

**IN THE COURT OF SPECIAL APPEALS
OF MARYLAND**

September Term, 2009

No. 2765

ALEX MYERS,
Appellant,

v.

**BALTIMORE COUNTY
DEPARTMENT OF SOCIAL SERVICES, ET AL.,**
Appellees.

On Appeal from the Circuit Court of Baltimore County
(Mickey J. Norman, Judge)

**BRIEF OF PUBLIC JUSTICE CENTER, LEGAL AID BUREAU, RANDALL &
SONNIER, CHILDREN'S ADVOCACY INSTITUTE, AND SUSAN LEVITON AS
*AMICI CURIAE***

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TABLE OF CONTENTS

TABLE OF AUTHORITIES ii

INTRODUCTION 1

INTERESTS OF AMICI CURIAE 2

ARGUMENT 4

I. THE STATE CAN FULFILL ITS DUTY TO SERVE A FOSTER CHILD’S BEST INTERESTS IF IT USES THE CHILD’S FINANCIAL RESOURCES IN A MANNER THAT DIRECTLY ADDRESSES THE CHILD’S NEEDS. 4

 A. Development-Enhancing Activities 5

 B. Transitioning 10

 1. Young Adults Fare Poorly When Transitioning from Foster Care to Independence 11

 2. Existing Transition Services Are Insufficient to Fully Address Foster Youths’ Needs 16

 3. Providing Youth with Financial Resources Can Help to Ease their Transition to Adulthood 18

II. EVEN IF THIS COURT WERE TO PERMIT DSS TO RETAIN FOSTER CHILD’S OASDI BENEFITS AS REIMBURSEMENT FOR CARE PROVIDED, THE COURT SHOULD EXPRESLY PROHIBIT THE AGENCY FROM COLLECTING MORE THAN THE AMOUNT IT CAN DOCUMENT AS HAVING ACTUALLY BEEN SPENT ON THE CHILD. 23

CONCLUSION 28

TABLE OF AUTHORITIES

CASES

In re Adoption/Guardianship of RaShawn H., 402 Md. 477 (2007)..... 23

In re J.G., 652 S.E.2d 266, 275-76 (N.C. Ct. App. 2007)..... 19

Washington Dep’t of Social & Health Servs. v. Guardianship Estate of Keffeler,
537 U.S. 371 (2003) 23, 24

STATUTES

MD. CODE ANN. FAM. LAW. § 5-501(g)..... 4

MD. CODE REGS. 07.02.11.31 (2010)..... 5

MD. CODE REGS 07.02.11.34(b)-(c)(2010) 28

MD CODE REGS 10.09.29.08 (2010) 28

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ASSOCIATION FOR CHILDREN AND FAMILIES, *CHILD WELFARE POLICY MANUAL* (2001)..... 28

The Big House Foundation, www.ourbighouse.org..... 9

CAROL BRANDFORD & DIANA ENGLISH, *FOSTER YOUTH TRANSITION TO INDEPENDENCE STUDY: FINAL REPORT* (2004)..... 12, 16

Camp Freedom, www.lions-campcrescendo.org/campfreedom.html 9

CASEY FAMILY PROGRAMS, *CASEY YOUNG ADULT SURVEY: FINDINGS OVER THREE YEARS* (2008)..... 16

CASEY FAMILY PROGRAMS, *YOUNG ADULT SURVEY 2006: EXAMINING OUTCOMES FOR YOUNG ADULTS SERVED IN OUT-OF-HOME CARE* 26 (2006)..... 15, 16

Child Welfare League of America, Programs and Resources for Youth Aging Out of Foster Care, http://www.cwla.org/programs/fostercare/agingoutresources.htm	15
CHILDREN’S AID SOCIETY, YOUTH AGING OUT OF FOSTER CARE FACE POVERTY, HOMELESSNESS, AND THE CRIMINAL JUSTICE SYSTEM (2006)	passim
MARK COURTNEY, POLICY BRIEF: YOUTH AGING OUT OF FOSTER CARE (2005).....	13, 17
Deana B. Davalos et al, <i>The Effects of Extracurricular Activity, Ethnic Identification, and Perception of School on Dropout Rates</i> , 21 <i>Hisp. J. of Behav. Sci.</i> 61 (1999)	6
Dianne H. Peterson, Jenna Lynn Mazzucca, <i>Youth at Risk: The ABA Initiative and Colorado’s Participation</i> , 36 <i>COLO. LAW.</i> 31 (2007).....	5
Rich Gilman, <i>The Relationship Between Life Satisfaction, Social Interest, and Frequency of Extracurricular Activities Among Adolescents</i> , 30 <i>J. YOUTH & ADOLESCENCE</i> 749 (2001).....	5
Jennifer A. Fredricks & Jacquelynne S. Eccles, <i>Developmental Benefits of Extracurricular Involvement: Do Peer Characteristics Mediate the Link Between Activities and Youth Outcomes?</i> , 34 <i>J. YOUTH & ADOLESCENCE</i> 507 (2005).....	6
Angelique Day & Debraha Watson, <i>How Does Michigan Fare in the Fight to Improve Outcomes for Youth Aging Out of Foster Care? A Response from the State and One of Its Communities</i> , 11 <i>MICHIGAN CHILD WELFARE J.</i> 3 (2007).....	12
DEPARTMENT OF LEGISLATIVE SERVICES, OFFICE OF LEGISLATIVE AUDITS, AUDIT REPORT: DEPARTMENT OF HUMAN RESOURCES SOCIAL SERVICES ADMINISTRATION 5 (2008)	24, 25
DEPARTMENT OF LEGISLATIVE SERVICES, OFFICE OF LEGISLATIVE AUDITS, AUDIT: DEPARTMENT OF HUMAN RESOURCES LOCAL DEPARTMENT OPERATIONS (2009).....	25, 26
DEPARTMENT OF LEGISLATIVE SERVICES, OFFICE OF LEGISLATIVE AUDITS, AUDIT: DEPARTMENT OF HUMAN RESOURCES SOCIAL SERVICES ADMINISTRATION (2005)	25
DEPARTMENT OF LEGISLATIVE SERVICES, OFFICE OF LEGISLATIVE AUDITS, AUDIT: DEPARTMENT OF HUMAN RESOURCES SOCIAL SERVICES ADMINISTRATION (2001).....	25

DEPARTMENT OF LEGISLATIVE SERVICES, OFFICE OF LEGISLATIVE AUDITS, AUDIT: DEPARTMENT OF HUMAN RESOURCES LOCAL DEPARTMENT OPERATIONS (2002).....	26
DEPARTMENT OF LEGISLATIVE SERVICES, OFFICE OF LEGISLATIVE AUDITS, AUDIT: DEPARTMENT OF HUMAN RESOURCES LOCAL DEPARTMENT OPERATIONS (2005).....	26
Donna’s Place, http://www.mdlab.org/Donnas%20Place	9
AMY DWORSKY & MARK COURTNEY, ASSESSING THE IMPACT OF EXTENDING CARE BEYOND AGE 18 ON HOMELESSNESS: EMERGING FINDINGS FROM THE MIDWEST STUDY (2010).....	14, 19, 20
AMY DWORSKY & MARK COURTNEY, DOES EXTENDING FOSTER CARE BEYOND AGE 18 PROMOTE POSTSECONDARY EDUCATIONAL ATTAINMENT? (2010).....	13, 21
AMY DWORSKY ET AL, MIDWEST EVALUATION OF THE ADULT FUNCTIONING OF FORMER FOSTER YOUTH: OUTCOMES AT AGE NINETEEN (2005).....	16
Amy Dworsky & Alfred Perez, <i>Helping Former Foster Youth Graduate from College through Campus Support Programs</i> , 32 CHILD & YOUTH SERVICES REV. 255 (2010).....	20, 22
<i>The Economic Self-Sufficiency of Wisconsin’s Former Foster Youth</i> , 27 CHILDREN & YOUTH SERVICES REV. 1085 (2005)	13
John Emerson, <i>From Foster Care to College: Supporting Independent Students</i> , 4 LEADERSHIP EXCHANGE (2007)	14
Rowena Fong, <i>Continuity of Activities and Child Well-Being for Foster Care Youth</i> , 28 CHILD AND YOUTH SERVICES REV. 1359 (2006).....	7
<i>Growing Up Baltimore – Foster Care Survivor Works to Make Life Better for Those in System</i> , (WYPR radio broadcast Nov. 6, 2009).....	15
ALENA M. HADLEY AT AL, WHAT WORKS FOR OLDER YOUTH DURING THE TRANSITION TO ADULTHOOD: LESSONS FROM EXPERIMENTAL EVALUATIONS OF PROGRAMS AND INTERVENTIONS (2010).....	20, 22
Jim Casey Youth Opportunities Initiative, Savings and Asset Building, http://www.jimcaseyyouth.org/savings-and-asset-building	22, 23

