

# The **Fleecing** of Foster Children

How We Confiscate Their Assets and Undermine Their Financial Security



Children's Advocacy Institute



## Acknowledgements

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## About the Authors

The **Children's Advocacy Institute** (CAI) was founded in 1989 as part of the Center for Public Interest Law at the University of San Diego (USD) School of Law. CAI's mission is to improve the health, safety, development, and well-being of children and youth. CAI advocates in legislatures to make the law, in courts to interpret the law, before administrative agencies to implement the law, and before the public to provide information on the status of children. CAI's goal is to ensure that children's interests are represented effectively whenever government makes policy and budget decisions.

Robert C. Fellmeth, J.D., CAI's Executive Director, is the Price Professor of Public Interest Law at the USD School of Law and founder of both CAI and the Center for Public Interest Law. Professor Fellmeth has over 30 years of experience as a public interest law litigator, teacher, and scholar.

**First Star** was founded in 1999 as a national 501(c)(3) public charity dedicated to improving life for child victims of abuse and neglect. We fight for a future in which America's abused and neglected children will have won full recognition of their fundamental right to be heard and protected by the systems legally entrusted with their care. A future in which those systems are fully resourced, transparent and accountable to the public. First Star improves the lives of America's abused and neglected children by strengthening their rights, illuminating systemic failures and igniting necessary reforms. We pursue our mission through research, public engagement, policy advocacy, education and litigation.

First Star's Co-Founder and President, Peter Samuelson, is a media executive, President of [www.splashlife.com](http://www.splashlife.com). He founded the Starlight Children's Foundation in 1982 and the Starbright World social network for ill children in 1995. Sherry A. Quirk, Esq., Co- Founder and Vice Chair of First Star, a partner of Schiff Hardin, LLP, is past president and founder of One Voice and the National Coalition of Abuse Awareness. First Star is proud to be a pro-bono client of Schiff Hardin, LLP.

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## Preface

### *Post-Partisan Imperative: Morality in Communal Parenthood*

We all want to cut the deficit, we all want government to save money and we all want better value and better results for the taxes we pay. And yes, we want to do everything we can to help all American children reach their full potential. So why then do we consistently spend money in ways that create massive social cost for all of us in the future, while blighting the lives of countless foster children? This is a perfect storm of short-sighted practice. We have illuminated here the large and endless social burden on all of us in dealing with the end product of specific misguided policies we follow in supporting foster children while they are our responsibility. As a result, we all end up spending a fortune later as their lives go horribly wrong.

In America, hundreds of thousands of children are removed from their homes by the state. These children have done nothing wrong. They are taken for their own protection and then become “children of the state.” State court judges legally assume “jurisdiction” over all these children, supplanting any other parental authority. These foster children thus depend entirely upon our public officials — and that means they depend upon each of *us*, the citizens who elect those officials. We *are* the state. We *are* their parents.

What happens to our foster children is no matter for national pride. Yet very little attention is paid. Kids don't march, write Op-Eds, vote, employ lobbyists or have money to make their voices heard. The nation's media choose mostly to cover celebrities, the shocking and the prurient. And our citizenry is preoccupied with other matters. Few detailed public discussions focus on our profound obligation to the 700,000 children served by our foster care system each year — children who are truly members of our extended families. Virtually no attention is paid to major flaws in policies that exacerbate the vast long-term social and humane costs of broken lives. Worse still, we hide our failing behind the confidentiality we impose in our juvenile dependency courts and around the children who are subject to those courts. We think we have placed barriers of silence around hundreds of thousands of children to protect them, but the rationale is an unworthy self-deception that allows us to continue our culpable negligence without being exposed to the inconvenient or embarrassing light of day. It is a secrecy that is often and inexplicably maintained after a child dies of abuse or neglect, hindering the quest for answers, the path to prevent repetition of the tragedy. And in one third of the states we erect no such barrier of secrecy, with no apparent adverse consequence.

The median age of initial self-sufficiency for the average American youth is 26. Imagine how difficult the transitional years following age 18 are for a youth leaving our foster care system! Things that most of us took for granted during our struggle to achieve self-sufficiency are not available to former foster youth. For example, American parents give a median of almost \$50,000 in assistance to each of their own children after age 18 to help them achieve self-sufficiency. And the help parents give their young adult children goes far beyond money: we advise them on major decisions, we guard their important documents in our homes, and we often continue to provide homes for them as they work to establish themselves in our economy.

