

2021

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Recommended Citation

Abigail Mitchell, *The Strengthening Protections for Social Security Beneficiaries Act Fails to Improve Foster Youth's Awareness of their Federal Benefits*, 42 CHILD. LEGAL RTS. J. 52 ().

Available at: <https://lawcommons.luc.edu/clrj/vol42/iss1/4>

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Legislative Update:

The Strengthening Protections for Social Security Beneficiaries Act Fails to Improve Foster Youth's Awareness of their Federal Benefits.

*Abigail Mitchell**

I. INTRODUCTION

In 2018, Congress passed the Strengthening Protections for Social Security Beneficiaries Act (Strengthening Protections Act) which attempted to remedy child welfare agencies' lack of representative payee reporting when they claimed foster youth's federal benefits. However, a 2021 Government Accountability Office (GAO) report found that most states have failed to implement data exchanges with the Social Security Administration (SSA) in compliance with the law.

In April of 2021, the Marshall Project reported that child welfare agencies were receiving federal benefits on behalf of foster youth without their knowledge. Rather than providing additional services for those children based on an individualized assessment of heightened needs, in some cases, states were outsourcing applications to a private contractor and funneling the federal benefits into the state general fund. Because foster children are generally not required to pay for their care, specific information about how states are spending garnished federal benefits is imperative to avoid violating beneficiary foster youth's due process rights. Yet, states have consistently failed to provide a detailed accounting of how Social Security Supplement Income (SSI) or survivor benefits (OASDI) are being spent and collecting data through the Strengthening Protections Act has proven difficult.

For young adults in the foster care system, receiving SSI or OASDI benefits can be life changing. Moving forward, states must implement the required data exchanges with SSA so that advocates and foster youth can better hold child welfare agencies accountable for how their federal benefits are being spent.

II. FEDERAL BENEFITS AVAILABLE TO CHILDREN IN FOSTER CARE

A child is eligible for SSI if they are disabled and meet the income and resource limits imposed by law. Benefits must be used to support the beneficiary's current maintenance, including the costs incurred in obtaining food, shelter, clothing, medical care, and personal comfort items. Because the funding is based on current maintenance, the SSA requires rigorous accounting of expenditures, and few funds can be conserved for later use.

OASDI benefits are intended for unmarried minors whose parents or guardians were eligible for certain benefits and have passed away. These funds can be saved without

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penalty for future use. Since OASDI funds do not need to be put toward current maintenance, less reporting is required.

Given that foster children are not able or expected to pay for their state care, a representative payee is appointed to spend federal benefits on the child's behalf and report to the SSA regarding how the funds are spent.

Because young adults emerging from foster care generally have less support from their parents than the general population, providing federal benefits to foster youth can help allow foster youth to participate in higher education or obtain financial security.

OASDI and SSI benefits provide integral help for young adults emerging from the foster care system. SSI maintenance payments could be utilized to provide heightened services for high needs children at an individual level while a child is under state supervision or utilized to aid family reunification efforts. Instead, states fail to engage in rigorous accounting and may divert federal benefits to the general state fund. Child development studies have found that the average age of financial self-sufficiency for American youth now extends into the mid-twenties. Foster youth are expected to be fully self-sufficient much earlier without any financial contributions from parents. OASDI benefits could be conserved for foster youth's education or large expenses to help them obtain self-sufficiency. Instead, many foster youths' futures are undermined when state representative payees fail to conserve funds on their behalf.

III. STRENGTHENING PROTECTIONS FOR SOCIAL SECURITY BENEFICIARIES ACT

Prior to 2018, foster children were liable for accidental SSA overpayments even when the state was receiving the benefits on their behalf. Former foster youth's credit could be marred by overpayments. To correct this, Congress passed the Strengthening Protections Act. The law clarified that states were liable to repay minor beneficiaries' overpayments and states could not use conserved minor's funds to repay the SSA.

Section 103(a) of the Act directed SSA to enter into agreements with states to share and match SSA and child welfare data. The goal was to remedy the lack of available information on how many children had federal benefits that were being funneled to states by identifying representative minor beneficiaries who are in foster care. States are required to report this data monthly to ensure that if a child's foster status shifted, an appropriate payee could be located. The law also required that the GAO report to congressional committees on issues related to foster care beneficiaries based on this data.

Section 103(a) promised transparency and foreshadowed potential future legislative moves should the data compiled by this data-exchange schema prove to show a larger issue affecting huge swathes of children. Unfortunately, over the past three years, states have failed to comply with the law.

IV. IMPLEMENTATION CHALLENGES HAVE OBSCURED ESSENTIAL DATA COLLECTION

According to a GAO report released in June of 2021, over the last three years the SSA designed a data system, developed a model exchange agreement, produced a starter

kit for states on what information had to be reported, and held webinars explaining the data exchanges. Despite this, the GAO found that as of April 2021, only fourteen states are actively exchanging data with SSA (Alabama, Delaware, District of Columbia, Illinois, Indiana, Iowa, Kentucky, Maine, Nebraska, Nevada, Ohio, South Dakota, Vermont, and Virginia). Of the fourteen states reporting data, most self-reported that they used almost all federal funds on current maintenance with less than 15% being conserved on the child's behalf. Only thirty-one states have entered into data exchange agreements at all (Alabama, Delaware, District of Columbia, Illinois, Indiana, Iowa, Kentucky, Maine, Nebraska, Nevada, Ohio, South Dakota, Vermont, Virginia, Arizona, California, Massachusetts, Montana, Tennessee, Texas, Utah, Alaska, Florida, Hawaii, Kansas, Louisiana, Maryland, Missouri, Oregon, Rhode Island, West Virginia).