KATHERINE KORTENKAMP & JENNIFER EHRLE, THE WELL-BEING OF CHILDREN INVOLVED WITH THE CHILD WELFARE SYSTEM: A NATIONAL OVERVIEW (2002).....	8
Ben Kerman et al, <i>Extending Transitional Services to Former Foster Children</i> , 83 CHILD WELFARE 239 (2004)	passim
Kate Leckie, <i>Wish Granted Draws Tears in Courtroom</i> , FREDERICK NEWS POST, June 17, 2010.....	8, 9
Deanna C. Linville & Angela J. Heubner, <i>The Analysis of Extracurricular Activities and Their Relationship to Youth Violence</i> , 34 J. Youth & Adolescence 483 (2005).....	6
THOMAS LOVITT & JOHN EMERSON, <i>Foster Youth Who Have Succeeded in Higher Education: Common Themes</i> , INFO. BRIEF: ADDRESSING TRENDS & DEVS. IN SECONDARY EDUC. & TRANSITION (Nat’l Ctr. on Secondary Educ. & Transition, Minneapolis, MN), April 2008	7
Maryland Higher Education Commission, Tuition Waiver for Foster Care Recipients, www.mhec.state.md.us/financialAid/ProgramDescriptions/prog_fostercare.asp	18
MASSACHUSETTS SOCIETY FOR THE PREVENTION OF CRUELTY TO CHILDREN, 18 AND OUT: LIFE AFTER FOSTER CARE IN MASSACHUSETTS (2005)	19
Curtis McMillen et al, <i>Educational Experiences and Aspirations of Older Youth in Foster Care</i> , 82 CHILD WELFARE 475 (2003).....	14
Toni Naccarato & Emily DeLorenzo, <i>Transitional Youth Services: Practice Implications from a Systemic Review</i> , 25 CHILD & ADOLESCENT SOC. WORK J. 287 (2008).....	19
NATIONAL FOSTER CARE COALITION, THE CHAFEE EDUCATIONAL AND TRAINING VOUCHER (ETV) PROGRAM: SIX STATES’ EXPERIENCES 2.....	17, 18, 21
OFFICE OF THE ASSISTANT SECRETARY OF PLANNING AND EVALUATION, DEPARTMENT OF HEALTH AND HUMAN SERVICES, COMING OF AGE: EMPLOYMENT OUTCOMES FOR YOUTH WHO AGE OUT OF FOSTER CARE THROUGH THEIR MIDDLE TWENTIES (2008).....	11, 12, 22
OFFICE OF THE INSPECTOR GENERAL, DEPARTMENT OF HEALTH & HUMAN SERVICES, RETAINING FOSTER PARENTS (2002).....	7, 8

Peter J. Pecora et al, <i>Assessing the Educational Achievements of Adults who were Formerly Placed in Family Foster Care</i> , 220 CHILD & FAM. SOC. WORK 231 (2006).....	7, 8
PETER J. PECORA ET AL, ASSESSING THE EFFECTS OF FOSTER CARE: EARLY RESULTS FROM THE CASEY NATIONAL ALUMNI STUDY (2003)	16
Peter J. Pecora et al, <i>Educational and Employment Outcomes of Adults Formerly Placed in Foster Care: Results from the Northwest Foster Care Alumni Study</i> , 28 CHILD. & YOUTH SERVICES REV. 1459 (2006)	passim
Thom Reilly, <i>Transition from Care: Status and Outcomes of Youth Who Age Out of Foster Care</i> , 82 Child Welfare 727 (2003).....	16
Rachel Sherman, <i>Serving Youth Aging Out of Foster Care</i> , THE FINANCE PROJECT ISSUE NOTE (Welfare Information Network, Washington, D.C.), Oct. 2004	17
SOCIAL SECURITY ADMINISTRATION, FINANCIAL-RELATED AUDIT OF THE BALTIMORE CITY DEPARTMENT OF SOCIAL SERVICES – AN ORGANIZATIONAL REPRESENTATIVE PAYEE FOR THE SOCIAL SECURITY ADMINISTRATION (2001).....	27
A Step Closer Foundation, About Us, http://www.asteppcloser.org/about.html	9
Richard Wertheimer, <i>Youth Who “Age Out” of Foster Care: Troubled Lives, Troubling Prospects</i> , CHILD TRENDS (2002)	11

INTRODUCTION

This appeal presents the question of whether a local Department of Social Services (“DSS”), when acting as a representative payee for a foster child who receives Old Age Survivors and Disability Insurance (“OASDI”), may take the limited financial assets it manages on behalf of the child for deposit into its own coffers. Appellant argues that DSS has a legal duty to use the OASDI funds in a manner that directly furthers the best interests of the individual foster child in question, which it breaches when it systematically and without notice to the child retains the funds for itself as “reimbursement” for services it may have provided. Because a child does not incur any debt when he or she receives services while in foster care, DSS’s practice of paying itself with the child’s financial resources in disregard of the child’s best interests violates statutes and common law governing child welfare, conversion of property, the responsibilities of fiduciaries, and the operations of administrative agencies. Moreover, because DSS acts in secret and without notifying the child of its conduct, it violates the child’s right to due process under the federal and state constitutions. Amici fully endorse Appellant’s arguments as to the illegality and impropriety of the DSS conduct at issue in this case.

Through this brief, Amici offer two additional points for this Court’s consideration of the subject of what responsibilities DSS must carry out when it acts as a foster child’s representative payee. First, Amici outline some of the numerous strategies by which DSS could utilize a foster child’s OASDI funds in a manner that fulfills its obligation to advance the child’s individual best interests, as required by the law. Which particular

strategy will best serve a particular child will depend on the child's needs and circumstances but, certainly, there are abundant opportunities for DSS to invest a child's OASDI income to enhance his or her development and promote his or her successful transition into independent adulthood. Second, Amici demonstrate that DSS may not currently be applying accounting methods adequate to ensure that it takes from a foster child only that portion of an OASDI payment equal to the amount as it has actually spent on that child. Thus, even if this Court were to permit DSS to retain a child's OASDI benefits as reimbursement for any care or services provided, it should expressly limit DSS to collecting no more than that which the agency can prove is its actual expenditure on the child's needs.

INTERESTS OF AMICI CURIAE

The **Public Justice Center (PJC)**, a non-profit civil rights and anti-poverty legal services organization, has a longstanding commitment to protecting the rights of children in foster care. To this end, the PJC has participated in numerous appeals before this Court and involving the enforcement of federal and state child welfare laws. See, e.g., *L.J. v. Donald*, No. 09-2259 (Fourth Cir. pending); *In re: Adoption/Guardianship Nos. J9610436 and J9711031*, 368 Md. 666, 796 A.2d 778 (2002); *In re: Noberto C.*, 133 Md. App. 558, 758 A.2d 637 (2000). The PJC has an interest in this case because its outcome will determine whether state agencies have a duty to use a foster child's financial resources to serve the individualized best interests of that child, thus improving the child's chances of overcoming the challenges he or she will face while in foster care and during the transition to independent adulthood.

