

Presented:

2022 CHANGES AND TRENDS AFFECTING SPECIAL NEEDS TRUSTS
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**Protecting and Maximizing
Public Benefits**

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This outline presents the law as of this writing, with the warning that many public benefits in Texas are presently in a state of change. Nothing contained in this publication is to be considered as the rendering of legal advice for specific cases, and readers are responsible for obtaining such advice from their own legal counsel. This publication is intended for educational and informational purposes only.

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This overview of the most significant public benefits for persons with disabilities in Texas is intended to assist attorneys and other benefits counselors to identify the major benefits to which such clients may be entitled.

Its focus is primarily on the “means-tested” benefits, which are available only to persons with assets and income below certain limits. Therefore, particular attention is paid to rules relating to trusts and transfers of assets to assist attorneys and other professionals with estate planning for family members and with planning for dispositions of personal injury awards, inheritances and other assets of persons with disabilities.

Although much of the law discussed is federal law, many rules are state-specific. Accordingly, with regard to cases governed by the law of jurisdictions other than Texas, it must be used, if at all, with great caution.

This outline is intended as a “bridge” to help the practitioner better understand and use the voluminous statutes, rules, and agency operating instructions applying to each program. Therefore, although it seeks to cover the most important rules, it cannot include every benefit, exclusion, exemption, etc. contained in the numerous sources of law, which are cited for further reference.

I. OVERVIEW OF TEXAS HEALTH & HUMAN SERVICE AGENCIES

A. TEXAS AGENCIES

The Texas Health and Human Services Commission (HHSC) administers the government programs Special Needs Trust beneficiaries need the most often:

- Long-Term Care Medicaid (nursing home and home care programs)
- Medicaid for children and their caregivers
- SNAP (food stamps)
- TANF (cash assistance for families)
- Behavioral Health Services
- Intellectual Disability Services
- Women's Health Services

HHSC also licenses long-term care facilities, certifies certain nursing facilities as Medicaid providers.

Within HHSC, the Texas Department of State Health Services (DSHS) manages birth and death records, gathers and shares public health data, collects data to monitor for chronic and infectious disease, provides emergency response services for health emergencies, regulates producers of consumer health goods and service providers that pose potential danger to public health.

Other agencies that do not fall under HHSC’s umbrella but are still important to know include:

- Texas Department of Family and Protective Services (DFPS) - responsible for adult and child protective services.¹
- Texas Workforce Commission (TWC) - responsible for workforce development including providing training and employment services to people with disabilities.²

B. MEDICAID SERVICE DELIVERY MODELS

1. HISTORICAL BACKGROUND IN TEXAS

Medicaid is funded by federal and state government but is administered by the state. Typically, a state provides through a fee-for-service model (“traditional” Medicaid) or a pay-per-patient model (“managed care” Medicaid). In 2011, the Texas Health & Human Services Commission applied for a new Medicaid waiver program that moved away from the “traditional model” towards the “managed care” model. The U.S. Centers for Medicare & Medicaid Services (CMS) approved the new waiver program on December 12, 2011. By that approval, CMS “waived” certain requirements of federal Medicaid law, most notably the prohibition on payment of certain Medicaid funds to hospitals serving large numbers of low-income patients, when the hospitals participate in Medicaid managed care.³ This is a five-year “demonstration program,” scheduled to end in September 2016 but has been extended several times and is currently approved through September 2022.

Over the last 10 years, most Medicaid programs have been integrated into the STAR managed care model including long-term care recipients, children with intellectual and developmental disabilities, children in state conservatorships, and those receiving services under 1915(c) waiver programs.⁴

A few categories of individuals remain eligible for “traditional Medicaid” benefits, as discussed below. The switch to managed care does not affect (1) long-term care programs without comprehensive medical coverage, such as non-waiver home care programs like Community Attendant Services, or (2) Medicare Savings Programs (QMB, SLMB, QI-1).

2. CHANGES SHOULD NOT ADVERSELY AFFECT CLIENTS

There is an inherent conflict when the delivery of a public benefits is entrusted to a for-profit organization that is paid a “capitated” rate per member.⁵ There is an obvious financial incentive to

¹TEXAS DEPARTMENT OF FAMILY AND CHILD PROTECTIVE SERVICES, *About DFPS*, https://www.dfps.state.tx.us/About_DFPS/default.asp.

² TEXAS WORKFORCE COMMISSION, *About Texas Workforce*, <https://www.twc.texas.gov/about-texas-workforce>.

³ These “demonstration program” is sometimes referred to as the “1115 Transformation Waiver” because CMS’s authority derives from Social Security Act §1115, 42 U.S.C. §1315.

⁴ See Tex. Health & Human Services Comm’n, *Demonstration Extension Application Section 1115(a), Appendices A-E*, (July 2021), available for download at <https://www.medicaid.gov/medicaid/section-1115-demo/demonstration-and-waiver-list/83231> (application pending approval as of January 11, 2022).

⁵ “Capitated” managed care is required by Texas statute for acute-care Medicaid generally, unless the HHSC determines that another arrangement, including a traditional fee-for-service arrangement, would be “more cost-

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