SSA processing timeframes currently take several months, this means that these youth[s] will not have benefits in place prior to their emancipation." Best Practice Guidelines, *supra* note 19, at 2.

²¹U.S. DEPARTMENT OF HEALTH AND HUMAN SERVICES, ADMINISTRATION FOR CHILDREN AND FAMILIES, CHILD WELFARE POLICY MANUAL § 8.4D, www.acf.hhs.gov/j2ee/programs/cb/laws_policies/laws/cwpm/index.jsp (Question 1).

²²A survey of the monthly SSI benefit amount compared with the foster care rate in the fifty states reveals that, in 2000, thirty-five states had, for 16-year-olds, foster care maintenance rates below the monthly SSI amount of \$512. Two more states, Iowa and Vermont, had rates below that of the SSI amount but based on 1998 figures. Eleven states had foster care rates that equaled or exceeded the SSI benefit amount in that year (<http://waysandmeans.house.gov/media/pdf/greenbook2003/Section11.pdf>). Agencies and advocates in the latter states will have to consider carefully the decision to apply for SSI benefits for youths in care. However, in most states, the benefit to youths and in turn to the state is greater with SSI.

to the difference between the two benefit amounts.²³ If the youth receives both benefits, the total amount that the youth receives does not exceed the SSI rate.²⁴ If the Title IV-E payment is greater than SSI, the SSI payment is reduced to zero, and the benefit is suspended.²⁵ After twelve months in suspension, SSI benefits are terminated, and a youth must re-apply in order to receive benefits again.²⁶ Because of these offset rules, timing the application for SSI in order to have the benefits available upon emancipation or exit from care through adoption or reunification may be more beneficial for the youth. Advocates need to know how to submit an application on behalf of a youth who is receiving federal foster care benefits in excess of the SSI benefit in order to ensure that the application is processed before emancipation.²⁷

Advocates need to understand fully the intricacies of their states' statutes and regulations with regard to funding sources for federally and nonfederally eligible foster youths because the state may not have any choice between SSI and foster care when the foster care payment exceeds the SSI benefit. For example, in California an agency that chooses to receive an SSI payment for a federally qualified foster youth in lieu of the IV-E foster care payment is not allowed to supplement the SSI benefit amount with state foster care benefits.²⁸ The county is permitted only to supplement an SSI benefit for a foster youth not qualified for

federal foster care benefits.²⁹

The amount of the federal, state, and county share of federal foster care benefits and the state statutes and regulations that allow or prohibit supplementation of a youth's placement costs should be considered when evaluating whether an application for SSI is appropriate while the youth is in foster care and when timing the submission of an application to make sure that benefits are in place when they are most needed by the youth. To advocate better laws and policies, advocates must understand the details of their states' laws.

How and When to Apply for Emancipating Youths

While SSI is not always the best choice of assistance for disabled youths while in foster care because of the dollar-for-dollar offset, SSI is critical for youths emancipating from the state's care to independent living. SSI is one of the few sources of cash assistance available to youths, particularly those with no dependents of their own, once they emancipate. Receiving SSI can have tangential benefits, such as qualification for housing assistance and categorical eligibility for Medicaid.³⁰

The eligibility for SSI for foster youths with disabilities must be established before their emancipation from foster care for two reasons. First, in order to determine whether the youth will remain

²³U.S. DEPARTMENT OF HEALTH AND HUMAN SERVICES, *supra* note 21, § 8.4D1.

²⁴*Id.*

²⁵20 C.F.R. § 416.1323 (2007).

²⁶*Id.* § 416.1335.

²⁷See the discussion below under the heading "The Work-Around that Works."

²⁸CALIFORNIA DEPARTMENT OF SOCIAL SERVICES, MANUAL OF POLICIES AND PROCEDURES 45-302.11, www.dss.cahwnet.gov/ord/entres/getinfo/pdf/eas12b.pdf (effective July 1, 1998; updated July 19, 2004). Foster care placements in California are funded through the Aid to Families with Dependent Children-Foster Care (AFDC-FC) program. In some cases the federal government pays a percentage of the benefit if the youth meets the criteria for Title IV-E foster care maintenance payments. If the youth does not qualify for Title IV-E benefits, there is no federal share and the state and county share the full amount of the AFDC-FC benefit.