The **Legal Aid Bureau, Inc. (Legal Aid)** has served Maryland's poor since 1911 by providing civil legal services. Since 1982, Legal Aid has represented over 100,000 children in Children in Need of Assistance (CINA) and Termination of Parental Rights (TPR) proceedings throughout Maryland. As of March 2010 there were 8,337 children in out-of-home placement in Maryland. Legal Aid represents over fifty percent of these abused and neglected children, who range in age from birth to 21 years. Some of the children represented by Legal Aid receive social security benefits. Legal Aid seeks to insure the basic human and constitutional rights of children in foster care and joins as amicus curiae on important cases that may have a significant impact on their basic rights.

Randall & Sonnier, LLC (R&S) is a law firm representing children in CINA and TPR proceedings. R&S has appeared on behalf of these children in this Court and in other Maryland courts. The decision in this case will impact clients of R&S's that receive OASDI and other benefits, and for this reason, R&S has an interest in this case.

The **Children's Advocacy Institute (CAI)** is based at the University of San Diego School of Law. It has represented the interests of children in California and nationally for 21 years. It is an academic center training law students in child advocacy law, including active clinics representing parents, the county and children in juvenile dependency court, and children in delinquency court. It also operates a statewide law firm advocating for children and is active in litigation. Its director serves as the Chairman of the Board of the National Association of Counsel for Children and as Counsel to the Board of Voices for America's Children and is the author of the text *Child Rights and Remedies* (Clarity, 2002, 2006). This participation is on behalf of CAI in

particular, and its interest in this matter includes advocacy for the welfare of foster children, and concern that where the state serves as the legal parent of a child, monies payable for the benefit of that child should be so credited and received, and are not properly diverted to the pecuniary advantage of a representative payee with a fiduciary duty to the child.

Susan Leviton is an attorney and professor of law. For several years, Professor Leviton represented children in abuse and neglect proceedings in Maryland courts. She founded Advocates for Children and Youth, a statewide child advocacy program, and she has served on various commissions to address the needs of foster children and other at-risk children, including the Governor's Commission on Adoption, the Governor's Commission on Students At Risk, and the CINS/CINA Task Force. Currently, she runs the Children's Issues and Legislative Advocacy Clinic at the University of Maryland. Professor Leviton has an interest in this appeal because its outcome will impact the opportunities available to many children and youth in foster care, a population whose interests she has advocated throughout her career.

ARGUMENT

I. THE STATE CAN FULFILL ITS DUTY TO SERVE A FOSTER CHILD'S BEST INTERESTS IF IT USES THE CHILD'S FINANCIAL RESOURCES IN A MANNER THAT DIRECTLY ADDRESSES THE CHILD'S NEEDS.

All foster children are legally entitled to receive a wide range of services from DSS throughout the time they are in its care. For example, the state pays for all foster children to receive 24-hour care in an approved setting (MD. CODE ANN. FAM. LAW. § 5-501(g))

and basic living necessities such as food, clothing, and transportation (*e.g.*, MD. CODE REGS. 07.02.11.31 (2010)). Even with these services, foster children often lack the resources and support they need to develop into physically and mentally healthy, law-abiding, productive members of society. *See, e.g.*, Dianne H. Peterson, Jenna Lynn Mazzucca, *Youth at Risk: The ABA Initiative and Colorado's Participation*, 36 Colo. Law. 31, 33-34 (2007) (“In the foster care system, the state provides a bed, meals, clothing, and basic necessities, but generally does not provide for things like going to the movies, dances, participation in team sports, and other extracurricular activities where teens learn important social and life skills”). Therefore, when DSS acts as a representative payee for a foster child receiving OASDI benefits, it must promote that child’s best interests by using the benefits to narrow the gap between the bare minimum the child is legally entitled to receive by virtue of being in foster care and what the child needs to thrive.¹

A. Development-Enhancing Activities

One lawful way in which DSS can use a foster child’s OASDI funds is to facilitate the child’s participation in activities that would enhance his or her development. Young people achieve greater academic success when, instead of spending their free time in an unstructured manner, they become involved in athletic programs, music, theater or art classes, academic interest clubs, and summer camp. *See* Rich Gilman, *The Relationship*

¹ Amici in no way suggest that DSS may use a foster child’s OASDI funds to supplant its own payments in support of the child’s basic needs, including shelter, clothing, food, medical treatment, school supplies and the like. As Appellant argues, DSS has a legal obligation to provide these services to all foster children, and that obligation is unaffected by the child’s status as an OASDI beneficiary.

Between Life Satisfaction, Social Interest, and Frequency of Extracurricular Activities Among Adolescents, 30 *J. Youth & Adolescence* 749, 753, 762 (2001); Jennifer A. Fredricks & Jacquelynne S. Eccles, *Developmental Benefits of Extracurricular Involvement: Do Peer Characteristics Mediate the Link Between Activities and Youth Outcomes?*, 34 *J. Youth & Adolescence* 507, 516 (2005) (reporting data that supports the theory that “extracurricular involvement increases students’ identification with school and . . . academic benefits result from this increased identification”). They also report higher levels of satisfaction with school and with their personal relationships, even when one controls for the effects of race, gender, and socioeconomic status. *Id.* at 761; Deana B. Davalos et al, *The Effects of Extracurricular Activity, Ethnic Identification, and Perception of School on Dropout Rates*, 21 *Hisp. J. of Behav. Sci.* 61, 63 (1999) (citing research findings that “athletic involvement is associated with higher levels of motivation, positive affect, and greater psychological arousal relative to other activities”); Fredricks & Eccles, *supra*, at 516 (in study, “activity participation was related to lower depression”). Moreover, youths who engage in recreational and skill-building activities are less likely than their peers to get caught up in drugs, gangs, and premature sexual activity. *See* Deanna C. Linville & Angela J. Heubner, *The Analysis of Extracurricular Activities and Their Relationship to Youth Violence*, 34 *J. Youth & Adolescence* 483, 484 (2005). Contrastingly, youth who do not participate in activities that reinforce positive behaviors are 57% more likely to drop out of school, 49% more likely to use drugs, and 27% more likely to be arrested than those who do. *See* Davalos, *supra*, at 62.

Ongoing involvement in structured programming may be especially

beneficial to children and adolescents in out-of-home care. *See generally*, Anne E. Casey Foundation, *A Roadmap For Learning: Improving Educational Outcomes in Foster Care* 45 (2004), www.casey.org/Resources/Publications/pdf/RoadMapforLearning.pdf (last visited Oct. 7, 2010) (discussing the potential positive impact of co-curricular activities on foster children); OFFICE OF THE INSPECTOR GENERAL, DEPARTMENT OF HEALTH & HUMAN SERVICES, *RETAINING FOSTER PARENTS* 6 (2002) (stating that access to sports and social events is as “equally important” to foster children’s social development as access to medical and psychological services). A survey of former foster youth who completed college revealed that nearly all had participated in co-curricular activities while in high school. *See* THOMAS LOVITT & JOHN EMERSON, *Foster Youth Who Have Succeeded in Higher Education: Common Themes*, INFO. BRIEF: ADDRESSING TRENDS & DEVS. IN SECONDARY EDUC. & TRANSITION (Nat’l Ctr. on Secondary Educ. & Transition, Minneapolis, MN), April 2008, http://www.ncset.org/publications/info/NCSETInfoBrief_7.1.pdf (last visited Oct. 7, 2010). Another study found that youth who graduated from a foster care program that had funded them to participate in sports teams, arts classes, and the like completed high school and began college at higher rates than youth who participated in programs that did not provide similar financial support. *See* Peter J. Pecora et al, *Assessing the Educational Achievements of Adults who were Formerly Placed in Family Foster Care*, 220 *CHILD & FAM. SOC. WORK* 231, 227 (2006). One reason for this trend is that year-after-year participation in school and leisure activities creates stability in the otherwise unpredictable and often chaotic lives of foster children. “[C]ontinuity of activities may . .

