

Immigrant Health: The Role and Impact of Medicaid, HIPAA, and the Public Charge Doctrine

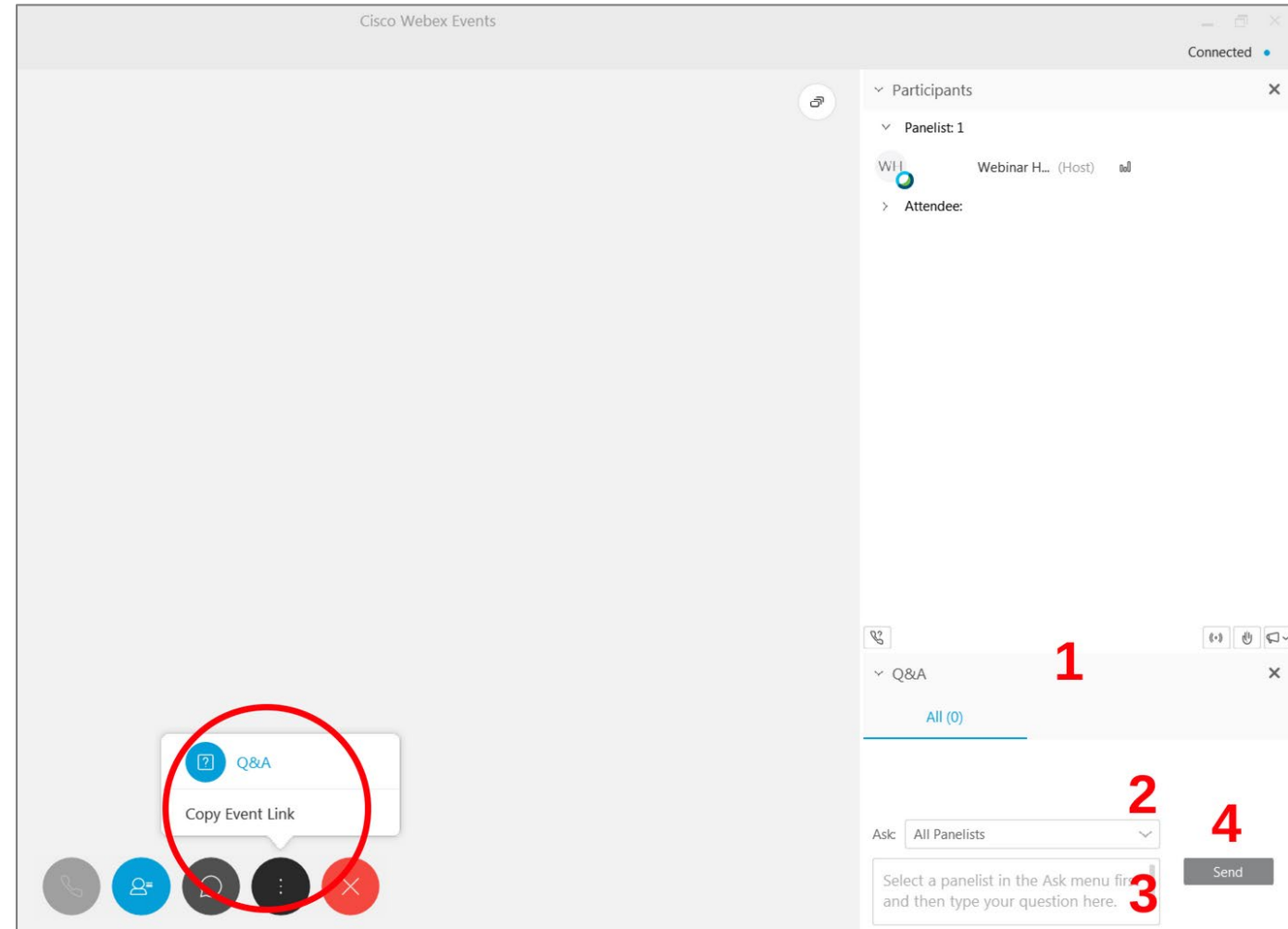
April 25, 2019

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Moderator



Kerri McGowan Lowrey, Deputy Director, Network for Public Health Law - Eastern Region

- J.D., University of Maryland School of Law
- M.P.H., Johns Hopkins University Bloomberg School of Public Health
- Research interests/areas of expertise:
 - Empirical Legal Research and Coding
 - Injury Prevention
 - Child and Adolescent Health Policy

Presenter



Priscilla Huang, Senior Attorney, the National Health Law Program

- J.D., American University, Washington College of Law
- Research interests/areas of expertise:
 - Reproductive Justice
 - Racial and Ethnic Health Disparities
 - Immigrant Health Care Access

Presenter



Dorothy Singletary, Student Attorney, Public Health Law Clinic, University of Maryland Carey School of Law

- J.D. Student, University of Maryland Francis King Carey School of Law
- Research interests/areas of expertise:
 - Employment Discrimination
 - Civil Rights
 - Income Tax Law

Presenter



Laura Macherelli, Student Attorney, Public Health Law Clinic,
University of Maryland Carey School of Law

- J.D. Student, University of Maryland Francis King Carey School of Law
- M.P.H., George Washington University
- Research interests/areas of expertise:
 - Food and Drug Law and Regulation
 - Health Policy
 - Immigrant Health

Medicaid Eligibility for Immigrants

Priscilla Huang



Immigrant Eligibility: Federal Minimum

- **Qualified:**

- Includes LPRs, refugees, asylees or withholding of deportation/removal, conditional entrants, parolees, Cuban/Haitian entrants, certain domestic violence and trafficking survivors and their spouses and children