²⁹*Id.* The rationale behind the regulation appears to be to ensure that the county utilizes federal foster care benefits in the event that the youth qualifies for the federal benefit or otherwise the state bears the burden of supplementing the placement cost with county-only funds.

³⁰Thirty-two states and the District of Columbia provide Medicaid to people eligible for SSI. Seven states use the same rules to decide eligibility for Medicaid as the Social Security Administration uses for SSI, but the seven states require the filing of a separate application. Eleven states use their own Medicaid eligibility rules, which are different from the Social Security Administration's SSI rules. See www.socialsecurity.gov/disabilityresearch/wi/medicaid.htm.

eligible for SSI as an adult, the Social Security Administration initiates a continuing disability review in the month before the month in which the youth turns 18.³¹ While the agency is conducting the review, which can take many months, the youth remains eligible for SSI.³² If the agency determines that the youth no longer qualifies for SSI under the adult rules, the youth is not required to pay back any of the benefits received during the review.³³ Thus, for many youths, having eligibility determined while they are still in care is a safety net during the initial months after emancipation.

Second, processing times for SSI eligibility are very long. According to the Social Security Administration's own website, the average initial application is processed in three to five months.³⁴ Applications, however, are known to take many times longer. In order for a foster youth to have a determination made before leaving care, the application must be submitted at least six months in advance of emancipation.

For SSI benefits to be in place at emancipation, the best practice guidelines developed in California recommend that a youth who exits foster care at 18 be screened for SSI eligibility at 16½ and, if the youth is determined likely eligible, an SSI application be submitted by the time the youth turns 17. Conforming to this guideline without taking additional steps is, however, not always possible because federal law erects some barriers to making SSI applications on behalf of foster

youths. The challenge arises in applying for SSI on behalf of a foster youth who receives federal foster care benefits that exceed the SSI benefit. As discussed above, under federal law a youth may be eligible for both SSI and federal foster care payments, but SSI is offset dollar for dollar by the foster care payment.³⁵ If a foster youth is receiving Title IV-E benefits, this is considered income to the youth and disqualifies the youth from SSI financial eligibility. The Social Security Administration does not accept or approve an application for SSI benefits until thirty days before financial eligibility.³⁶ Foster youths receiving federal foster care benefits in excess of the SSI benefit may not apply for SSI until one month before foster care benefits are terminated. Although foster youths may receive retroactive benefits backdated to the date of initial application once the SSI application is approved, this does not solve the immediate need for an income stream and appropriate medical care for youths with disabilities in the initial months after emancipation from foster care.³⁷

The Work-Around that Works

Recognizing the importance of having SSI benefits in place at the time of emancipation, California Assembly Member Noreen Evans introduced Assembly Bill 1331, which was signed into law on October 11, 2007. This law mandates that the best practice guidelines be implemented so that every youth in foster care is screened for SSI eligibility at 16½ and

³¹20 C.F.R. § 416.987 (2007).

³²*Id.* § 416.987(e). See also Linda Landry, *Continuing Disability Reviews: What Advocates Need to Know*, 40 CLEARINGHOUSE REVIEW 415 (Sept.–Oct. 2007).

³³20 C.F.R. § 416.987(e).

³⁴SOCIAL SECURITY ADMINISTRATION, NO. 05-10029, DISABILITY BENEFITS (2006), www.ssa.gov/pubs/10029.pdf.

³⁵Program Operations Manual System (POMS) SI 00830.410(C)(1)(a) states that “[f]oster care payments made under title IV-E (both the Federal amount and State amount) are considered income based on need (IBON) to the individual in care.” POMS SI 00830.170(B) indicates that “[i]ncome based on need is counted as income dollar for dollar,” while POMS SI 00830.410(D)(1) states that “[i]f countable income, including any title IV-E foster care payments, exceeds the FBR (Federal Benefit Rate), the claim should be denied for excess income.”