. minimiz[e] the disrupting effect of placement in foster care” and shifts in foster placements and “is associated with improved measures of well-being.” Rowena Fong, *Continuity of Activities and Child Well-Being for Foster Care Youth*, 28 CHILD AND YOUTH SERVICES REV. 1359, 1371 (2006). Indeed, a child who is continuously involved in a particular supervised recreational or artistic activity might be more likely to succeed in his or her current placement, thus reducing the likelihood that he or she will experience any placement disruptions at all.

Regrettably, many foster children lack access to these development-enhancing opportunities. *See, e.g.*, KATHERINE KORTENKAMP & JENNIFER EHRLE, THE WELL-BEING OF CHILDREN INVOLVED WITH THE CHILD WELFARE SYSTEM: A NATIONAL OVERVIEW 3 (2002), http://www.urban.org/uploadedpdf/310413_anf_b43.pdf (last visited Oct. 7, 2010). This is so, at least in part, because states do not pay for the costs associated with participation in sports, music classes and the like, forcing foster parents to foot bills on their own, pull their foster children out of the activities, or leave foster care altogether. *See, e.g.*, Pecora et al, *Educational Opportunities*, *supra*, at 227 (noting that most public foster care programs do not pay for foster children to pursue extracurricular opportunities); OFFICE OF THE INSPECTOR GENERAL, *supra*, at 6 (reporting that foster parents often have difficulty paying on their own for costs associated with extracurricular activities); Kate Leckie, *Wish Granted Draws Tears in Courtroom*, FREDERICK NEWS POST, June 17, 2010, www.fredericknewspost.com/sections/news/display_comments.htm?StoryID=106261 (last visited Oct. 7, 2010) (reporting that many Maryland foster youth need laptop

computers for school or to pursue academic interests but cannot obtain them through DSS). Private organizations throughout the nation have attempted to fill this gap in services. *See, e.g.*, The Big House Foundation, www.ourbighouse.org (last visited Oct. 7, 2010) (non-profit organization that provides art and music lessons, money for birthday parties, haircuts, and other services to foster children); Camp Freedom, www.lions-campcrescendo.org/campfreedom.html (grant-funded camp for children with disabilities in foster care or in the custody of grandparents); Leckie, *supra* (reporting that Maryland lawyers have formed a committee to collect laptops and digital cameras for foster children). In Baltimore City, for instance, two attorneys who represent children in abuse and neglect cases discovered that “there were financial limitations to what the government could provide to foster the children’s abilities,” and formed A Step Closer Foundation to supplement the services guaranteed by the State of Maryland to children in foster care. A Step Closer Foundation, About Us, <http://www.astepcloser.org/about.html> (last visited Oct. 7, 2010). To date, A Step Closer Foundation has paid for music instruction, prom expenses, computers, and other items and services that help foster children develop their talents and interpersonal relationships both in school and through after-school programming. *See id.* Donna’s Place, a creation of another Baltimore City child advocacy organization, runs a literacy project for children in foster care and provides them with holiday gifts, toys, books, and computers. *See* Donna’s Place, <http://www.mdlab.org/Donnas%20Place> (last visited Oct. 7, 2010). While these organizations undoubtedly make a difference in the lives of those they touch, they cannot afford to support all foster children who wish to pursue opportunities not paid for by the

state's foster care dollars.

The state's limited resources need not be a barrier to participation in structured, growth-enhancing activities for foster children who are OASDI recipients. When DSS manages OASDI benefits on behalf of the child, the agency must evaluate whether it could promote the child's best interests and promote permanence by employing these funds to pay for the child to participate in team sports, study music or the arts, obtain a computer for use in class and/or in academic clubs, or attend structured social events or summer camp. A child who has demonstrated an interest in or talent for singing, for example, might benefit from the opportunity to take voice lessons or travel to a performance by his choir. Another child who has to move from one foster placement to another might handle the shift more easily if she can keep playing for the sports team on which she has been a long-standing member. DSS, when playing the role of a foster child's representative payee, must consider whether options such as these would further the child's best and, if so, invest the child's funds accordingly.²

B. Transitioning

When DSS is managing OASDI benefits on behalf of an older child – especially one who is unlikely to secure a permanent living arrangement prior to his or her twenty-first birthday – it must also consider using the benefits to ease the child's transition from

² Any benefits not spent in these lawful ways must be conserved for the foster child's future. Should the child leave foster care for a permanent placement such as reunification, adoption or guardianship, DSS must at that point forward the unspent and conserved benefits to the former foster child's new representative payee.

foster care to independent adulthood.³ Having access to financial resources may help youth to overcome some of the obstacles they face upon leaving state care.

1. Young Adults Fare Poorly When Transitioning from Foster Care to Independence

Typically, foster youth who never secure a permanent living arrangement and simply “age out” of state care have suffered years of trauma and instability, and lack family and community support to help them make the transition to adulthood. The outlook for these young adults is bleak.

Youth who age out of foster care generally experience high unemployment and earn little income during their first several years on their own. *See* OFFICE OF THE ASSISTANT SECRETARY OF PLANNING AND EVALUATION, DEPARTMENT OF HEALTH AND HUMAN SERVICES, COMING OF AGE: EMPLOYMENT OUTCOMES FOR YOUTH WHO AGE OUT OF FOSTER CARE THROUGH THEIR MIDDLE TWENTIES i (2008) (hereinafter “HHS STUDY”), <http://aspe.hhs.gov/hsp/08/fosteremp/report.pdf> (last visited Oct. 7, 2010).

Approximately one fifth to one third⁴ of aged-out foster youth have “very low probabilities of employment and hardly any earnings at any time between ages 18 and

³ Many children in foster care “stay for a finite period of time,” and are no longer wards of the state when they begin the transition to adulthood. But other children remain in foster care for years or, alternatively, are removed from their homes in their mid-to-late teens. It is this latter group of children that experiences most of the difficulties associated with aging out. *See, e.g.,* Richard Wertheimer, *Youth Who “Age Out” of Foster Care: Troubled Lives, Troubling Prospects*, CHILD TRENDS, 4-5 (2002), <http://www.aecf.org/upload/publicationfiles/youth%20who%20age%20out.pdf> (last visited Oct. 7, 2010).

⁴ The HHS study involved a survey of aged out foster youth in three states: California, Minnesota, and North Carolina. Variation in percentages reflect variation in survey results across states.

