



**Department
of Health**

**Medicaid
Redesign Team**

Value-Based Payment Patient Confidentiality: Issues and Considerations

Meeting 2: Technical and Data Sharing Issues

November 8, 2016

Agenda

Today's agenda includes the following:

Agenda Item	Time
Welcome & Introductions	9:00
Patient Confidentiality Rules and Regulations	9:10
Patient Confidentiality Relevant Consent Forms	9:20
Data Flows	9:30
Patient Confidentiality Issues and Considerations	9:45
Create Draft Recommendations	11:00
Conclusions	12:00

Welcome & Introductions

Rules and Regulations

Federal-Health Insurance Portability and Accountability Act (HIPAA)

Health Insurance Portability and Accountability Act (HIPAA)

Data Covered

Individually identifiable health information transmitted to Covered Entities or Business Associates

Entities Covered

Health plans, health care clearing houses, and any health care provider

General Rule

No disclosure without consent or exception


Consent Exception

Treatment, payment and health care operations

Treatment: Provision, coordination or management of healthcare and related services by one or more health care provider, including consultation.

Payment: Activities by health care providers to obtain reimbursement for provision of care to an individual; Activities of a plan to obtain premiums, determine/fulfill coverage/benefit responsibility; tender payment for health care delivery to an individual.

Health Operations: (a) quality assessment; (b) competency assurance; (c) conducting/arranging for audit/reviews/legal/FW&A, (d) insurance functions; (e) business planning tasks; (f) business management and administrative tasks.



HIPAA generally permits the exchange of claims and clinical data required by an integrated health system, including a VBP system

Note One: This is not a comprehensive overview of HIPAA. Rather this is a general summary of the *relevant portions* for our discussion. A comprehensive overview is located in the supplemental material provided prior to the workgroup. This is not legal advice

Note Two: Other federal laws, such as 42 USC 290dd-2; 42 CFR Part 2; are potentially relevant in this area.

New York State Laws-General Restrictions

Public Health Law § 18: *Written Patient Authorization*

- Provider disclosed PHI requires written consent together with certain recording requirements.¹
- *Implication:* Can be violated in cases where an organization shares a patient's information with a third party without the patient's consent; Courts have not addressed whether provisions of Public Health Law § 18 are violated in cases where the disclosure is made for purposes of treatment, payment or health care operations. Therefore, it is unclear if § 18 maintains the same or more restrictive provisions than HIPAA.

Education Law § 6530: *Professional Misconduct related to revealing Protected Health Information (PHI)*

- Applies to physicians, physician's assistants, and specialist's assistants,
- ...“revealing of personally identifiable facts, data, or information obtained in a professional capacity without the prior consent of the patient, except as authorized or required by law” constitutes professional misconduct.
- *Implication:* Education Law § 6530 has previously been cited by DOH legal broadly as potentially being interpreted to require broad consent beyond HIPAA.

¹ “Whenever a health care provider, as otherwise authorized by law, discloses patient information to a person or entity other than the subject of such information or to other qualified persons, either a copy of the subject's written authorization shall be added to the patient information or the name and address of such third party and a notation of the purpose for the disclosure shall be indicated in the file or record of such subject's patient information maintained by the provider...”

Note: This is not a comprehensive overview of any NYS law or regulation provided herein. Rather this is a general summary of the *relevant portions* for our discussion. A comprehensive overview of these laws are located in the supplemental material provided prior to the workgroup. This is not legal advice

New York State Laws-Special Circumstance

NYS Public Health Law § 2782: HIV related patient records

- Health care providers and other persons who obtain HIV related patient information must meet specific requirements before disclosing HIV related information to third parties: *Relevant Exceptions: When necessary for care or with patient consent.*
- DOH takes a broad view of data transmission *when necessary for care.*
- *Implication:* Limited ability to release HIV/AIDS related medical information to third parties.