³⁶POMS SI 00601.010.

³⁷In the criminal justice system, Congress recognized that these regulations and policies prohibited otherwise eligible individuals being released from public institutions from accessing benefits in a timely manner and enacted legislation requiring the Social Security Administration to provide a way for these individuals to receive benefits upon their release. As a result, the agency created a prerelease procedure, outlined in POMS SI 00520.900–SI 00520.930, which allows for prospective determinations of potential eligibility and payment amount, based on anticipated circumstances, so that the individual may begin receiving assistance immediately upon release.

that an application is submitted for each youth determined likely eligible for the benefit.³⁸

For youths who are receiving federal foster care benefits, the law creates a work-around to ensure that they have timely SSI applications made on their behalf. While Social Security Administration rules prohibit the agency from accepting an application more than thirty days before financial eligibility, the rules require only that a youth meet all the factors of eligibility in one month during the life of an SSI application.³⁹ As long as all of the financial eligibility criteria are met for one month while the application is pending, SSA will process the application and make a disability determination. Once medical eligibility is established, a foster youth remains eligible for assistance—even if the youth is not receiving any SSI benefits—for twelve consecutive months. California law now requires that, when necessary to make an application for a foster youth within the statutorily prescribed time, the child welfare agency forgo federal foster care funds on behalf of the youth for one month in order to submit the SSI application.⁴⁰ This allows the child welfare agency to file an application for a youth at 17, gives the Social Security Administration an entire year to process the application, and enables the child welfare agency to pursue any necessary appeals.⁴¹ Once benefits are approved, they remain suspended and will commence as soon as the youth eman-

cipates, as long as emancipation occurs within twelve months.

Because this work-around responds to and respects federal law and regulations, the work-around may be duplicated in other states. Advocates need to be well versed in their states' funding mechanisms for foster care in order to determine whether this work-around can be written into state law.

Managing a Foster Youth's SSI Benefits: Ensuring that Benefits Are Used in the Youth's Best Interest

As critical as having, especially upon emancipation, access to SSI for foster youths with disabilities is ensuring that those youths who receive SSI while in the state's care have their benefits properly managed and used in their best interest. A youth does not receive SSI directly; instead a person or entity, called a representative payee, receives and manages the funds on behalf of the youth.⁴² Generally a payee must expend the money received on behalf of the youth for the use and benefit of the youth and in the youth's best interests.⁴³ The Court in *Keffeler* emphasized that "[d]etailed regulations govern a representative payee's use of benefits" and the regulations place child welfare agencies as the "last in order of preference" to serve as a representative payee.⁴⁴ Indeed, some child advocacy organizations, such as the Children's Defense Fund, Catholic Charities USA,

³⁸The provisions of Assembly Bill 1331 (Cal. 2007) have been incorporated into California Welfare and Institutions Code Section 13757.

³⁹POMS SI 00601.009; POMS SI 00601.010 ("If the claimant meets all factors of eligibility in any month during the life of the application, the claimant can receive payment without filing a new application.").

⁴⁰Assembly Bill 1331, 2007–2008 Leg. Reg. Sess. (Cal. 2007) (Section 1(d) to be chaptered as CAL. WELF. & INST. CODE Section 13757).

⁴¹Although this "work-around" may encounter resistance at the county and state levels, it is consistent with federal law. When Assembly Bill 1331 was being considered by the California legislature, the California Department of Social Services contacted the Social Security Administration to confirm that this approach would result in applications being processed and was told that "if a youth in foster care meets all SSI eligibility factors for at least one month in the application period, [the Social Security Administration] will process a disability application for him/her to allowance or denial. If the application is allowed based on the medical evaluation but the youth no longer meets the income criterion, the benefits are in suspense status for up to 12 months, at which point eligibility is terminated and a new application and disability determination would be required. If income eligibility is met within the 12-month period a new application is not required." Letter from Marianna LaCanfora, Assistant Deputy Commissioner for Disability and Income Security Programs, Office of Disability and Income Security Programs, Social Security Administration, to John A. Wagner, Director, California Department of Social Services (Jan. 24, 2008).