24,” while an additional one fifth to one half had high rates of employment through their late teens but were much less likely to be employed during their early and mid-twenties. *Id.* at ii; *see also, e.g.* CHILDREN’S AID SOCIETY, YOUTH AGING OUT OF FOSTER CARE FACE POVERTY, HOMELESSNESS, AND THE CRIMINAL JUSTICE SYSTEM 2 (2006), <http://www.childrensaidsociety.org/files/upload-docs/FosterCare.pdf> (last visited Oct. 7, 2010) (reporting that 25-55% of young adults who had aged out of foster care are unemployed); CAROL BRANDFORD & DIANA ENGLISH, FOSTER YOUTH TRANSITION TO INDEPENDENCE STUDY: FINAL REPORT 4 (2004) (reporting that less than half of aged-out foster youth in a Washington study were employed). Even to the extent that these young adults do have jobs, their earnings are typically very low. *See* HHS STUDY at i (reporting that, at age 24, employed former foster youth earned on average \$450-690/month whereas the general population of that age earned \$1,535); CHILDREN’S AID SOCIETY, *supra*, at 2 (summarizing research findings that average wage of employed former foster youth was below the federal poverty level); BRANDFORD & ENGLISH, *supra*, at 4 (47% of employed aged-out foster youth in a Washington study earned wages at or below the poverty line). Unsurprisingly, many former foster youth must rely on public assistance to make ends meet. *See* BRANDFORD & ENGLISH, *supra*, at 4 (one third of surveyed youth received at least one form of public assistance); CHILDREN’S AID SOCIETY, *supra*, at 2 (32-40% of former foster youth utilize public assistance, and 50% have experienced extreme financial hardship); Angelique Day & Debraha Watson, *How Does Michigan Fare in the Fight to Improve Outcomes for Youth Aging Out of Foster Care? A Response from the State and One of Its Communities*, 11 MICHIGAN CHILD WELFARE J. 3, 5 (2007)

(one half of Michigan's former foster youth depend on public benefits); Amy Dworsky, *The Economic Self-Sufficiency of Wisconsin's Former Foster Youth*, 27 CHILDREN & YOUTH SERVICES REV. 1085, 1095 (2005) (17% of surveyed youth received cash assistance, and one third received food stamps).

Former foster youth are also less likely to complete high school or attend college than their peers. Researchers estimate that a significant proportion of transitioning foster youth, ranging from 37 to 63%, do not have a high school diploma or GED. See MARK COURTNEY, POLICY BRIEF: YOUTH AGING OUT OF FOSTER CARE 1 (2005), <http://www.transad.pop.upenn.edu/downloads/courtney--foster%20care.pdf> (37% of current and former foster youth aged 17 to 20 have not attained a high school diploma or GED); CHILDREN'S AID SOCIETY, *supra*, at 2 (summarizing survey data showing that 40-63% of former foster youth have not completed high school) (this website has health insurance stuff too). But see Peter J. Pecora et al, *Educational and Employment Outcomes of Adults Formerly Placed in Foster Care: Results from the Northwest Foster Care Alumni Study*, 28 CHILD. & YOUTH SERVICES REV. 1459, 1470 (2006) (finding that surveyed former foster youth graduated high school at similar rates to the general population). Young people aging out of foster care also "lag far behind their peers in the general population when it comes to attending college and graduating from college if they do attend." AMY DWORSKY & MARK COURTNEY, DOES EXTENDING FOSTER CARE BEYOND AGE 18 PROMOTE POSTSECONDARY EDUCATIONAL ATTAINMENT? 1 (2010), http://www.chapinhall.org/sites/default/files/publications/Midwest_IB1_Educational_Attainment.pdf (last visited Oct. 7, 2010) (citing findings that only 1-11% of former foster

youth graduate from college, but acknowledging the difficulties of determining this figure accurately); John Emerson, *From Foster Care to College: Supporting Independent Students*, 4 LEADERSHIP EXCHANGE 6, 7 (2007) (citing findings that 3% of former foster youth complete college, as compared to 27% of the general population); Pecora et al, *Northwest Foster Care Alumni Study*, *supra*, at 1470 (2.7% of former foster youth aged 25 to 33 had a Bachelor's degree, as compared to 24.4% of similarly-aged individuals in the general population); Curtis McMillen et al, *Educational Experiences and Aspirations of Older Youth in Foster Care*, 82 CHILD WELFARE 475, 477 (2003) (citing research findings that 2-11% of former foster youth attended some college). These statistics do not reflect any lack of interest in education among foster youth; most transitioning youth want to attend and expect to graduate from college. *See id.* at 483 (2003).

Just as they are less likely than other young adults to attain stable employment and higher education, aged-out foster youth are more likely to experience housing and health difficulties and become involved in criminal activity. Numerous studies have reported that, within five to seven years after leaving state care, large percentages of former foster youth find themselves homeless for at least one night. *See* AMY DWORSKY & MARK COURTNEY, ASSESSING THE IMPACT OF EXTENDING CARE BEYOND AGE 18 ON HOMELESSNESS: EMERGING FINDINGS FROM THE MIDWEST STUDY 3 (2010), http://chapinhall.org/sites/default/files/publications/Midwest_IB2_Homelessness.pdf (last visited Oct. 7, 2010) (by the time they were 24, 30% of surveyed former foster youth had “sle[pt] in a place where people weren't meant to sleep, . . . sle[pt] in a homeless shelter, or not ha[d] a regular residence in which to sleep” for at least one night, and 30% had

engaged in couch-surfing, “moving from one temporary housing arrangement provided by friends, family, or strangers to another”); Pecora, et al, *Northwest Foster Care Alumni Study, supra*, at 1471 (in a study of former foster youth in Washington and Oregon, over 20% of respondents had been homeless for one or more nights since leaving foster care); CHILDREN’S AID SOCIETY, *supra*, at 3, (concluding on the basis of surveys conducted in various states that 12-30% of youth leaving foster care have “struggled with homelessness”); Child Welfare League of America, Programs and Resources for Youth Aging Out of Foster Care, <http://www.cwla.org/programs/fostercare/agingoutresources.htm> (last visited Oct. 7, 2010) (summarizing studies finding that 12-36% of former foster youth had experienced homelessness); *Growing Up Baltimore – Foster Care Survivor Works to Make Life Better for Those in System*, (WYPR radio broadcast Nov. 6, 2009), *available at*, <http://www.publicbroadcasting.net/wypr/news.newsmain/article/1/0/1574312/WYPR.Ne ws.in.Maryland./Growing.Up.Baltimore-Foster.Care.Survivor.Works.To.Make.Life.Better.For.Those.In.System> (last visited Oct. 7, 2010) (quoting estimate that 25% of youth aging out of foster care in Maryland are homeless). Young foster care alumni also face a greater risk of mental illness than the general population. *See* CASEY FAMILY PROGRAMS, YOUNG ADULT SURVEY 2006: EXAMINING OUTCOMES FOR YOUNG ADULTS SERVED IN OUT-OF-HOME CARE 26 (2006) (hereinafter “CASEY YOUNG ADULT SURVEY 2006”) (reporting that, relative to the general population of young adults, former foster youth are twice as likely to suffer from depression, and more than twice as likely to suffer from psychosis or obsessive

compulsive disorders); BRANDFORD & ENGLISH, *supra*, at 5 (reporting over two-fifths of surveyed former foster youth “scored high on a depression scale indicating depressive symptomology”). Exacerbating this problem is the widespread lack of health insurance among this demographic. *See* CASEY FAMILY PROGRAMS, CASEY YOUNG ADULT SURVEY: FINDINGS OVER THREE YEARS 5 (2008) (35.7% of surveyed former foster youth had no health insurance); PETER J. PECORA ET AL, ASSESSING THE EFFECTS OF FOSTER CARE: EARLY RESULTS FROM THE CASEY NATIONAL ALUMNI STUDY 39 (2003), http://www.chapinhall.org/sites/default/files/publications/Midwest_IB2_Homelessness.pdf (last visited Oct. 7, 2010) (29.2% of foster care alumni lack health insurance, as compared to 18% of the general adult, non-senior population); Thom Reilly, *Transition from Care: Status and Outcomes of Youth Who Age Out of Foster Care*, 82 Child Welfare 727, 736 (2003) (55% of surveyed former foster youth lacked health insurance, and 32% needed health care and could not obtain it). Further challenges that confront young adults aging out of foster care include early or unplanned pregnancy or parenthood⁵ and contact with the criminal justice system.⁶

2. Existing Transition Services Are Insufficient to Fully Address Foster Youths’ Needs

⁵ *See, e.g.* CASEY YOUNG ADULT SURVEY 2006 at 42 (39% of aged-out youth had fathered or given birth to a child by age 25, and in 76% of these cases, the pregnancy was unplanned); AMY DWORSKY ET AL, MIDWEST EVALUATION OF THE ADULT FUNCTIONING OF FORMER FOSTER YOUTH: OUTCOMES AT AGE NINETEEN 52 (2005), http://www.chapinhall.org/sites/default/files/ChapinHallDocument_4.pdf (over one third of female participants in survey had become pregnant at least once since aging out of foster care); Reilly, *supra*, at 736 (70% of surveyed youth had become pregnant or impregnated another since leaving foster care).