- **Not qualified:**

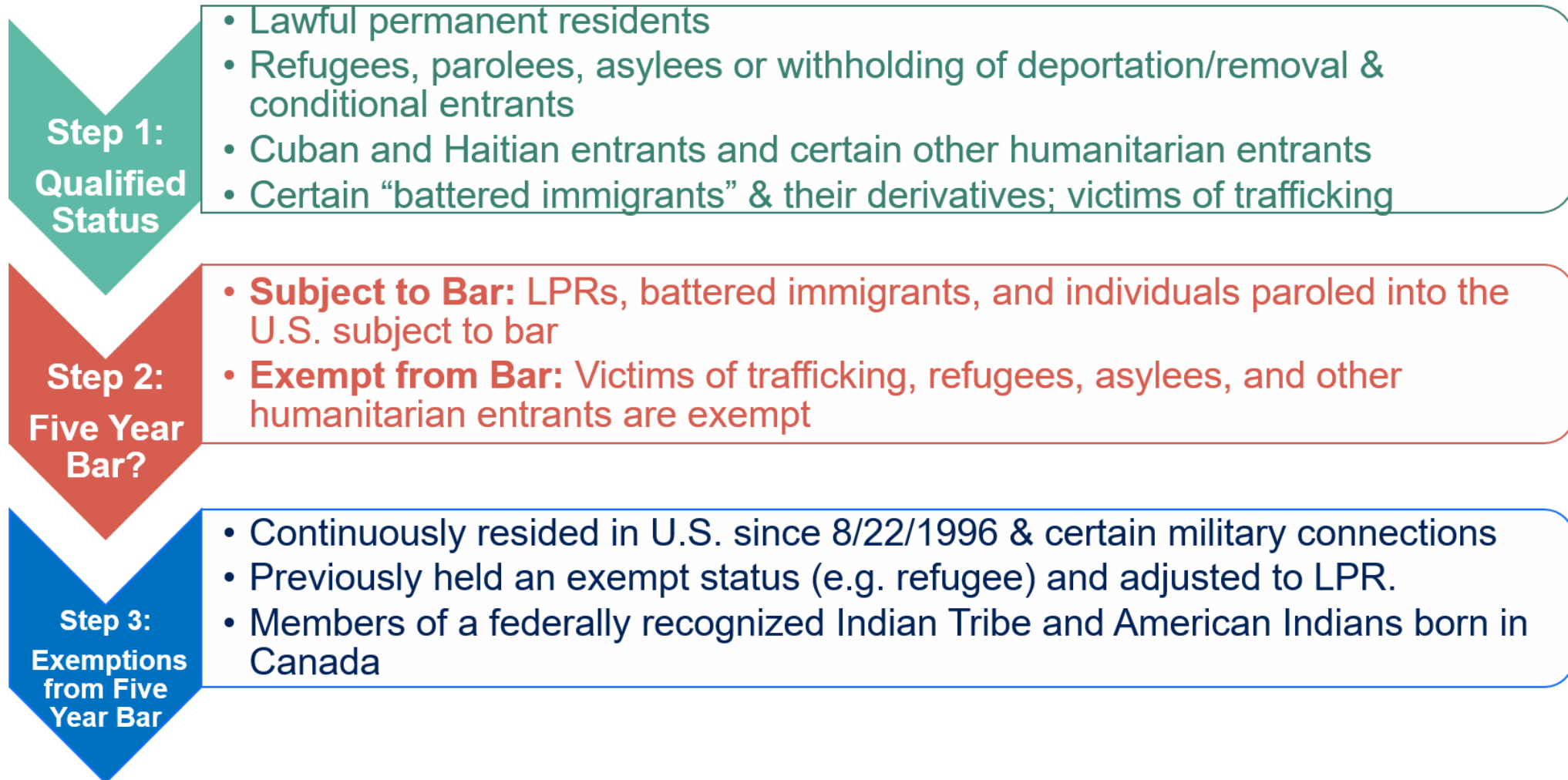
- Anyone who is not a citizen or “qualified immigrant
- Includes undocumented immigrants & temporary visa holders

- **Emergency Medicaid**



- Limited services for people who meet the state’s Medicaid eligibility requirements except for immigration status

