



Founder and President

Karen J. Freedman

April 8, 2024

Executive Director

Glenn Metsch-Ampel

Denise Borak
Assistant Commissioner
Division of Financial Services
Administration for Children's Services
150 Williams Street
New York, New York
By email: draft.policy.comments@acs.nyc.gov

Re: Draft Policy: Social Security Benefit Referrals for Children in Foster Care and Transfer of Payee Representation for Children and Young Adults Upon Entry and Exit from Foster Care

Dear Ms. Borak:

Two years ago, ACS Commissioner Dannhauser recognized, in no uncertain terms, that ACS should not be collecting children's Social Security benefits and using that money to cover the cost of their care. He said, "[t]his is their money, and they deserve to use it as they see fit."¹ The draft policy purports to implement the promise made by Commissioner Dannhauser to ensure that Social Security benefits are collected and set aside for eligible children in foster care. The policy states:

- "ACS seeks to maximize allowable savings from Social Security Administration benefits for Children in foster care." (Summary)
- "ACS' new approach aims to conserve allowable savings for children in care, and to maintain benefits for eligible children who are recipients upon entering care or who are determined eligible while in care." (Introduction).
- "For children who are not IV-E eligible, ACS will conserve SSI benefits up to the asset limitation imposed under federal law." (III.A.2.c)

Despite these clear statements of purpose, the draft policy fails to achieve its stated goals and fails to live up to the promises made by the Commissioner in several respects. The system set into place by the draft policy will not maintain benefits for all eligible children, will not maximize allowable savings, and will not allow children to use their funds to meet their special needs. We urge you to revise the draft policy to address the shortcomings explained below, in

¹ *New York City will stop collecting Social Security money from children in foster care*, NPR and WNYC, Joseph Shapiro, March 9, 2022 (available at <https://www.npr.org/2022/03/09/1084620883/new-york-city-will-stop-collecting-social-security-money-from-children-in-foster#:~:text=Child%20welfare%20officials%20in%20New,criticized%20by%20advocates%20for%20children>).

order to fulfill ACS's promises to ensure that children are able to retain and use their benefits to the fullest extent permitted by law.

IV-E Eligibility Should Not Impact the Application for and Use of SSI Benefits:

The draft policy's approach to the interaction between IV-E benefits and SSI eligibility is highly problematic in two key respects. First, "if IV-E eligibility is confirmed for a child who is a recipient of SSI, the child's SSI benefits will remain in suspense status throughout their placement in foster care." (III.A.2.b). The policy thus deprives IV-E eligible children of their SSI benefits, so that ACS can collect IV-E funding, which the policy explains "is an important and critical source of millions of dollars in funding to provide care for children in foster care." (II.E.). Second, for children who are not IV-E eligible, the policy provides for ACS to apply the monthly SSI payments "toward offsetting the cost of foster care." (III.A.2.c). Although "ACS receives federal reimbursement for only about 40% of children and youth in NYC foster care," (II.E) no other children in foster care are required to use or forfeit any income or assets to pay for their placement – without regard to their IV-E eligibility and no matter what the source or amount of any other income or assets they may have. ACS is legally required to provide food, clothing and shelter to children in foster care and should not use the children's own assets in order to meet that obligation – especially when those assets can and should be used to help meet the children's special needs.

The Draft Policy Fails to Retain the Maximum Allowable Benefit for SSI-Eligible Children:

The draft policy operates under the false premise that "Federal law and regulations do not permit a recipient to accumulate assets over \$2000 and continue to receive monthly benefits – this is the maximum for all SSI beneficiaries." (II.C.). To the contrary, several savings vehicles are available to conserve significantly more than \$2,000 without impacting a child's eligibility for benefits. Those vehicles include Achieving a Better Life Expectancy (ABLE) accounts and Special Needs Trusts. Congress created ABLE accounts specifically to "encourage and assist individuals and families in saving private funds for the purpose of supporting individuals with disabilities to maintain health, independence, and quality of life."² Up to \$100,000 can be held in an ABLE account without impacting resource limitations for SSI, Medicaid HUD, SNAP or FAFSA.³ There is no limit to the amount that can be conserved in a special needs trust.⁴ Other jurisdictions that have approved the use of these accounts to conserve the SSI benefits of children in foster care include Arizona, Maryland, and Washington D.C. If New York City is truly committed to maximizing the allowable savings, and conserving benefits as allowed by federal law, it must follow suit.