⁶ *E.g.*, Reilly, *supra*, at 736 (45% of surveyed former foster youth had “trouble with the law” since exiting care); CHILDREN’S AID SOCIETY, *supra*, at 2 (31-42% of youth had been arrested and 18-26% had been incarcerated since leaving care).

Government efforts to facilitate foster youths' transition to independence have had some success, but they have so far failed to serve the number of youth in need and provide the depth of services required. Federal support for youth in transition comes primarily from the Chafee Foster Care Independence Program, which provides \$140 million in funding for "independent living services," including mental health services, mentoring and life skills programs, employment preparation, and housing stipends, and also authorizes up to \$60 million in education vouchers (or "ETVs," worth up to \$5,000 annually per youth) for such youth. *See* NATIONAL FOSTER CARE COALITION, THE CHAFEE EDUCATIONAL AND TRAINING VOUCHER (ETV) PROGRAM: SIX STATES' EXPERIENCES 2, http://www.nationalfostercare.org/pdfs/chafee_etv_program_nfcc.pdf (last visited Oct. 7, 2010). Adolescents throughout the nation have benefited from CFCIP. For example, in a single year, the states of California, Maine, Montana, New York, North Carolina, and Wyoming provided CFCIP services to over 8,000 youth in total, allowing many to enroll in post-secondary education. *See id.* at 6. These figures provide cause for optimism, but they do not tell the whole story. "[O]nly about two-fifths of eligible foster youth receive independent living services, and service availability varies widely between states and even between counties within states." *See* COURTNEY, *YOUTH AGING OUT OF FOSTER CARE* at 2. California has found, for instance, that even with CFCIP funds and additional state spending, the availability of transitional housing assistance is "inadequate" to accommodate the number of youth aging out each year. NATIONAL FOSTER CARE COALITION, *supra*, at 8; *see also* Rachel Sherman, *Serving*

Youth Aging Out of Foster Care, THE FINANCE PROJECT ISSUE NOTE (Welfare Information Network, Washington, D.C.), Oct. 2004, at 4, <http://76.12.61.196/publications/servingyouthagingoutIN.pdf> (noting that, throughout the nation, transitional housing resources are insufficient to serve the population of youth in need). Similarly, many states report that the demand for educational training vouchers (ETVs) has outstripped or soon will outstrip supply, such that many youth will receive less than the full \$5,000 in assistance while others will go without assistance at all. See NATIONAL FOSTER CARE COALITION, *supra*, at 9 (California), 23 (Montana), 25 (New York), 33 (North Carolina). Furthermore, increases in the cost of living and in the cost of education in particular mean that those lucky few that do receive a \$5,000 education voucher often must take out additional loans to cover the cost of their tuition and living expenses. See *id.* at 21-22.⁷ Thus, “state and local administrators agree that sufficient resources do not exist to provide the full range of supports and services needed by transitioning foster youth.” Ben Kerman et al, *Extending Transitional Services to Former Foster Children*, 83 CHILD WELFARE 239, 241 (2004).

3. Providing Youth with Financial Resources Can Help to Ease their Transition to Adulthood

When a state agency acts as a representative payee for a child receiving OASDI

⁷ Maryland waives state college tuition for youth who were formerly in the state foster care system. See Maryland Higher Education Commission, Tuition Waiver for Foster Care Recipients, http://www.mhec.state.md.us/financialAid/ProgramDescriptions/prog_fostercare.asp. (last visited Oct. 7, 2010). But this waiver does not apply to out-of-state or private colleges or vocational programs, and it does not cover the cost of books or room and board.

income, it can advance that child's best interests by saving the income and using it to ease his or her departure from foster care. There are several strategies a state might pursue.

The agency can ensure the youth has stable housing upon becoming independent by using the accrued funds to pay for his or her rent, security deposit, basic moving and household expenses, or even mortgage. *See, e.g.*, Toni Naccarato & Emily DeLorenzo, *Transitional Youth Services: Practice Implications from a Systemic Review*, 25 CHILD & ADOLESCENT SOC. WORK J. 287, 299 (2008) (advising that social service agencies should either connect aging-out youth with existing subsidized housing resources or construct transitional housing for such youth); *In re: J.G.*, 652 S.E.2d 266, 275-76 (N.C. Ct. App. 2007) (holding that child welfare agency must use child's OASDI benefits to pay mortgage on Habitat-for-Humanity house that child owned); MASSACHUSETTS SOCIETY FOR THE PREVENTION OF CRUELTY TO CHILDREN, 18 AND OUT: LIFE AFTER FOSTER CARE IN MASSACHUSETTS 29 (2005), <http://www.chapa.org/pdf/18andOut.pdf>, (describing one agency's efforts to provide transitioning youth with financial assistance for housing). Or, the agency might use the funds to help the youth stay in his or her foster home beyond the point at which he or she would normally age out of the foster system. *See* Kerman et al, *supra*, at 248 (explaining how one child welfare agency provides financial support to foster parents who wish to continue housing and caring for foster children who have legally aged out of state care); *see also* DWORSKY & COURTNEY, HOMELESSNESS, *supra*, at 2, 7 (concluding that youth who remain in foster care for longer are less likely to experience homelessness in their late teens and early

twenties, although they may still become homeless later in life). Assisting transitioning young adults to avoid homelessness reduces the probability that they will suffer mental illness or become victims of violent crime and increases the probability that they will succeed in school and work. *See id.* at 7.

Similarly, a child welfare agency can expend OASDI benefits in a manner that aids a transitioning youth to pursue higher education and secure employment. As discussed previously, if the state provides a transitioning teenager with stable housing, that teenager will be in a far better position to earn his or her degree and/or get a job. *See id.*; *see also* Amy Dworsky & Alfred Perez, *Helping Former Foster Youth Graduate from College through Campus Support Programs*, 32 *Child & Youth Services Rev.*, 255, 261 (2010) (reporting that most foster care alumni who were in college found the availability of housing assistance important or very important to their academic success). Likewise, if the state helps the youth to earn a driver's license and/or purchase a car, the youth will have a greater capacity to search for and secure a job. *See* Pecora, *Northwest Foster Care Alumni Study*, *supra*, at 1477 (concluding that having a driver's license can positively impact youths' educational attainment); Kerman et al, *supra*, at 254 (recounting how one former foster youth was able to accept a higher-paying non-local job when her child welfare agency bought her a used car). If the youth in transition is a parent, the state can further support his or her participation in education and employment by paying for childcare. *See* ALENA M. HADLEY AT AL, WHAT WORKS FOR OLDER YOUTH DURING THE TRANSITION TO ADULTHOOD: LESSONS FROM EXPERIMENTAL EVALUATIONS OF PROGRAMS AND INTERVENTIONS 2 (2010),

http://www.fosteringconnections.org/tools/assets/files/Child_Trends-

2010_03_09_FS_WWOlderYouth.pdf (last visited Oct. 7, 2010) (summarizing research findings that access to childcare increases young parents' school attendance, employment, and earnings and decreases their dependence on welfare and their likelihood of becoming delinquent); *see also* DWORSKY & COURTNEY, *supra*, EDUCATIONAL ATTAINMENT at 5 (24.5% of female former foster youth who faced any barriers to educational attainment identified parenting responsibilities as the greatest barrier; 15.9% of female former foster youth who dropped out of college cited the need to care for children as their reason for terminating their education). Child welfare agencies can also utilize OASDI funds to fill gaps in the educational training voucher program.