Former foster youth receive none of this assistance from us, their default parents. Even if a former foster youth is fortunate enough to receive all available financial help, it totals less than one-fifth of the median amount per child that the average private parent provides, and it is skewed to the miniscule 2–3 % of foster kids who are able to earn a higher education degree. The rest are abandoned to fend for themselves. Thus former foster youth have wildly disproportionate levels of unemployment,

arrest and suicide. Over one-third of them experience homelessness. And the public costs of our failure to nurture in the first place are enormous and often last a lifetime.

Even during actual foster care, as this report carefully documents, in state after state we are sabotaging foster children's futures rather than providing guidance and help. Every state has criminal "child neglect" statutes that provide for incarceration of natural parents who fail to provide for their children, including providing or funding room and board. Indeed, until the 1970s, these obligations lasted until youth reached age 21. Each state likewise has a special affirmative obligation to provide for the care of foster children. But when a foster child is eligible for survivor benefits or disability funds, states confiscate the child's money to compensate themselves for the costs of care, instead of conserving the child's own funds to assist him/her during the difficult transitional years ahead. Is that what we should do as responsible parents: launch destitute children into the world on their own at age 18 with zero assets and no familial safety net to catch them when they fall? Does that reflect American values?



Beyond this stealing from our foster kids, things get even worse: If they try to save their own money to help them live post-18, accruing more than paltry amounts makes them ineligible for many programs. We encourage our own kids to save, but not these kids who arguably need savings the most! This Report calls upon the states *not to steal from their children*, but to provide for them as do all responsible, caring parents, and to encourage and ring-fence their savings.

We hope these accusations sound truly outlandish: bad for the children, bad for society — entirely wrong-headed by every standard! But brace yourselves for the revelations that follow. This is not a pretty set of truths. If this report causes you discomfort or if it makes you angry, then the Children's Advocacy Institute and First Star will have accomplished our goal.

The suggested policies in this report should draw bi-partisan support by ensuring our investment in the most vulnerable among us, and helping these youth in their struggle towards self-sufficiency, while simultaneously protecting the individual property rights of those children from unwarranted government takings.

Please support us in driving change. The kids can't do it on their own.

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## EXECUTIVE SUMMARY\*

### I. WHAT IT MEANS TO GROW UP IN FOSTER CARE

Each year, 30,000 of the nation’s foster children “age out” of the foster care system, typically at 18, and are expected to become independent, self-sufficient and contributing members of society with little or no assistance from others. These are young adults who experienced significant psychological trauma during their formative years — including being neglected and/or abused, being separated from their homes, friends, families and most things familiar to them, and often enduring multiple placements in homes and institutions. Particularly those foster youth who live their teen years in group homes do not benefit from normal growing-up experiences that most of us took for granted, but which prepared us for adult life, such as seeing an adult pay bills each month, do the laundry, buy groceries, pay taxes, arrange for car insurance, or undertake the dozens of other mundane tasks required to run a household.

The foster care system itself creates huge barriers to the normalcy of a child’s growing-up experience, causing foster youth to miss out on many rites of passage experienced by their peers. Many foster youth lack control over even minor aspects of their lives, giving them little opportunity to make decisions about their lives. Unlike their peers who were not raised by the foster care system, most foster youth alumni do not have a strong familial support system to offer guidance and to which they can go for help if they experience the difficulties that typically face young adults. We essentially abandon our foster youth in the wilderness when they age out, with no resources, no map or compass, and no one to serve as guide.

### II. TYPICAL OUTCOMES OF YOUTH AGING OUT OF FOSTER CARE

The consequences of our failure to adequately prepare foster youth for life on their own are woven throughout every aspect of their lives after foster care. They are evident in the bleak outcomes these youth experience, which include the following:

- **Educational attainment.** Although most foster youth express a desire to attend college, only about 3% earn four-year degrees.
- **Employment.** By age 24, less than half of foster care alumni are employed — and they earn less than half, on average, than their peers with no history of foster care.
- **Housing / homelessness.** By age 24, 37% of foster care alumni experienced homelessness or had “couch surfed.”
- **Health outcomes.** Many experience chronic health problems as a result of the abuse and neglect they endured. Up to 85% of foster youth experience mental health issues.
- **Credit issues.** Identity theft is a growing problem among foster youth — a problem that many do not discover until they exit care. When applying for a college loan, an apartment, a car loan, etc., they discover that their credit has been destroyed.