⁴²42 U.S.C. § 1383(a)(2)(A) (2007); 20 C.F.R. § 416.610 (2007); POMS GN 00502.005.

⁴³20 C.F.R. §§ 404.2035(a), 416.635(a) (2007); POMS GN 00602. See also *Keffeler*, 537 U.S. at 376–77.

⁴⁴*Keffeler*, 537 U.S. at 376–77.

the Child Welfare League of America, and the Alliance for Children and Families, joined as amici and urged the Court to find in favor of the child welfare agency; they argued that the social security commissioner “already has in place a number of safeguards to ensure that payees . . . utilize Social Security benefits in the best interests of the child, beginning with the payee selection process” and continuing with a “system of accountability to ensure that benefits are properly used.”⁴⁵ Advocates may and should use the oversight regulations to ensure that agencies manage SSI benefits in the youth’s best interests. As a recent case out of North Carolina makes clear, this type of advocacy continues to be successful, even post-*Keffeler*.

In determining how a youth’s SSI benefits should be managed to promote the youth’s best interest, advocates should first consider whether there is someone other than the child welfare agency to serve as the representative payee for the foster youth. Federal regulations contain criteria for the selection of a representative payee as well as a prioritized list of preferred payees.⁴⁶ Parents and relatives are first in preference, while a state agency with custody of the youth is last.⁴⁷ When a youth comes into foster care already receiving SSI, the foster care agency typically applies to become the representative payee for those benefits and this application is often granted “automatically” by the Social Security Administration.⁴⁸ However, this automatic designation is contrary to federal regula-

tions, which indicate that a representative payee will be selected by the Social Security Administration pursuant to an investigation of the youth’s family members and other potential representatives and that priority is to be given to relatives and other adults in a youth’s life before consideration of a state entity as representative payee.⁴⁹

No matter who the representative payee is, a youth’s SSI benefits must be managed in the youth’s best interests. Although SSI can benefit both states and foster youths, the SSI benefits should be used first and foremost to meet the youth’s special needs. For the benefits to be fully realized, advocates need to ensure that benefits are properly managed. Federal regulations provide that if the monthly SSI benefit exceeds the amount of the foster care benefit, the portion of the SSI grant that is not used to pay for foster care should be set aside each month to meet the youth’s individual needs.⁵⁰ Therefore, in many cases, if the state is properly managing the youth’s benefits, the youth will accumulate a portion of SSI benefits each month in a savings account to meet future needs.⁵¹

A recent case in North Carolina demonstrates not only that there is a need for this type of advocacy but also that *Keffeler* did not afford child welfare agencies unfettered access to a youth’s SSI benefits. As this case highlights, advocates may hold agencies accountable and ensure that benefits are used in the best interest of foster youths.

⁴⁵Brief of Children’s Defense Fund, Catholic Charities USA, the Child Welfare League of America and the Alliance for Children and Families, *Keffeler*, 2002 WL 1808594, at *18–19.

⁴⁶20 C.F.R. §§ 416.620, 416.621 (2006).

⁴⁷*Id.* § 416.621(c).

⁴⁸Hatcher, *supra* note 10, at 1800.

⁴⁹20 C.F.R. §§ 416.620, 416.621 (2007).

⁵⁰*Id.* § 416.645 (Note: Foster youths receiving SSI benefits are allowed, and in some cases required, to accumulate funds in two types of accounts. The first is a maintenance account, which conserves any SSI benefits that are paid to the youth and are not needed to pay current maintenance costs. *Id.* § 416.645. The second is the dedicated account, which federal law requires for any individual who is under 18 and receives a past-due benefit exceeding six times the individual’s maximum monthly benefit. *Id.* § 416.546. In the case of SSI benefits, the representative payee must establish a dedicated account for those youths who receive a retroactive benefit because the SSI application took more than six months to process).