Specifically, an agency might use OASDI benefits to subsidize tuition for a youth who did not receive a voucher, supplement the value of the voucher for a child who did receive one, pay room and board for a youth who has received a tuition waiver but has insufficient funds for room and board, fund the youth's participation in internships, or pay for the child to enroll in a non-traditional vocational program (e.g. medical billing programs, cosmetology school) that is not eligible for ETV funding. *See* NATIONAL FOSTER CARE COALITION, *supra*, at 23 (discussing gaps in ETV funding); Kerman et al at 253-54 (relating anecdotes of youth who achieved positive employment outcomes after child welfare agency funded them to participate in non-traditional programs, like missionary school and dog training school). Equally important are strategies aimed directly at the youth's academic needs. Many former foster youth are not "academically prepared" for college and need to take supplemental or remedial courses before they can

attain a high school diploma or GED or enroll in a bachelor's or associate's degree program. Dworsky & Perez, *supra*, at 258; *see also* HADLEY ET AL, *supra*, at 3 (discussing effectiveness of programs that “provide[] students with academic coursework relevant to their vocational goals”). By paying for such courses, the state can improve a former foster youth's chances of success in his or her education and subsequent employment.

Providing a transitioning youth with a stock of concrete, tangible resources, including cash, has significant value in and of itself. One study revealed that about a third of young adults have less than \$250 and lack basic necessities, like dishes, when they exit foster care. *See* Pecora, *Northwest Foster Care Alumni Study, supra*, at 1469, 1471; *see also* HHS STUDY at 31 (advising that some transitioning youth will require stipends upon exiting care). Those who do have such assets fare better than those who did not, not only because the “wealthier” youth also enjoy better access to other non-financial supports, but also because having a bank account and a certain amount of money is critical to functioning as an adult in the United States. *See* Pecora, *Northwest Foster Care Alumni Study, supra*, at 1477; *see also* Jim Casey Youth Opportunities Initiative, Savings and Asset Building, <http://www.jimcaseyyouth.org/savings-and-asset-building>, (last visited Oct. 8, 2010) (“Savings and assets are key ingredients to success in society”). Of course, like all young adults, aging-out foster youth need information and advice so that they can make wise financial decisions, but programs like the Jim Casey Youth Initiative's Opportunity Passport are in place to provide just this type of guidance. *See generally* Jim Casey Youth Opportunities Initiative, Savings and Asset Building.

Through the Opportunity Passport, young former foster youth receive a 100% match for every dollar they put in to an individual development account (“IDA”) up to \$1,000/year, and they also receive financial literacy training and assistance with investment in education, housing, cars, healthcare, and microenterprise. *See id.* Depositing a transitioning youth’s accrued OASDI benefits into an IDA is one effective way in which the state can help the youth to build his or her assets and learn skills necessary for financial survival.

Again, there is no one approach that will be effective for all foster youth. A transitioning youth with a child, for example, will likely have very different housing, educational, healthcare, and financial needs than a youth who is not a parent. Meanwhile, a youth who can cover most of her educational expenditures through scholarships and an educational training voucher might not need tuition support in the same way as a youth enrolling in a training program that does not qualify for an ETV subsidy but may need housing support or funding for internships in his or her field of study. The “paramount” inquiry is, as usual: what is in the best interests of this particular child? *See In re Adoption/Guardianship of RaShawn H.*, 402 Md. 477, 497 n. 9 (2007).

II. EVEN IF THIS COURT WERE TO PERMIT DSS TO RETAIN FOSTER CHILD’S OASDI BENEFITS AS REIMBURSEMENT FOR CARE PROVIDED, THE COURT SHOULD EXPRESLY PROHIBIT THE AGENCY FROM COLLECTING MORE THAN THE AMOUNT IT CAN DOCUMENT AS HAVING ACTUALLY BEEN SPENT ON THE CHILD.

Appellees’ position is that, pursuant to the Supreme Court’s decision in *Washington Dep’t of Social & Health Servs. v. Guardianship Estate of Keffeler*, 537 U.S. 371 (2003), DSS may properly retain a foster child’s OASDI benefits as reimbursement

for services it has provided to the child. Even if one assumes the merit of this interpretation of the Supreme Court's holding,⁸ *Keffeler* in no way suggests that a state child welfare agency may take *more* from a foster child than it has actually spent on that child. Yet, DSS's records-keeping practices are such that, if permitted to dip into a foster child's OASDI benefits, it may pay itself for services it has not rendered. Should this Court adopt Appellees' position, it must take care to avoid such a result, which goes well beyond what the Supreme Court anticipated in *Keffeler* and quite clearly violates the law for reasons set forth in the Appellant's brief. The Court should, in express terms, direct that DSS may collect no more from a foster child than the amount the agency can prove it has expended on the child's care and that DSS may only collect those funds when it does not contravene state and federal laws and regulations.

Audits of Maryland's Departments of Social Services reveal gaping holes in the agencies' documentation of the services they have provided to foster children and the revenues they have expended in doing so. A 2008 fiscal audit by the Office of Legislative Services of Maryland's Social Services Administration ("MSSA"), the agency within the Department of Human Resources that supervises all local DSS branches, revealed, among many significant findings, that:

- MSSA "ha[d] not been able to successfully... conduct effective programmatic and financial monitoring" of the foster care system. DEPARTMENT OF LEGISLATIVE SERVICES, OFFICE OF LEGISLATIVE AUDITS, AUDIT REPORT: DEPARTMENT OF

⁸ Amici agree with Appellant that this is not a proper reading of *Keffeler*. As Appellant argues, *Keffeler* established only that the Social Security Act's anti-attachment provision does not prohibit state child welfare agencies from collecting foster children's Social Security benefits. The anti-attachment provision is not at issue here, and the claims in this case were expressly reserved in *Keffeler*. 537 U.S. at 390 n. 12.

HUMAN RESOURCES SOCIAL SERVICES ADMINISTRATION 5 (2008) . For example, “children who were no longer in foster care were still recorded as being in foster care.” *Id.* at 10.

- MSSA “had not established adequate procedures to ensure that all available funds under Title IV-E [of the Social Security Act] were obtained for certain services delivered to eligible foster care children.” *Id.* at 17.
- MSSA failed to establish a system to “ensure that amounts paid to group care providers were used appropriately, and that certain overpayments retained by providers, in accordance with State law, were used for allowable purposes in subsequent years.” *Id.* at 19-20.

Earlier DLS audits of MSSA, in 2005 and 2001, resulted in similar findings, including systematic failures to monitor expenditures by and overpayments to group care providers,⁹ failures to place foster children with lower-rate group care providers when appropriate,¹⁰ and failures to monitor services provided by contractors.¹¹ Confirming these conclusions and providing further cause for concern are several parallel DLS audits of DHR’s Office of the Inspector General (“OIG”), DHR’s self-monitoring entity, as well as of three specific DSS branches (for Baltimore City, Baltimore County, and Prince George’s County). In 2009, DLS reported that:

- OIG did not adhere to standard auditing standards when reviewing the operations of DSS branches, and failed to performed reviews every two years as required by Maryland law. *See* DEPARTMENT OF LEGISLATIVE SERVICES, OFFICE OF LEGISLATIVE AUDITS, AUDIT: DEPARTMENT OF HUMAN RESOURCES LOCAL DEPARTMENT OPERATIONS (2009) (hereinafter DLS 2009 LDO AUDIT).