The Strengthening Protections Act signaled a shift away from the view that all child welfare agencies were always acting in the best interest of children when they garnished their federal benefits. The act promised a measure of transparency, if only between bureaucratic structures. However, since there has been no meaningful implementation, the number of children in foster care whose benefits are being handled by the state remains elusive.

V. PRIVATIZATION OF REPRESENTATIVE PAYEE APPLICATIONS

The lack of data on the number of youths in foster care that have state representative payees is even more unsettling considering the uptick in private contracting of SSI and OASDI applications. Turning to for-profit companies to mine through a child's private health records, caseworker notes, and school records began during the Reagan Era. Many states utilize a private contractor to apply for federal benefits on behalf of foster youth for the first time. Many contractors boast about their ability to identify disabled children, (particularly those suffering from post-traumatic stress disorder, which is a known symptom of foster care placement) and successfully apply for federal benefits that will be paid to the state on the child's behalf. One such company, Maximus, advertised their SSI advocacy project, stating that the cost of their services can "pay for themselves." In essence, funds intended for disabled children will be utilized by states to repay private contractors for their labor. Because most states do not require that children be notified when federal benefits are being paid to states on their behalf, the child, their representation, their parents, and other family court stakeholders remain unaware of the existence of the federal benefits.

VI. MOVING BEYOND THE LAW: UNIVERSAL NOTICE REQUIREMENT

The Strengthening Protections Act was a promising beginning to better understand whether states are handling foster youth's federal benefits appropriately. Yet, advocates have asserted that the Act fails to go far enough, especially regarding the lack of due process afforded to foster youth. Advocates argue that providing children with due process includes providing all stakeholders in a family court proceeding with notice of receipt of federal benefits and potential exploration of how the resource is spent.

In 2003, the Supreme Court held in *Wash. Dept. of Soc. And Health Servs. v. Keffeler* that Washington state could constitutionally use SSI to reimburse itself, but the Court tasked the agency, as a representative payee, to ensure that the use of funds best serves the child's best interest. In other words, the Court rejected the argument that the large-scale practice was unconstitutional. The Court failed to address the petitioners' argument that the practice violated foster youth's procedural due process rights.

In a class action suit in Alaska in 2019, more than 250 current and former foster children demanded that the state pay back their SSI funds. The court mandated notice when the state sought to garnish their federal benefits because children had a significant privacy interest in their benefits that should not be erroneously deprived and the burden of providing notice was low.

In 2018, Maryland opted to build transparency into their family code. The law required that a foster child's legal counsel be notified when states apply for federal benefits on their behalf. The law also required some funds be conserved for emerging adults. The Texas state legislature is currently considering a bill that would require that every foster child's lawyer be notified about their benefits. It would also offer protected trust accounts to hold a portion of the funds until the children reached adulthood and provide for continued screening of foster children for SSI eligibility so that state agencies continue to help children apply for benefits despite the fact they may no longer have a financial incentive to apply.

As evidenced above, for states that aggressively advocate or litigate this issue, greater transparency generally follows. However, States have not universally adopted notice requirements. Some states say that they provide information about federal benefits in children's case file, allowing the child's lawyer to access the information. But almost all states declined to comment on their specific notification practices. Many admitted that they do not provide an explanation to children, their family, or advocates about their federal benefits. While SSA attempts to provide notice to a child's guardian or their parents if a representative payee changes, critics have noted that in most cases, a foster child's guardian is the child welfare agency and new applications do not warrant notice to parents or foster youth's legal representatives.

Most family court stakeholders remain completely unaware of potential SSI or OASDI funding. Many children and families are unaware that federal benefits have been applied for on their behalf let alone *how* that money is being spent. A broad notice requirement would allow family court stakeholders to gauge how federal benefits are being used on behalf of an individual heightened needs child and curb potential misappropriation of the funds.

VII. CONCLUSION

The Strengthening Protections Act was enacted to better protect children from bureaucratic ineptitude. Instead, Section 103(a) has been largely ignored by state child welfare agencies. Enforcement of data collection between states and the SSA would be a positive first step towards greater transparency to prevent unfair usage of funds. Still, greater protections should be enacted. Foster youth with elevated needs remain

vulnerable and invaluable benefits that could have helped emerging foster children prepare for self-sufficiency are being squandered. Family court stakeholders should be broadly provided with notice when the state applies to be a child's SSI or OASDI representative payee and state agencies should be held accountable for how those funds are spent. Foster children need to be able to have a say in their care. An equitable foster system would execute large-scale data transparency to illuminate when state welfare agencies are erroneously depriving children of their funds and demand actual notice when foster children's federal benefits are garnished by the state.

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