NYS Mental Hygiene Law Sec. 33.13(d)

- OMH Guidance Pending
- Seems to present a caveat excepting the exchange of information broadly between facilities, MCOs, behavioral health orgs., health homes, or other entities authorized by DOH to provide, arrangement for or coordinate health care services
- Care Management Implications

NYS Mental Hygiene Law § 33.13: Office of Mental Health (OMH) and NYS Office for People with Developmental Disabilities (OPWDD) licensed providers

- Data from clinical facilities licensed/operated by the NYS OMH and OPWDD kept confidential without consent with limited exception.
- *Implication:* General requirement of confidentiality is more restrictive than the corresponding Public Health Law provisions.

NYS Mental Hygiene Law § 22.05: Office of Alcoholism and Substance Abuse Services (OASAS) licensed providers

- Patient records pertaining to rehabilitation programs/treatments kept confidential in the same manner set forth in section 33.13.
- *Implication:* Patient records related to rehabilitation from a NYS OASAS licensed providers fall under strict confidentiality requirements.

NYS Public Health Law § 17: Minors

- Expressly forbids the release of medical records pertaining to a minor's abortion or treatment for STIs to the minor's parents without explicit consent from the minor.
- *Implication:* Narrowly restricts issues of minor consent beyond HIPAA

Relevant Consent Forms

Medicaid Consent Form

Signed when enrolling in a Medicaid plan

Covers general medical information disclosure related to treatment, payment, and health care operations

Maintains broad inclusion of special circumstances (i.e. HIV, mental health, alcohol and/or substance abuse information)



On its face, the Medicaid Consent Form generally permits broad claims and clinical data exchange, including under most special circumstances, in line with HIPAA.

New York State provides a more narrow interpretation as it relates to treatment, payment, and health care operations.

TERMS, RIGHTS AND RESPONSIBILITIES

- **Release of Medical Information**
I consent to the release of any medical information about me and any members of my family for whom I can give consent:
 - By my PCP, any other health care provider or the New York State Department of Health (NYSDOH) to my health plan and any health care providers involved in caring for me or my family, as reasonably necessary for my health plan or my providers to carry out treatment, payment, or health care operations. This may include pharmacy and other medical claims information needed to help manage my care;
 - By my health plan and any health care providers to NYSDOH and other authorized federal, state, and local agencies for purposes of administration of the Medicaid programs; and
 - By my health plan to other persons or organizations, as reasonably necessary for my health plan to carry out treatment, payment, or health care operations.

I also agree that the information released for treatment, payment and health care operations may include HIV, mental health or alcohol and substance abuse information about me and members of my family to the extent permitted by law, until I revoke this consent.

If more than one adult in the family is joining a Medicaid health plan, the signature of each adult applying is necessary for consent to release information.

Relevant Non-Medicaid Consent Forms



RHIO/SHIN-NY Consent (Opt-In):

- Permits specific providers and their organizations the ability to obtain access to a patient's medical records through the RHIO/SHIN-NY



Health Homes Consent (Opt-In):

- Allows specific health homes and their partners to access specific RHIOs to take receipt of a patient's PHI



Medicaid Release of PHI:

- Authorization for the release of Medicaid protected information from the NYS department of health, office of health insurance programs to a third party other than a Medicaid enrollee/patient



Other

Issues Presented, Analysis and Conclusions

Issues Presented

- Medicaid Consent Form
 - Does the Medicaid Consent Form cover all necessary circumstances?
 - Is it possible to interpret the Medicaid Consent Form more broadly?
- Laws and Regulations
 - Is it possible to interpret relevant laws more broadly?
 - Can the restrictive NYS law be changed or eliminated?
 - Is it possible to enact new laws that may permit VBP specific data exchange?
- Can other consent forms be changed or created in a beneficial manner?
 - Can the substantive text of the forms be changed?
 - Can the non-substantive operation of the forms be changed?
- Can a global or other consent forms be created?



General Issues: Member education, disenfranchisement, ability to tag and segregate data, solutions applicable to all providers, difficulty of securing consent.