⁹ DEPARTMENT OF LEGISLATIVE SERVICES, OFFICE OF LEGISLATIVE AUDITS, AUDIT: DEPARTMENT OF HUMAN RESOURCES SOCIAL SERVICES ADMINISTRATION 13 (2005) (hereinafter DLS 2005 MSSA AUDIT); DEPARTMENT OF LEGISLATIVE SERVICES, OFFICE OF LEGISLATIVE AUDITS, AUDIT: DEPARTMENT OF HUMAN RESOURCES SOCIAL SERVICES ADMINISTRATION 5 (2001) (hereinafter “DLS 2001 MSSA AUDIT”).

¹⁰ DLS 2005 MSSA AUDIT at 14 (2005); DLS 2001 MSSA AUDIT at 4.

¹¹ DLS 2005 MSSA AUDIT at 16.

- One DSS branch had not established “adequate controls . . . to ensure that foster care and adoption payments were proper.” *Id.* at 14. The lack of oversight made foster care and adoption payments “more susceptible to errors and fraud.” *Id.*
- All three DSS branches did not require supervisors to approve recurring monthly payments to foster families, thus creating a risk of overpayment. *Id.* at 16. When overpayments did occur, DSS failed to take action to redeem the excess funds. *Id.*
- One of the DSS branches had “inadequate” internal controls over bank account disbursements, such that “unauthorized payments could be processed without detection.” *Id.* at 21.
- Two DSS branches lacked adequate internal control over purchasing and disbursement transactions, creating a risk that employees would make “fraudulent transactions.” *Id.* at 23.¹²

In short, several local departments of social services, along with the state agencies that oversee them, have demonstrated an inability to accurately track the dollars that come into and flow out of their coffers.

Certain DSS branches have struggled in particular with maintaining accurate records on the specific issue of OASDI benefits management, a matter not specifically addressed in the audits referenced above. A 2001 audit by the Social Services

¹² DLS made similar findings in its OIG audits of 2005 and 2002. See DEPARTMENT OF LEGISLATIVE SERVICES, OFFICE OF LEGISLATIVE AUDITS, AUDIT: DEPARTMENT OF HUMAN RESOURCES LOCAL DEPARTMENT OPERATIONS (2005) (hereinafter “DLS 2005 LDO AUDIT”); DEPARTMENT OF LEGISLATIVE SERVICES, OFFICE OF LEGISLATIVE AUDITS, AUDIT: DEPARTMENT OF HUMAN RESOURCES LOCAL DEPARTMENT OPERATIONS (2002) (hereinafter “DLS 2002 LDO AUDIT”). During the 2005 audit, DLS reported that local departments of social services had “poor control over disbursements” and “inadequate control over trust accounts,” and made “improper bank reconciliations.” DLS 2005 LDO AUDIT at 5-6. In 2002, OLS concluded that OIG failed to complete audits in a timely fashion, and that, with respect to foster care, local departments of social services systematically failed to determine eligibility for federal funds and had “poor control over disbursements.” DLS 2002 LDO AUDIT at 5, 7.

Administration (“SSA”) of Baltimore City DSS (“BCDSS”) concluded that the agency “did not have effective safeguards over the receipt and disbursement of Social Security benefits” and failed to “ensure that Social Security benefits were used and accounted for in accordance with [SSA’s] policies and procedures.” SOCIAL SECURITY ADMINISTRATION, FINANCIAL-RELATED AUDIT OF THE BALTIMORE CITY DEPARTMENT OF SOCIAL SERVICES – AN ORGANIZATIONAL REPRESENTATIVE PAYEE FOR THE SOCIAL SECURITY ADMINISTRATION ii (2001). BCDSS did not, for example, correctly record benefits receipt and disbursement in an astounding 82% of records reviewed by SSA. *See id.* Furthermore, BCDSS failed to deposit \$1.6 million into foster children’s savings accounts where it should have. *See id.* at iii. Indeed, in some instances, BCDSS spent funds “on the wrong individuals.” *Id.* Finally, “BCDSS did not return conserved funds to SSA beneficiaries who were no longer in their care,” and in doing so, deprived former foster children of approximately \$864,000 in benefits. *Id.*¹³

The Court can easily imagine how weaknesses in the state child welfare system’s accounting mechanisms might cause a local branch to over-reimburse itself for services it has provided to a foster child. The most straightforward situation is one in which DSS spends a certain amount on a child but, as a result of faulty bookkeeping, takes a greater

¹³ SSA audited BCDSS again in 2006 and also audited DHR in 2010. *See* SOCIAL SECURITY ADMINISTRATION, REPRESENTATIVE PAYEES RECEIVING BENEFITS FOR CHILDREN IN FOSTER CARE: EVALUATION REPORT (2006); SOCIAL SECURITY ADMINISTRATION, BENEFIT PAYMENTS MANAGED BY REPRESENTATIVE PAYEES OF CHILDREN IN FOSTER CARE (2010). These later audits focused on situations in which individuals (e.g. natural parents, foster parents), rather than child welfare agencies, served as foster children’s representative payees. They did not revisit the results of the 2001 BCDSS audit.

amount of the child's OASDI benefits as "reimbursement." Worse still, DSS might retain benefits it manages on behalf of a foster child during a period when it is making no contribution at all to the child's current upkeep. For example, DSS might continue to collect a foster child's financial resources during a period when the child is in a residential treatment facility, notwithstanding that Medicaid insurance rather than DSS typically pays for the child's day-to-day needs in this circumstance. *See* MD CODE REGS 10.09.29.08 (2010). Similarly, DSS may continue to "reimburse" itself when the child runs away or leaves his or her foster care placement to stay with friends or relatives, notwithstanding that state law prohibits DSS from continuing to make foster care payments when this happens. *See* MD. CODE REGS 07.02.11.34(b)-(c)(2010) (establishing that only foster parents and other approved care providers can receive foster care payments, and that "additional [foster care] payment is not made" where child is absent from foster care for more than thirty days); *see also* ASSOCIATION FOR CHILDREN AND FAMILIES, CHILD WELFARE POLICY MANUAL, § 8.3B (2001) (explaining that child welfare agencies may not receive federal reimbursement for foster care maintenance payments they make "when the child is absent from the placement for more than a reasonable brief period" – i.e. more than fourteen days). To prevent such an outcome, this Court should expressly instruct DSS that it must justify any effort to collect a foster child's financial resources on the basis of documented, allowable expenditures it has made on behalf of that child.

CONCLUSION

Foster children and youth are among Maryland's most vulnerable citizens and, yet,

DSS takes from them what little money they may have and spends it in ways not directly beneficial to their own unique needs. Such action both violates the law, which requires DSS to act in the best interests of each foster child in its care, and diminishes each affected child's chances of developing into a healthy and responsible adult. Accordingly, this Court should hold that DSS must abandon its blanket policy of retaining for itself any OASDI benefits it receives on behalf of a given foster child, and require instead that DSS use such benefits in a manner that directly furthers the child's individually-determined best interests.

If this Court holds that DSS may, as a general matter, retain a foster child's OASDI benefits as reimbursement for services rendered, it should state explicitly that DSS may not do so in any particular case without first providing direct notice to the child and presenting a detailed accounting of the agency's particular expenditures on behalf of the child in question. Without clear guidance from this Court, DSS may retain foster children's benefits in amounts exceeding what it has actually spent on those children and what it is legally entitled to retain.

For the reasons set forth above, and in the Appellant's brief, this Court should reverse the decision below and remand for proceedings consistent with the Court's opinion.

Respectfully submitted,

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Times New Roman, 13 Point Font

CERTIFICATE OF SERVICE

I hereby certify that on this 8th day of October 2010, I mailed first class, postage prepaid,

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