⁵¹The maintenance account is subject to the federal resource limit of \$2,000, making it crucial for the representative payee to monitor the account balance and ensure that funds are expended appropriately in order to avoid exceeding this limit. By contrast, funds in the dedicated account are not subject to the resource limit and may be used only for specific purposes benefiting the child; they may not be used by the state to pay for foster care. 20 C.F.R. § 416.640 (2007); CAL. WELF. & INST. CODE § 13754(c) (2007).

John G. was placed in foster care after his mother abandoned him and his adoptive father died.⁵² After his father's death, John G. received survivor benefits from his father's Old Age, Survivors, and Disability Insurance and inherited the home where he had lived.⁵³ However, the county child welfare agency, as representative payee for his benefits, used John's social security to pay for his monthly foster care maintenance expenses and refused to apply them to mortgage payments on the home, which fell into foreclosure and disrepair.⁵⁴ John G.'s guardian ad litem filed suit to protect John G.'s home, and the trial court held that the child welfare agency's "use of J.G.'s Social Security benefits to reimburse itself, rather than make the \$221.00 monthly Habitat mortgage payment, had not been reasonable... reason[ing] that J.G. will need the Habitat home as a residence when he turns eighteen years old and ages out of foster care."⁵⁵ The child welfare department appealed, and the North Carolina Court of Appeals affirmed the trial court's decision; the appellate court noted that *Keffeler* did not resolve issues relating to the proper management of a youth's social security benefits. The court of appeals rejected the agency's argument that "it is always proper for it to reimburse itself of the cost of [foster] care using ... Social Security funds" and noted that the Supreme Court in *Keffeler* "acknowledged that it was not always appropriate to use all of a juvenile's Social Security funds to reimburse itself, in particular in anticipation of impending emancipation."⁵⁶ The North Carolina Court of Appeals held that the agency's refusal to use John G.'s

social security benefits to pay the mortgage on his home was contrary to his best interests.⁵⁷

In response to the *John G.* litigation, federal legislation would prohibit agencies from using social security benefits to pay for foster care expenses. In February 2007 Rep. Pete Stark (D-Cal.) introduced H.R. 1104, the Foster Children Self-Support Act.⁵⁸ This legislation would require states to screen youths for SSI eligibility and apply on behalf of those likely to be found eligible. The bill prohibits states from using SSI benefits to reimburse themselves for the cost of foster care. Instead the state would create for each youth receiving SSI a plan for achieving self-support with the goal of helping the youth achieve financial independence upon emancipation.⁵⁹

Although the proposed legislation seeks to protect the income stream and assets of foster youths with disabilities by prohibiting states from reimbursing themselves with SSI payments, the legislation would more likely result in fewer foster youths gaining or retaining eligibility for SSI benefits. As the Children's Defense Fund and other amici in *Keffeler* pointed out, if state agencies were not acting as representative payees, "the disabilities of many of these children might go unrecognized, and they would never be determined eligible for—or actually receive—benefits."⁶⁰ Legislation that prohibits states from using at least some of the SSI benefits received by youths in foster care to ameliorate their costs eliminates the incentive these agencies have to apply for SSI on behalf of disabled youths. A requirement to screen youths for SSI eligibility and apply

⁵²Erik Eckholm, *Welfare Agencies Seek Foster Children's Assets*, NEW YORK TIMES, Feb. 17, 2006.

⁵³*Id.* While the benefits at issue in this case were Title II benefits, the same rules that govern the conduct of representative payees apply to both Title II benefits (Old Age, Survivors, and Disability Insurance) and Title XVI benefits (SSI).

⁵⁴*Id.*

⁵⁵*In re J.G.*, 2007 WL 3253665, at *3 (N.C. Ct. App. 2007).

⁵⁶*Id.* at *8, citing *Keffeler*, 527 U.S. at 378–79 (citations omitted).