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\* Additional details, including endnotes and references, are included in the body of the report.



These issues of education, employment, housing, health, and credit are intertwined. Because most foster care alumni lack the social and familial safety net their peers with no history of foster care enjoy, a negative outcome in any one of these areas can spiral into a lifetime of poverty. Responsible parents give their children the tools, framework and knowledge they need to achieve financial security — and we must give that same foundation to our foster children. To do so, however, we must address several federal and state policies and practices that currently impede the ability of foster youth to achieve self-sufficiency and financial security.

### III. SPECIFIC FEDERAL AND STATE POLICIES AND PRACTICES THAT CONFISCATE ASSETS FROM FOSTER YOUTH AND UNDERMINE THEIR FINANCIAL SECURITY

#### A. Diversion of Foster Children’s OASDI/SSI Benefits to Pay for Foster Care

Thousands of children in foster care are eligible for benefits from the Old Age, Survivors and Disability Insurance Benefits program (OASDI) and/or the Supplemental Security Income for Aged, Blind and Disabled (SSI) program. Generally a child entitled to such benefits is required to have a representative payee appointed by the Social Security Administration (SSA) to manage his or her funds, and to ensure that the funds are used to serve the best interests of the child beneficiary. A duly appointed representative payee serves in a fiduciary capacity to the beneficiary.

For most child beneficiaries, SSA appoints the child’s parent or guardian to serve as representative payee. However, for foster children, that is often not possible or appropriate. In such cases, SSA is required to identify and select the representative payee who will best serve the child’s interests, using preference lists contained in federal regulations. Although the lists provide guidelines that are meant to be flexible, foster care agencies are ranked last in order of preference. However, in many jurisdictions, the assignment of the responsible child welfare agency as representative payee for a foster child is practically automatic. Instead of conducting a meaningful, proactive inquiry to determine who would best serve a child’s interests, SSA often automatically appoints the foster care agency—neglecting a critical oversight step in the appointment process.

Regrettably, most of those agencies then routinely confiscate foster children’s SSI and OASDI money to pay for the cost of foster care. The vast majority of states openly admit to — and actually defend — taking and using foster children’s Social Security benefits to pay for child welfare services that these children are entitled to receive as a matter of right. Although *Washington State Dep’t of Social and Health Services v. Keffeler* held that a foster care agency serving as a foster child’s representative payee did not violate the Social Security Act’s anti-attachment provision when using the child’s benefits to reimburse itself for the cost of the child beneficiary’s foster care placement, ***the Keffeler decision did not excuse foster care agencies serving as representative payees from their affirmative fiduciary duties to ensure that such use best serves the unique interests of each child beneficiary*** — a determination that must be made on a individualized, case-by-case basis following a meaningful examination of each child’s circumstances, special needs, age, etc.

#### B. Failure to Notify the Foster Child’s Attorney/GAL that an Agency Has Applied To Be or Was Appointed as the Child’s Representative Payee

Further, children usually have no idea that states have even applied for benefits on their behalf, let alone that the states are confiscating the funds. Before it selects a representative payee, SSA is required to notify the beneficiary and give the beneficiary an opportunity to appeal SSA’s

decision. Because of their age, foster children are typically not notified directly about the impending appointment, nor are most of them even told they are eligible for (or receiving) benefits.

Instead, for most foster youth, SSA provides notice solely to the child's legal guardian or legal representative — and this is often the same state or county agency that is applying to be the child's representative payee in the first place. Current federal law does not require the foster care agency to notify the child, the child's attorney/guardian ad litem (GAL) or the juvenile court (which is ultimately responsible for the child's well being) that it has applied to be or has been appointed as a foster child's representative payee. Without notification, the child, the child's attorney/GAL and the juvenile court have no opportunity to notify SSA that there is a parent, relative, family friend, or other person in the child's life who might be a more appropriate choice. The result is a rather clandestine process in which the foster care agency applies to be representative payee, is appointed, and uses a child's benefits to benefit itself. Many youth leave foster care unaware that they had been receiving benefits— and for those receiving SSI, they leave care unprepared for the cumbersome redetermination process that awaits them.