ACS Should Not Apply to Become the Representative Payee in All Cases:

The draft policy improperly provides, "[w]hen a child is identified as a beneficiary of SSA benefits, the benefits consultant will notify the SSA that the beneficiary is in ACS' care and apply to become the child's representative payee." (III.A). Providing for ACS to presumptively seek to become the child's representative payee violates the federal regulations, disempowers families, and prevents youth from gaining important skills.

² ABLE Act of 2014, H.R. 647, 113th Cong. § 101 (2014)

³ 26 U.S.C. § 529A; NY MHL Art. 84; www.ablenrc.org

⁴ Social Security, Spotlight on Trusts, <https://www.ssa.gov/ssi/spotlights/spot-trusts.htm>

Federal regulations set forth a clear order of preference for who should serve as a representative payee for children under 18. An “an authorized social agency or custodial institution” falls last on that list.⁵ The Social Security Administration (SSA) cautions “[r]emember, even when the agency is the legal guardian, you are not required to appoint the legal guardian as the payee.”⁶ A parent or other relative – even one who does not have custody and is not contributing to the support of the child – is preferable to the agency.⁷

Youth under the age of 18 may be payees of their own benefits in some circumstances. According to the SSA regulations, “we will make payments to a beneficiary under age 18 who shows the ability to manage the benefits.”⁸ Notably, benefits may be paid directly to the youth without regard to who may have legal responsibility for supporting them. As such, a youth’s placement in ACS custody does not negate the youth’s ability to collect their own benefits in appropriate circumstances. Accordingly, it is inappropriate for ACS to seek to become a representative payee for those young people. In addition, helping youth to access and manage their benefits as early as possible is critical to ensuring that when those youth leave foster care, they fully understand the benefits that they are entitled to receive and how to use them.

Youth aged 18 or older should be presumed to be capable of serving as their own payee. According to the federal regulations governing representative payees, “our policy is that every beneficiary has the right to manage his or her own benefits.”⁹ Putting itself forth as the representative payee for these youth clearly violates both the spirit and the letter of the regulations, particularly when ACS is using those funds to reimburse itself for the child’s care and is preventing the child from accessing the funds to use as they see fit.

ACS Must Allow Youth to Use their Benefits While they are in Foster Care :

The draft policy contains no provision for youth to use their benefits while they are in foster care. With respect to youth who are entitled to Survivor’s Benefits, “ACS will conserve all RSDI benefits for children and youth who enter care as RSDI beneficiaries in designated subaccounts, with the savings accessible upon the child’s exit from care.” (III.A.1). “For SSI beneficiaries whose benefits were suspended upon entry to care as a result of their IV-E eligibility status, ACS will issue a check for up to \$2,000. . . to a child who has aged out or to the parent or legal guardian in whose care they are placed after final discharge.” (VI.B.1.a). Notably, the draft policy contains no provision for conserving benefits for children who are deemed eligible for SSI while in care.

The draft policy’s failure to provide for benefits to be used while the beneficiary is in ACS custody clearly undermines the purposes for which the benefits are paid. Payments are intended to be used for the current maintenance of the beneficiary¹⁰ They should, as such, be used to supplement foster care services, just as the benefits are used to supplement the income of a parent/guardian caring for an eligible child who is not in foster care.

⁵ 20 C.F.R. §§ 404.2021(c) and 416.621(c).

⁶ Social Security Program Operations Manual System (POMS), GN 00502.070 Determining Capability – Children, <https://secure.ssa.gov/poms.nsf/lnx/0200502070#:~:text=We%20generally%20presume%20children%20under,2>.

⁷ 20 C.F.R. §§ 404.2021(c) and 416.621(c).

⁸ 20 C.F.R. § 2010(b)

⁹ 20 C.F.R. §§ 416.610, 404.2001(b)

¹⁰ 20 C.F.R. §§ 404.2040, 416.640 (“Use of benefits payments”).

There are many ways in which accessing Social Security benefits could provide crucial support to children in foster care who have lost their parents. Survivors Benefits could have been used to keep one young LFC client in the private daycare she attended before her parents died and she was placed in foster care. Survivors Benefits could be used to pay for a storage facility to maintain the parents' belongings until a child leaves care and sets up a home of their own, or to pay the mortgage on a home owned by the parents.¹¹ For older clients, they could be used to defray the cost of higher education and vocational training, rather than requiring the youth to incur student debt.