⁵⁷*Id.* at *8, citing *Jahnke v. Jahnke*, 526 N.W.2d 159, 163 (Iowa 1994).

⁵⁸Foster Children Self-Support Act, H.R. 1104, 110th Cong. (2007).

⁵⁹The Plan to Achieve Self-Support (PASS) program allows recipients of SSI to exceed resource limits while the recipients work toward an employment and savings goal (A Guide to PASS Plans, www1.dshs.wa.gov/pdf/Publications/22-1097.pdf). PASS is appropriate for those SSI recipients who can work and have specific vocational objectives. The PASS ultimate goal is to allow disabled persons to earn enough income to make SSI unnecessary for their support.

⁶⁰2002 WL 1808594, at *21.

on behalf of youths may be an empty one due to the nature of SSI applications—the agency assisting in the application needs to be dedicated to the outcome. For children who enter the system and are already receiving SSI, the state would have little incentive to make sure that SSI eligibility remains in place. Given the challenges in obtaining SSI benefits and the resources that child welfare agencies can bring to bear on the process, advocating a collaborative relationship with child welfare agencies makes more sense. The state has much to gain not only from monetary reimbursement with SSI proceeds but also from the positive ripple effects of ensuring that foster youths have a stable income stream upon emancipation. Foster youths with disabilities benefit from the child welfare agency applying on their behalf and from the proper management of their SSI benefits while they remain in care. Prohibiting states from reimbursing themselves with SSI benefits creates a divergence in interests between foster youths and the agencies designated to care for them. This divergence of interests may lead to the unintended result of fewer youths qualifying for and receiving SSI and greater numbers of foster youths having disabilities and attempting to become independent adults without a crucial source of income.

Instead of prohibiting states from using benefit monies to pay for youths' foster care costs, tighter controls could be placed on the use of the funds in order to avoid situations such as that of John G. and other youths who lose valuable assets while in foster care. For example, California state law now requires that if the county serves as the youth's representative payee, it must establish a no-cost, interest-bearing maintenance account for the youth and credit interest to the account.⁶¹ The county must keep records of income and expenses on the account.⁶² The county may use the SSI funds only for the youth's benefit or for purposes "determined by the county to be in the

child's best interest."⁶³ Besides clarifying a representative payee's duties, federal law could require a set-aside of funds up to the federal resource limit in anticipation of a disabled foster youth's discharge from care. Increasing the amount of assets and income that disabled foster youths may take with them when they exit care increases the likelihood of successful permanent placements (such as adoption and long-term foster care) and positive outcomes for those youths who emancipate at 18 and must care for themselves without the support of a family.



Youths with disabilities in the foster care system represent one of our country's most vulnerable population groups of young people and a particular challenge for advocates and policymakers. The extreme disadvantages faced by this population result in young adults who are unable to achieve independence and often become homeless, addicted to drugs, and involved in the criminal justice system. We have presented various avenues by which advocates can assist foster youths with disabilities in achieving greater financial security and better outcomes after they exit care. For more foster youths with disabilities to obtain SSI benefits, changes in legislation and policy are necessary. Advocates might promote in their states policies requiring child welfare agencies to make applications for each youth in their care, regardless of the financial incentives, manage the youth's benefits according to the youth's best interest, and aid youths in their transition out of foster care to ensure that they maintain their SSI eligibility during the transition and receive benefits immediately upon their exit from care. Better coordinated laws and regulations should allow advocates to maximize economic and social benefits for this population and ultimately help improve the overall health and welfare of foster youths with disabilities and facilitate their integration into their communities as self-sufficient adults.

⁶¹CAL. WELF. & INST. CODE § 13754(a) (2007); 20 C.F.R. § 416.645 (2007) (federal law requires that any funds not needed for the beneficiary's current maintenance must be conserved in accordance with the rules followed by trustees).

⁶²CAL. WELF. & INST. CODE § 13754(a) (2007); 20 C.F.R. § 416.645 (2007).

⁶³CAL. WELF. & INST. CODE § 13754(b) (2007); POMS GN 00605.350.

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