### **C. Failure to Screen Foster Children for OASDI / SSI Eligibility and To Provide Assistance in Applying for Benefits**

Unfortunately, foster children are not accessing all the government programs available to them while they are in care or after they age out of care. Among 25 states responding to a recent survey of state child welfare agencies, 7 indicated that SSI eligibility screening was not routine. This is particularly troubling because these are youth who, through no fault of their own and by institutional design, have only the government to act as their safety net.

### **D. Asset and Resource Caps: Limiting How Much Money Foster Youth Can Save for the Future**

Most parents encourage their kids to save money that comes their way, perhaps from part-time employment, bequests, gifts, etc. Saving for the future is a basic value that all responsible parents imbue in their children. It is difficult to imagine a responsible parent telling his or her child, "OK, that's it. You've hit the limit — you are not allowed to save any more money for your future." And yet that is exactly the message that we send to our foster children in a variety of ways. For example, those who are eligible SSI benefits because of a qualifying disability are not allowed to accumulate resources that exceed \$2,000 — a figure that has been in place since 1989 and is not indexed for inflation. While the SSI cap applies to all SSI beneficiaries, not just foster kids, its impact is arguably more severe for children who lack a familial support system and will be expected to support themselves. While some mechanisms allow for the accumulation of assets beyond the \$2,000 cap, those vehicles carry their own restrictions and can be burdensome for foster youth to create and maintain.

Further, many foster youth will need to rely temporarily on programs such as Temporary Assistance for Needy Families, Medicaid, and Supplemental Nutrition Assistance Program (Food Stamps) for support after they age out of foster care. In many states, they will be disqualified for some or all of these programs if their assets exceed certain levels — a disincentive to foster youth to save for their future. Considering that these youth age out of foster care with little or no safety net or support, it is irresponsible and short-sighted not to allow them to save as much as possible for their futures.

### **E. Failure to Require Dedicated Accounts to Hold Benefits for Each Youth**

Where a representative payee lives with the child, that payee has firsthand knowledge of the long- and short-term needs of the child, and knows how the child's funds are being used to meet those needs. However, when governments act as representative payee for foster children, benefits are frequently dumped into an account and billed for services by someone who often has not even met the child and has no direct knowledge of the best interest needs of the child. SSA's Office of the Inspector General (OIG) has found that oversight mechanisms are often not in place to ensure that a foster child's benefits are spent on that specific child and that unspent money is were saved for the child's use at a later date. With so many government agencies acting as representative payees for foster children nationwide, OIG's audits reveal a system that takes abused and neglected children and subjects them to further abuse — this time by a fiduciary. Without individualized, dedicated accounts for each child, it is nearly impossible for a foster care agency to track foster youth income and expenditures and conserve unused funds — *i.e.*, to comply with the most basic aspects of the fiduciary relationship.

### **F. Failure to Require States to Check into Foster Youths' Credit Records and Repair Credit Where Necessary**

Identity theft is a common problem in the foster care system. Parents, grandparents, family members, foster parents, social workers, group home personnel and many others regularly have access to a foster youth's Social Security number and other personal information. Too often, this access is abused for everything from opening credit cards to fraudulently providing identification for criminal matters. Many foster youth do not learn that their identities have been stolen and their credit destroyed until they have exited care and apply for credit.

Identity theft can have devastating consequences. Former foster youth may face problems finding safe and adequate housing; they may be denied loans for cars and other larger necessities, and they may be denied financial aid and the opportunity to attend college, all as a result of identity theft that occurred while they were in foster care. Complicating the problem is the reality that repairing credit problems caused by identity theft can be a complex, expensive, and time-consuming process.

### **G. Failure to Pass Conserved Funds — When They Do Exist — to the Youth in a Timely Manner upon Aging Out**

Until very recently, when a representative payee who had conserved funds for a foster youth stopped serving as payee, the payee was required to return the conserved funds and any interest earned to SSA, which would then reissue the funds to the youth. The unfortunate result was a delay between when the youth left the system and when the youth received his/her own funds. Given the lack of a familial safety net, and the limited resources most foster youth have when they age out of the system, the delay had a very real potential for disastrous consequences.

Although SSA's Program Operations Manual System now specifies that the SSA may permit a former payee to transfer conserved funds directly to a new payee or to a capable beneficiary, it is not clear how a payee should proceed with requesting a direct transfer of funds to a beneficiary. SSA should more clearly define the process for requesting and obtaining approval for this expedited transfer.