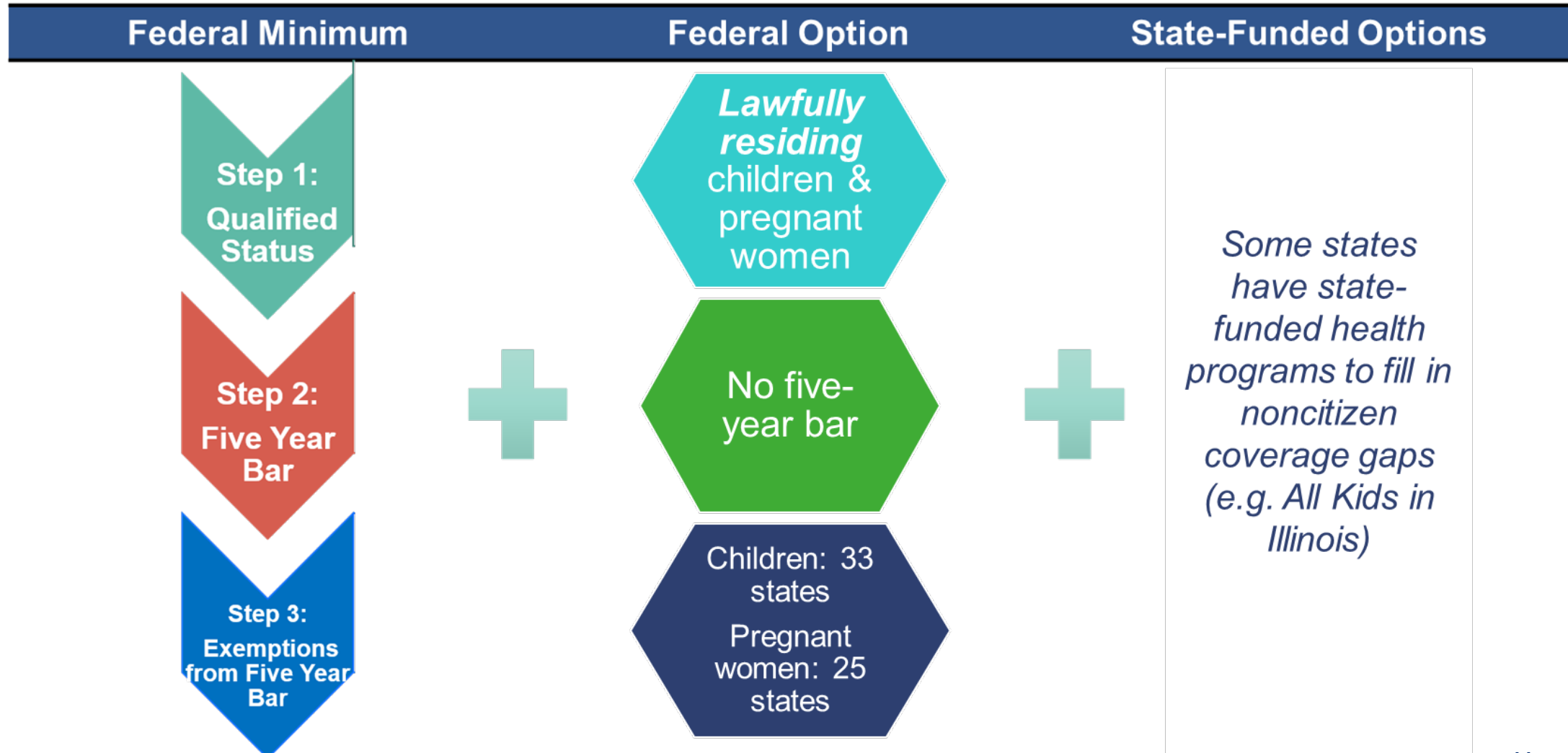
Immigrant Eligibility: Federal Minimum



State Option & State-Based Medicaid Programs

- States can opt to cover lawfully residing immigrant children & pregnant women, and without the five year bar
 - Lawfully residing is *much broader* than “qualified” and includes more immigration statuses
 - As of Jan. 2019:
 - 33 states and DC have taken this option for immigrant children
 - 24 states and DC have taken this option for pregnant women
- Some states have state-funded health programs to fill in noncitizen coverage gaps

Summary



Public Charge

October 2018 Proposed Rule

Current public charge test

Definition



A person who is likely to become primarily dependent on the government for subsistence.

Benefits Considered



Only two types of benefits considered:

1. Cash assistance for income maintenance
2. Institutionalization for long-term care at government expense

Totality of Circumstances Test

- ✓ Age
- ✓ Health
- ✓ Family status
- ✓ Financial status
- ✓ Education and skills
- ✓ Affidavit of support

When does the public charge test come up?

A public charge assessment is made when a person:

- Applies to enter the U.S.
- Applies to adjust status to become a Lawful Permanent Resident (LPR)
- A green card holder leaves the U.S. for more than 180 consecutive days (6 months) and reenters

Public charge assessment is NOT made when a person:

- Applies to become a U.S. citizen
- Falls under certain categories of immigrants (such as refugees, asylees, and survivors of human trafficking and domestic violence)

**How would the public charge
test change under the
proposed regulation?**

Changes in proposed regulation

1

New definition of “public charge”

2

Totality of circumstances test has new detailed negative factors that make it harder for low and moderate income people to pass