Benefits could be used to provide crucial services and supports to help maintain a disabled child in a foster home, rather than being placed in a restrictive congregate care setting. The benefits might be used to provide therapeutic services from private providers – avoiding the lengthy waitlists for Medicaid-funded services. The extra funding can help foster parents access a greater array of resources for after-school and weekend programming, or to replace assistive technologies such as wheelchairs and other adaptive equipment not covered by Medicaid. It can help to provide transportation to appointments for a foster parent who is hesitant or finds it challenging to manage a child with a disability on public transportation. Federal benefits should be available to use to assist children, as the need arises, and as intended by the SSA.

While we recognize the great advantage of setting aside unused benefits payments in order to help youth when they leave care, there is also a clear advantage to making the funds available when needed for children before they are discharged from foster care. Placing SSI funds in a ABLÉ account or Special Needs Trust, as discussed above, will help to ensure that the funds are available, and put to proper use when withdrawn from the account.

ACS Must Provide Timely, Effective Notice to the Attorneys for the Child and Parent:

The notice provided to parents and to the child's attorney regarding ACS becoming the representative payee for children who enter foster care as benefits recipients is totally inadequate. The draft policy provides for notice to be sent only after SSA approves ACS' application to become the child's representative payee. (III.A.4). This does not give the parent or youth an effective opportunity to challenge the appointment, and, in fact, appears to be calculated to prevent the parent and child from challenging to the appointment. In light of the fact that, as noted above, the agency is the least preferable representative payee under the SSA regulations, the parent and child should be given timely notice of the agency's intent to claim that role.

The child's attorney should also be provided with timely, effective notice of a determination regarding eligibility for benefits. Providing that notice is critical, both so that the child's attorney understands what benefits the child is entitled to receive and so that the child's attorney may challenge a determination that the child is not eligible to receive benefits. The draft policy contains no provision for notice of a determination of eligibility regarding Survivor's benefits. It provides for notice of a determination of SSI eligibility to be sent only to the child's parent or guardian, even when the child is over the age of 18. This must be changed.

¹¹ See *In re J.G.* 186 N.C. App. 496 (N.C. Ct. of App. 2007) (holding that DSS could be ordered to use a child's social security benefits to pay off a mortgage on a house, make past-due mortgage payments on the house, and make repairs).

Provisions regarding Discharge from Foster Care:

The draft policy’s provisions regarding discharge from foster care deprive vulnerable children and their families of critically needed supports. “For children on trial discharge, ACS will retain the conserved savings until the child’s final discharge.” (VI.B.2). Following final discharge, “[o]nce ACS confirms that the SSA has removed ACS as representative payee all conserved funds will be returned to the SSA by check within two months.” (VI.B.1). Many more weeks will, no doubt, pass, before the retained funds are returned to the child. Trial discharge can last for several months for younger children and for several years for those who are discharged to APPLA.¹² The child and family must be able to access their benefits during that time. It is particularly inappropriate for ACS to prevent the family from accessing the child’s benefits when the agency is not providing any services to help meet the child’s daily needs.

Conclusion

The overwhelming majority of children and youth who would be subject to this policy are Black and brown and come from economically disadvantaged families. The draft policy will deprive them of access to benefits to which they are entitled, disenfranchise families from making important decisions regarding their children’s benefits, and keep them in an unbroken cycle of poverty.

With Commissioner Dannhauser’s recognition that social security benefits for children belong to the children, ACS was hailed as a leader in ensuring that benefits accrue to children. Since then, ACS has largely failed to implement the changes necessary to realize his vision. With this long-awaited policy, ACS completely undermines the Commissioner’s promise. In the last two years, several cities and states have implemented laws and policies that go much further than the ACS draft policy toward ensuring that children and youth are able to receive and use their Social Security benefits to address their needs. We urge you to look to those jurisdictions – Arizona in particular – in designing and implementing a policy that truly benefits children.

We remain available to work with ACS to address these concerns and craft a policy that effectively maximizes allowable savings from SSA benefits for children in foster care.

Very truly yours,



Karen Freedman
Founder and President



Betsy Kramer
Public Policy Project Director

¹² 18 NYCRR § 430.12(f)(4)(i)(a)