## H. Slashing of State and County Social Services Budgets

Most of the problems discussed above are exacerbated by the fact that state and county social services budgets have been reduced over the last several years — and face more cuts as a result of the struggling economy and focus on deficit reduction. As they watch their budgets shrink and caseloads and needs grow, government officials are tempted to explore any and all available options to raising revenue — even if that means abusing their fiduciary role as representative payee to take Social Security benefits out of the pockets of abused and neglected children.

One notable federal policy regarding foster children unduly exacerbates the financial woes of states and counties. Eligibility for federal reimbursement of foster care benefits through Title IV-E funding is linked to the Aid to Families with Dependent Children (AFDC) income requirements as they existed in 1996 — with no adjustment to reflect inflation over the past fifteen years. If a child does not meet the 1996 eligibility criteria, federal Title IV-E funds are not available to reimburse the state. According to one source, 53% of children in foster care were eligible for federal support in 1998, but by 2005 the percentage had declined to 46% — and the number was projected to decline by approximately 5,000 children each year thereafter. As long as the federal eligibility remains linked to the 1996 AFDC income requirements, the financial burden on states and counties will continue to grow. Child welfare agencies are in desperate need for more funds, but they obviously must not take money from the very children they are trying to help.

## IV. RECOMMENDATIONS FOR POLICY REFORMS AT THE FEDERAL LEVEL

When foster youth age out of care, they generally have nobody to answer basic questions about life's concerns. There is no opportunity to move back home when things get tough. They have nobody to ask for a loan. There is no family health insurance policy providing coverage. Their caseworker is no longer available. Their attorney (if they were lucky enough to have one) has closed their file. They are, quite literally, on their own.

Foster children are “our” children. It is our legal, ethical, and moral imperative to take good care of them and prepare them for life. As taxpayers and responsible citizens, we must ask ourselves, “How are my kids doing now that they have left the nest? How can I help them do better?”

Two excellent measures would provide this population with the safety net and tools for success they desperately need. If enacted, they will help give some of our most vulnerable youth a better chance for a successful start.

First, the **Foster Children Self-Support Act** will safeguard some of our foster children's Social Security benefits, creating a basic safety net for when they age out of foster care. Just as parents work hard to raise children who will become self sufficient, we should work hard to prepare foster youth to have the same capabilities. Key provisions would:

- Require that all foster children be screened for OASDI and SSI eligibility while in care, and require child welfare agencies to notify the child's attorney and/or GAL;
- Require foster care agencies to notify the child's attorney or GAL (and the child if he/she is 14 or older) of eligibility for and receipt of Social Security benefits;

- Develop and implement a “Plan for Achieving Self Support” specific to each child receiving Social Security benefits, with the goal of using Social Security benefits to meet the child’s current and future needs;
- Create an Individual Development Account for each child receiving benefits, so that these Social Security assets will be conserved to assist the youth in securing housing, education, or job training after they leave care;
- Restrict state agencies from using a child’s benefits as a general revenue source; and
- Exclude conserved funds, personal earnings, inherited assets, and civil judgments from the \$2,000 resource limit under the SSI program.

Second, the **Foster Youth Financial Security Act** seeks to redress identity theft or credit fraud issues and ensure that youth transitioning out of care have the most basic documents and tools for achieving independence. To strengthen the financial security of foster youth and to empower them to make responsible financial decisions as adults, key provisions of the Act would:

- Protect against identity theft and credit fraud by requiring that foster care agencies review the credit reports of all foster children, take actions to clear them if there is an inaccuracy, and end the use of a child’s Social Security number as an identifier.
- Ensure that youth leave foster care with the documents they need, and require agencies to help them apply for state benefits and financial aid, educate them about obtaining health and auto insurance, and provide them and any interested caretakers with financial literacy courses.
- Provide modest financial seed money to set up Individual Development Accounts (IDAs) for foster youth so they leave care with a small nest egg to cover the first costs of specific items such as housing, education, and job training.

The federal government is also called upon to delink Title IV-E funding from 1996 AFDC income eligibility requirements. It is widely acknowledged that these standards are antiquated, irrelevant, and harmful to the very groups that were meant to benefit from the program.

Finally, the federal government should ensure that youth staying in care beyond age 18 pursuant to the landmark 2008 Fostering Connections to Success and Increasing Adoptions Act are entitled to the continuation of juvenile court involvement and legal representation to ensure that their rights are being protected and their best interests served.