3

Additional public benefits included

Definition of public charge

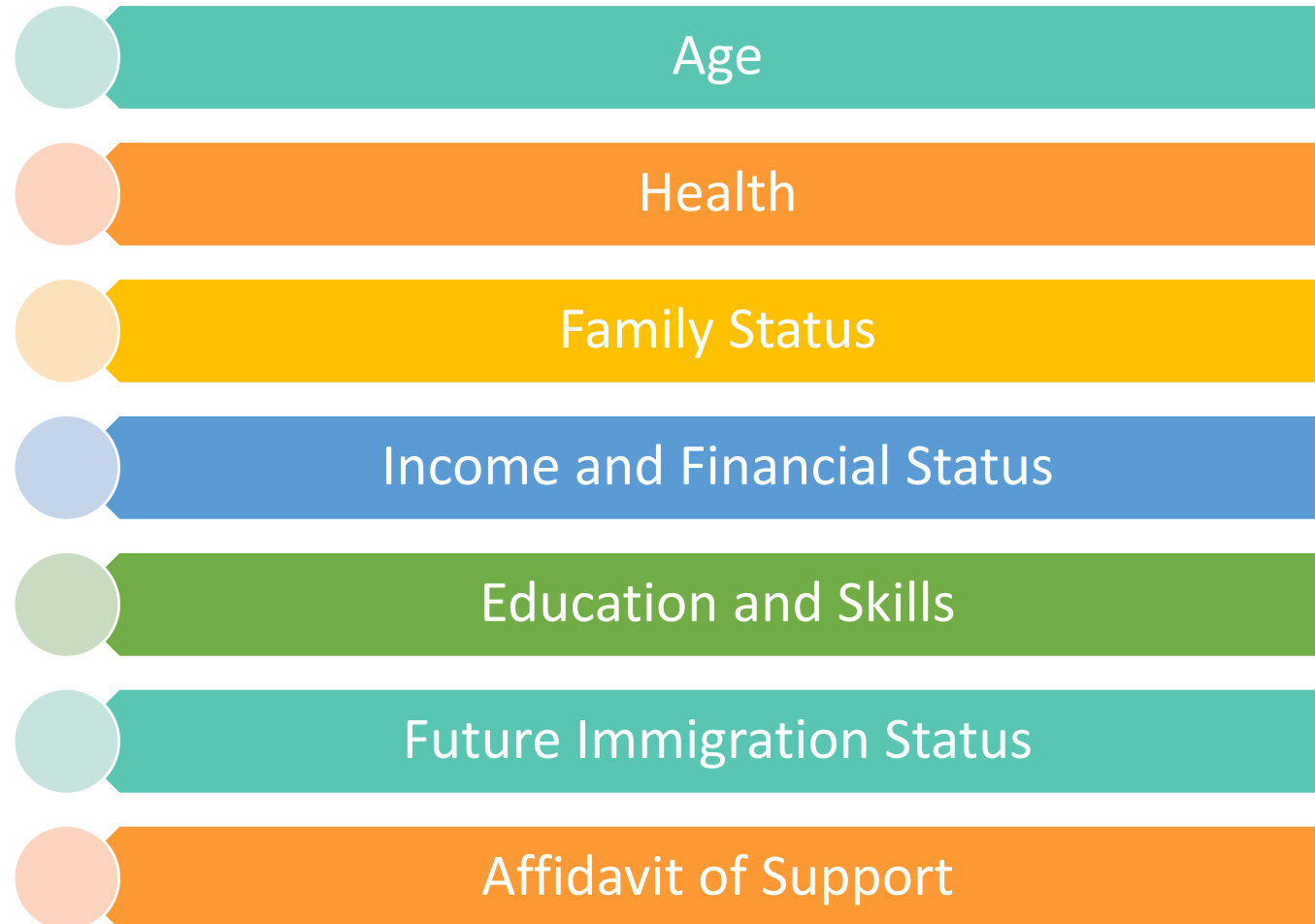
Currently

A person “likely to become primarily dependent on the government for subsistence”

As Proposed

An immigrant “who receives one or more public benefits”

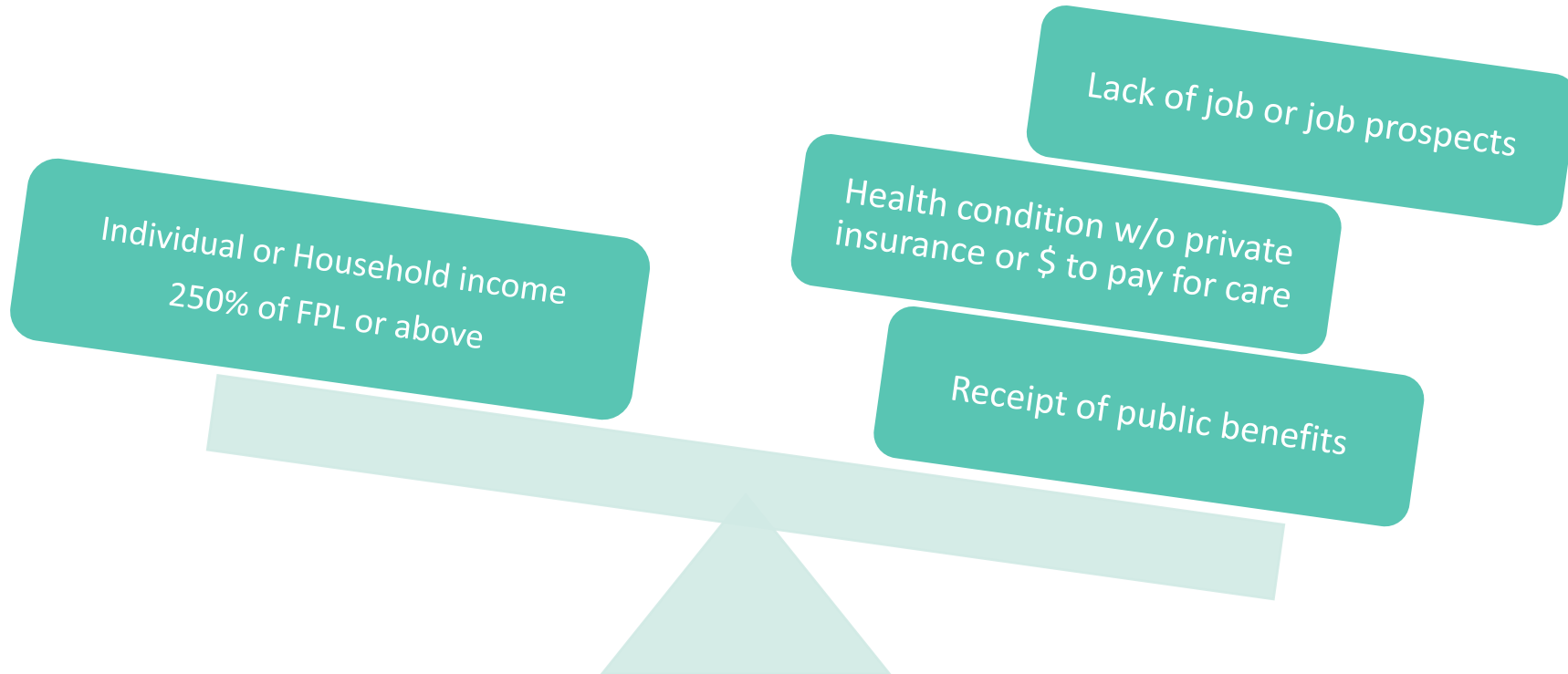
Totality of Circumstances Test: New criteria and factors



