ONC’s Chief Privacy Officer
National Academy for State Health Policy
Dallas, TX. October 20, 2015
Today’s Agenda

• What is ONC OCPO? Who am I?
• OCPO’s Three-pronged approach to Privacy
  ➢ HIPAA BASICS: HIPAA supports electronic exchange for TPO without requiring a patient to authorize it
  ➢ Basic Choice (“Opt In vs. Opt Out”)
    ▪ what are the consequences offering individuals a choice to have or not have their data exchanged electronically? Is it ever required)?
  ➢ Interoperability and State Law: Help states that want to harmonize their special privacy laws
    ➢ reduce confusion and
    ➢ enable computers to help with compliance.
• HIPAA permits access, use and disclosure of PHI without a required writing from a patient, for treatment, payment and health care operations
  – Can be discloser’s operations
  – Can be receiver’s operations
• Operations are Health Care Operations types (1), (2), and part of (4)
  – 45 CFR 164.501 “health care operations” definition
Health care operations means any of the following activities of the covered entity to the extent that the activities are related to covered functions:

1. **Conducting quality assessment and improvement activities**, including outcomes evaluation and development of clinical guidelines, provided that the obtaining of generalizable knowledge is not the primary purpose of any studies resulting from such activities; *patient safety activities* (as defined in 42 CFR 3.20); *population-based activities* relating to improving health or reducing health care costs, *protocol development, case management and care coordination,* *contacting of health care providers and patients with information about treatment alternatives*; and related functions that do not include treatment;

2. *care planning*

3. **Reviewing the competence or qualifications of health care professionals**, evaluating practitioner and provider performance, health plan performance, conducting training programs in which students, trainees, or practitioners in areas of health care learn under supervision to practice or improve their skills as health care providers, training of non-health care professionals, accreditation, certification, licensing, or credentialing activities;

4. **Conducting or arranging for medical review, legal services, and auditing functions**, including fraud and abuse detection and compliance programs.
• Rule found in 45 CFR 164.524
  – There are limited exceptions to this right, such as
    • A psychiatrist can refuse to release psychiatric notes
    • A correctional facility can refuse to release records
    • Records can be withheld if releasing them would cause substantial harm to a person reflected in the data
  – Since 2013, the rule includes a copy in the “medium” of the patient’s choosing
    • Unless the medium they choose is a security threat to the physicians’ system
  – More guidance due on this from OCR this fall.
Basic Choice: the problem of opting

Problem: Is there something fundamentally different about electronic exchange of information that indicates at a *policy* level that individuals should be required to document privacy choices that they are not required to document for fax, telephonic or oral exchange?

• “opt in” vs. “opt-out”: people are just confused.

• This is not a HIPAA question: HIPAA is media neutral

• It is an emerging issue of state privacy law

• This is a policy question for stakeholders to resolve in a way that supports interoperability, patient health, and better healthcare.
Basic Choice: ONC commitment

• Our Final Interoperability Roadmap states:
  By the end of CY 2016 ONC will identify a definition of “Basic Choice” and provide policy guidance regarding if/when Basic Choice should be offered, even when not required by law, based on recommendations from the HITPC by the end of CY 2016.

• ONC can
  – Clarify the interoperability and health implications of offering choices about electronic exchange that are not offered about other media
  – Translate complex policy recommendations from the HITPC into actionable information by states and organizations
Work with States on Interoperability: Why

- An identified source of confusion
- May impede military readiness
- Too complex for technology to assist at this time
• ONC identified confusion about state privacy law as a probable barrier to interoperability.
• GAO identified confusion about state privacy law as a barrier to interoperability (Report 15-817)
• When HELP Chairman Alexander asked stakeholders to identify barriers to interoperability, the following organizations identified confusion about state privacy law as in their top 10:

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<th>Organization</th>
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<tr>
<td>American College of Surgeons</td>
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<td>American Society of Clinical Oncology</td>
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<td>Bipartisan Policy Center</td>
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<td>CHIME</td>
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<td>Visiting Nurse Associations of America</td>
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<td>American Academy of Facial Plastic and Reconstructive Surgery*</td>
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<td>American Association of Neurological Surgeons*</td>
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<td>American College of Mohs Surgery*</td>
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<td>American Gastroenterological Association*</td>
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<td>American Society for Dermatologic Surgery Association*</td>
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<td>American Society of Cataract and Refractive Surgery*</td>
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<td>American Society of Echocardiography*</td>
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<td>American Urological Association*</td>
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<td>Coalition of State Rheumatology Organizations*</td>
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<td>Congress of Neurological Surgeons*</td>
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<td>National Association of Spine Specialists*</td>
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<td>Society for Excellence in Eyecare*</td>
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Working with states on Interoperability: Military Readiness:

Large, dispersed, federally funded beneficiary populations:
   – DOD: 9.5 million
   – VHA: 8.3 million
   – In every state

• 50,000 wounded Service Members from Iraq and Afghanistan
  – 10,000 are National Guard or Reserve
• 300,000 of the 1.7 million Veterans who deployed to Iraq or Afghanistan suffer from PTSD
• 22% of Veterans receive mental health care outside the VA system
• To be ready to be recalled to active duty, service members need the right care when inactive, including comprehensive care that includes mental health services.
• Sources of Confusion—focus on mental health
  – To what data does a state statute apply: notes? Rx codes? DX codes? Appointment schedules? A primary care doctor’s observation of potential mental health issues that necessitate a referral to a specialist?
  – Misunderstandings about 42 CFR Part 2
  – Interstate exchange
    • Ambulatory care
    • Telemedicine
ONC’s Plan

• Devi Mehta, JD, MPH, workshop for states Wednesday, 12:30
• Collaborate with appropriate organizations of state health policy officials
  – NASHP
  – National Governor’s Association
  – Others
• Detailed in Interoperability Roadmap
• CMMI SIM Health IT Resource Center Privacy & Security resources
• Regional Extension Centers Communities of Practice
• Final Interoperability Roadmap: www.healthit.gov
• Its not a technology problem: https://www.healthit.gov/sites/default/files/privacy-security/ecm_finalreport_forrelease62415.pdf
• Consumers can get & use their data: http://www.healthit.gov/buzz-blog/consumer/harnessing-consumer-engagement-health-care-cost/