Totality of Circumstances Test: Heavily Weighed Factors

Heavily Weighed
Positive Factors

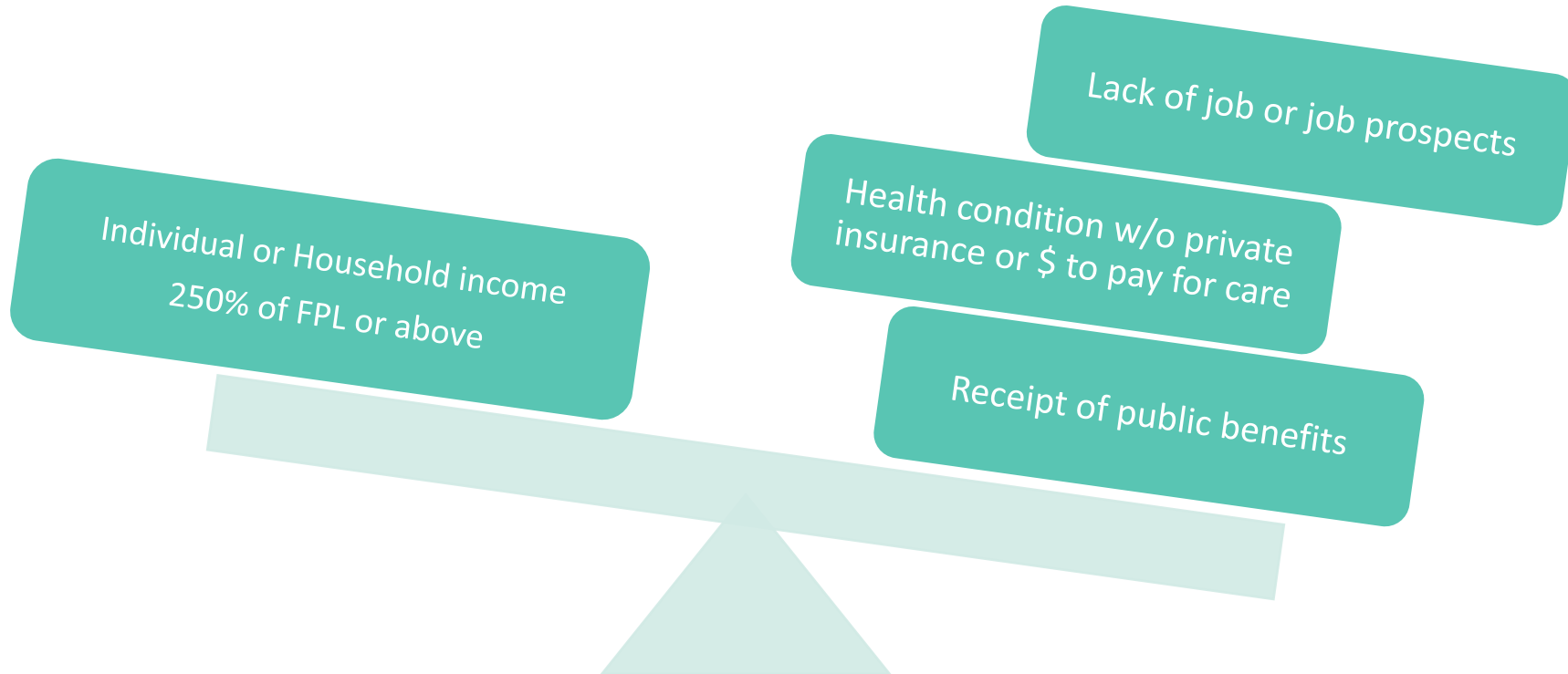
Heavily Weighed
Negative Factors



Totality of Circumstances Test: Heavily Weighed Factors

Heavily Weighed
Positive Factors

Heavily Weighed
Negative Factors



Public benefits included

***Cash Support for Income Maintenance**

***Long Term Institutional Care at Government Expense**

****Non-Emergency Medicaid**

Supplemental Nutrition Assistance Program (SNAP or Food Stamps)

Medicare Part D Low Income Subsidy

Housing Assistance (Public Housing or Section 8 Housing Vouchers and Rental Assistance)

* Included under current policy as well

** Exception for certain disability services offered in school. DHS is asking for input on inclusion of CHIP, but the program is not included in the regulatory text

Changes in the Proposed Rule that Impact Medicaid and Health Care

Proposed Rule

- **Non-Emergency Medicaid**
 - Exception for certain disability services offered in school.
- **Medicare Part D Low Income Subsidy**
- **Maybe: CHIP**
 - Not included in the proposed rule, but requested comments on whether to include

Also adds SNAP and federal housing benefits

- Expands the types of benefits that could be considered in a “public charge” determination to include non-emergency Medicaid
- Lowers threshold of public benefits use
 - Main source of support v. public benefits to supplement
- Implements new criteria and factors for totality of circumstances

Implications on Immigrant Communities



Illustration by Edel Rodriguez for LA Times

Chilling Effect

POLITICO

Immigrants, fearing Trump crackdown, drop out of nutrition programs

Both documented and undocumented immigrants fear that accepting federal aid could make them ineligible for a green card if rules are changed.

By **HELENA BOTTEMILLER EVICH** | 09/03/2018 08:17 AM EDT | Updated 09/04/2018 01:29 PM EDT

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The Health 202: Under Trump, immigrants back away from Medicaid, Obamacare subsidies

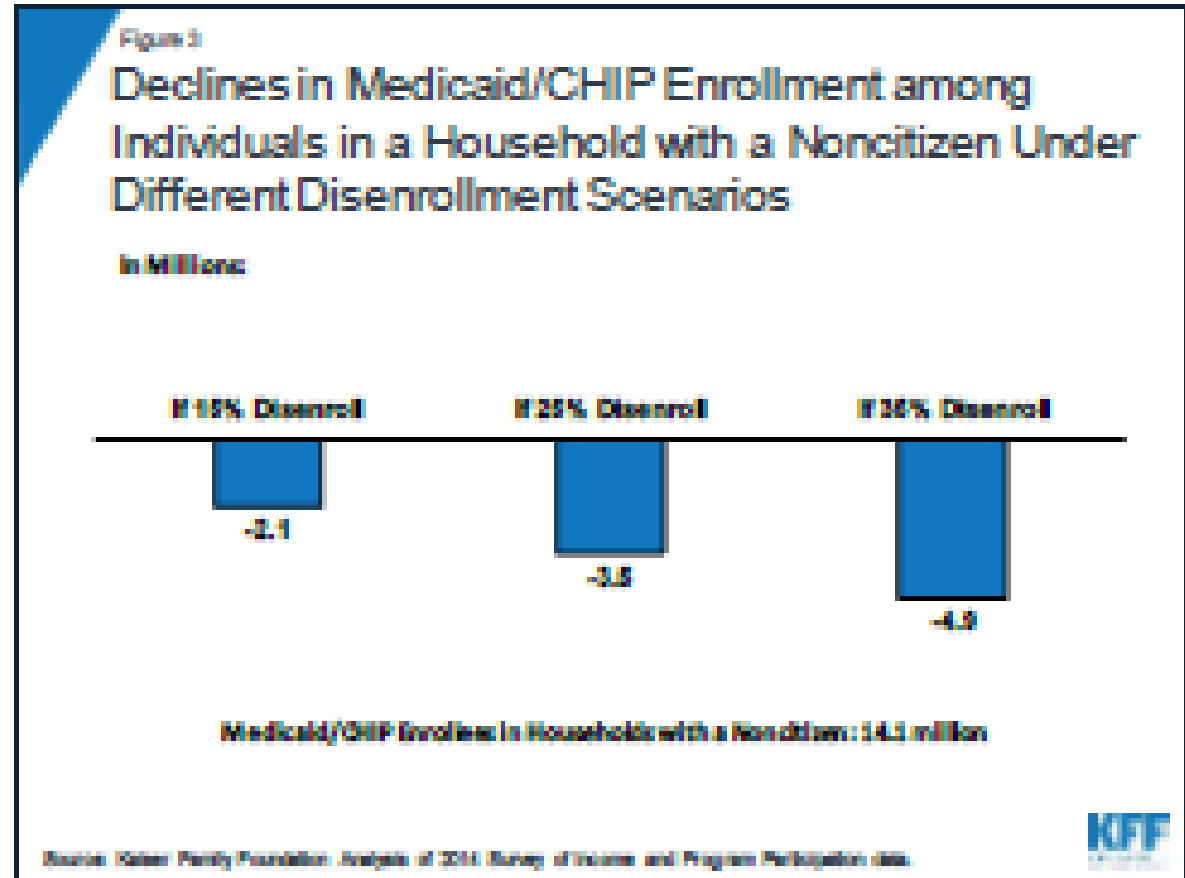
By [Paige Winfield Cunningham](#)
April 11

THE PROGNOSIS

Enrolling in Medicaid or an Obamacare plan doesn't hurt immigrants' chances of gaining permanent residency in the United States. That might change soon, under a major policy shift the Trump administration is considering that could curtail legal immigration.

Chilling Effect from the Proposed Public Charge Rule

- Fears of negative consequences on immigration status are a barrier to Medicaid & CHIP enrollment *beyond those directly impacted by the proposed rule*
- There are over **14 million** Medicaid/CHIP enrollees living in a household with at least 1 noncitizen & half of these enrollees were citizen children



More Resources

Medicaid/CHIP Coverage of Lawfully-Residing Immigrant Children and Pregnant Women:

<https://www.kff.org/health-reform/state-indicator/medicaid-chip-coverage-of-lawfully-residing-immigrant-children-and-pregnant-women/?currentTimeframe=0&sortModel=%7B%22colId%22:%22Location%22,%22sort%22:%22asc%22%7D%20>

Guidance and Model Policies to Assist California's Healthcare Facilities in Responding to Immigration Issues:

<https://oag.ca.gov/sites/all/files/agweb/pdfs/immigration/healthcare-guidance.pdf>

Priscilla Huang (LA office)

huang@healthlaw.org

Sarah Grusin (NC office)

grusin@healthlaw.org

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WASHINGTON, DC OFFICE

1444 I Street NW, Suite 1105

Washington, DC 20005

ph: [\(202\) 289-7661](tel:(202)289-7661)

LOS ANGELES OFFICE

3701 Wilshire Blvd, Suite 750

Los Angeles, CA 90010

ph: [\(310\) 204-6010](tel:(310)204-6010)

NORTH CAROLINA OFFICE

200 N. Greensboro Street, Suite D-13

Carrboro, NC 27510

ph: [\(919\) 968-6308](tel:(919)968-6308)



The Network
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Immigrants and Patient Privacy Laws

April 25, 2019

Dorothy Singletary, J.D. Student
Laura Macherelli, J.D. Student, M.P.H.

Overview

» **The Email...**

- » Father was picked up by ICE
- » Part of the paperwork that ICE had was from a medical clinic that he goes for help for his diabetes
- » The family avoids seeking medical treatment now
- » How can we help them?

Overview

» **Privacy for immigrants**

- » Do HIPAA protections extend to undocumented immigrants?
- » When can medical providers disclose a patient's PHI to law enforcement?
- » Protection under Executive Agency Memos
- » Protection under the Fourth Amendment
- » State Privacy Rights

What is HIPAA?

» Background

- » HIPAA requires U.S. Department of Health and Human Services to develop regulations to protect privacy and security of patients' protected health information (PHI).
- » Covered Entities includes: (1) a health plan, (2) a health plan clearinghouse, and (3) a health care provider who transmits any health info in electronic form.
- » HIPAA specifically protects the PHI of any patient, including undocumented immigrants. HIPAA protects the information, not the person.



What is PHI?

» Immigration status could be PHI

- » PHI is information that pertains to a patient's "past, present, or future physical or mental health condition; or the past, present, or future payment for the provision of healthcare to the individual, and that identifies the individual."
 - Also information that could reasonably be used to identify an individual
- » Common PHI: Name, Address, unique identifying numbers (e.g., SSN, drivers license number, passport number, account number)
- » How about country of origin or place of birth?

PHI Disclosure

- » **Health Care Providers can disclose PHI w/o a patient's permission in certain circumstances**
 - » 45 C.F.R. 164.512(f)
 - » (1)- Court Order or Court-ordered warrant, a subpoena or summons
 - » (2)- Crimes Committed on the Premises
 - » (3)- Administrative Request



Exception: Court Orders, Warrant, a Subpoena or Summons

- » **Only court orders issued by Federal Judges or Immigration Judges**
 - » **Important to remember:** ICE order is not an exception under 45 C.F.R. 164.512(f).
 - » Court Order must present all four of the followings:
 - (1)- Date
 - (2)- Address of the medical center
 - (3)- Items or person being ordered
 - (4)- Judge's signature

Exception: Reporting Crimes Committed on the Premises

- » **A medical provider may disclose a patient's PHI to law enforcement if they have a good faith belief that the information constitutes evidence of a crime on the premises of the covered entity.**
- » **Important to remember:** An undocumented immigrant being present on the premise of a covered entity does not constitute a crime.

Exception: Administrative Requests

- » **An administrative request includes an administrative subpoena or investigative demand or other written requests from a law enforcement official.**
- » The administrative request must be accompanied by a written statement that the information requested is relevant, specific, limited in scope, and will only use de-identified information.

Consequences for Violating HIPAA

- » **HIPAA is enforced by the Department of Health and Human Services' Office of Civil Rights through fines and penalties.**
- » **There is no private cause of action under HIPAA.**
- » **PHI shared in violation of HIPAA may be used at a patient's deportation proceeding.**

Limits on Immigration Enforcement at Health Centers

» Sensitive Locations Policies

- » Discourages immigration enforcement action by immigration officials at sensitive locations.
- » Sensitive locations include health facilities such as hospitals and clinics.
- » Discouraged law enforcement actions include arresting, interviewing, searching, and performing surveillance for immigration purposes.
- » If you witness a violation of the sensitive location policies, file a complaint at the Department of Homeland Security.

Limits on Immigration Enforcement at Health Centers

» **Fourth Amendment Protections**

- » The Fourth Amendment protects against unreasonable searches and seizures.
- » The reasonableness of a search depends on whether a person has a reasonable expectation of privacy in the areas searched.
- » A warrant is required in areas where there is a reasonable expectation of privacy.
- » Information found in violation of the Fourth Amendment may still be used at a patient's deportation hearing.

Warrant Example

AO 93 (Rev. 12/09) Search and Seizure Warrant

UNITED STATES DISTRICT COURT
for the
Eastern District of California

In the Matter of the Search of _____)
(Briefly describe the property to be searched)
or identify the person by name and address)) Case No. _____
540 Oak Avenue)
Davis, California 95616)

SEARCH AND SEIZURE WARRANT

To: Any authorized law enforcement officer 2:11-SW-0161 EFB

An application by a federal law enforcement officer or an attorney for the government requests the search of the following person or property located in the EASTERN District of CALIFORNIA
(Identify the person or describe the property to be searched and give its location):
SEE ATTACHMENT A, ATTACHED HERETO AND INCORPORATED BY REFERENCE

The person or property to be searched, described above, is believed to conceal (Identify the person or describe the property to be seized):
SEE ATTACHMENT B, ATTACHED HERETO AND INCORPORATED BY REFERENCE

I find that the affidavit(s), or any recorded testimony, establish probable cause to search and seize the person or property.

YOU ARE COMMANDED to execute this warrant on or before 5-9-2011
(not to exceed 14 days)

☐ in the daytime 6:00 a.m. to 10 p.m. ☐ at any time in the day or night as I find reasonable cause has been established.

Unless delayed notice is authorized below, you must give a copy of the warrant and a receipt for the property taken to the person from whom, or from whose premises, the property was taken, or leave the copy and receipt at the place where the property was taken.

The officer executing this warrant, or an officer present during the execution of the warrant, must prepare an inventory as required by law and promptly return this warrant and inventory to United States Magistrate Judge _____
(name)

☐ I find that immediate notification may have an adverse result listed in 18 U.S.C. § 2705 (except for delay of trial), and authorize the officer executing this warrant to delay notice to the person who, or whose property, will be searched or seized (check the appropriate box) ☐ for _____ days (not to exceed 30).
☐ Until, the facts justifying the later specific date of _____

Date and time issued: 4-25-2011
9:10:00 AM

City and state: SACRAMENTO, CALIFORNIA



EDMUND F. BRENNAN, U.S. MAGISTRATE JUDGE
Printed name and title

State Patient Privacy Laws

» **Maryland Confidentiality of Medical Records Act (MCMRA)**

- » Prohibits medical providers from disclosing patients' medical records except under certain circumstances.
- » A medical record is covered under the MCMRA if the information:
 - Is entered in a patient's medical record,
 - Identifies or can readily be associated with the identity of a patient, and
 - Relates to the health care of the patient or recipient.

State Patient Privacy Laws

- » **Maryland Confidentiality of Medical Records Act (MCMRA)**
 - » Immigration status alone would not be protected by the MCMRA.
 - » Immigration status would be protected if it was entered into the patient's medical record along with the patient's name or address and information related to their healthcare.
 - » Individuals may sue a medical provider under the MCMRA.

State Tort Claims

- » **Patients can also bring state tort claims against medical providers who violate patient privacy laws such as:**
 - » Negligence claims
 - » Invasion of privacy claims
 - » Breach of doctor-patient relationship



Conclusion

- » **There is no individual remedy under HIPAA, but patients may sue under the MCMRA and state tort claims**
- » **The Sensitive Location Policies and the Fourth Amendment discourages immigration law enforcement at health centers**

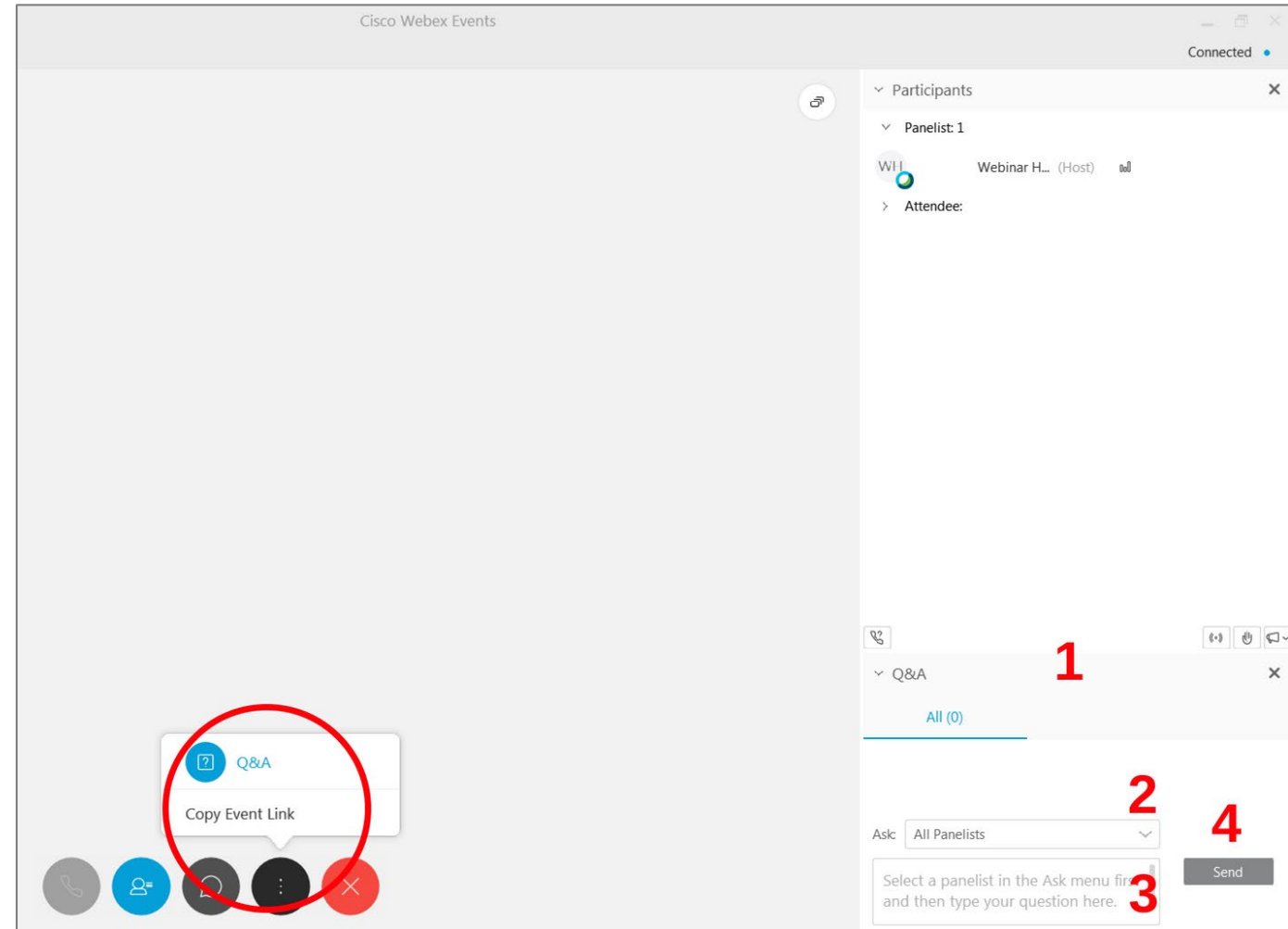
Conclusion

- » **All identifiable information provided to medical center staff for the purpose of providing health care is protected by HIPAA.**
- » **This information includes name and DOB as well as zip code, passport number, nationality, personal ID, place of birth and history of travel.**



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Data Sharing Strategies to Advance Health Equity
May 16, 1:00 – 2:30 p.m. EST



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