Analysis: Policy Options-Two Main Buckets

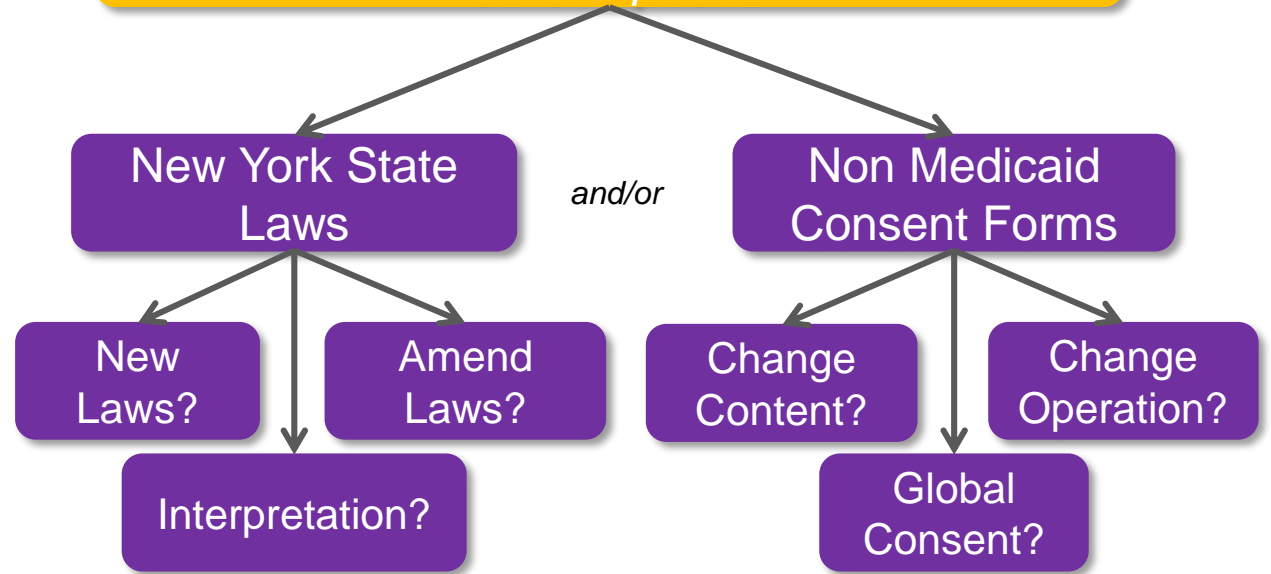
Comprehensive Application of Medicaid Consent Form

Broad Interpretation?

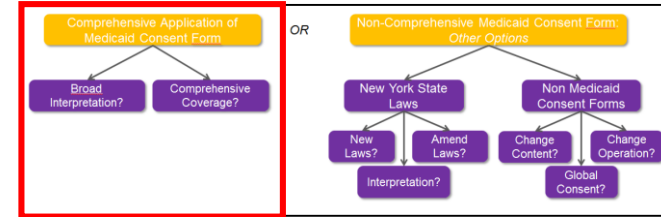
Comprehensive Coverage?

OR

Non-Comprehensive Medicaid Consent Form:
Other Options



Bucket One: Medicaid Consent Form



Comprehensive Coverage: Does the Medicaid Consent Form cover all necessary circumstances?

- HIV
- Mental Health
- Substance Abuse
- Minors
- Care Management



Broad Interpretation: Is it possible to interpret the Medicaid Consent Form more broadly to ensure that necessary data sharing is feasible?

Yes/No/Other



Issue

- Whether DOH legal will reasonably take a broad interpretation of the Medicaid Consent Form (*consistent with HIPAA*)



Solution/Potential Considerations

- Purpose of receipt of information
- Difficulty obtaining consent
- Timing of consent (at enrolment/provider visit/other)
- Informed consent (patient's understanding of consent form)
- Patient education opportunities
- True HIPAA harmonization without a change in law
- Other

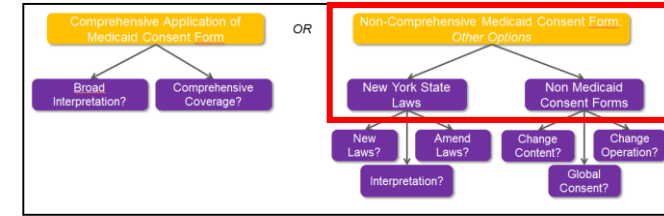


Potential Alternatives

- NYS Law
- Non Medicaid Consent Forms
- Other



Bucket Two: Other Options

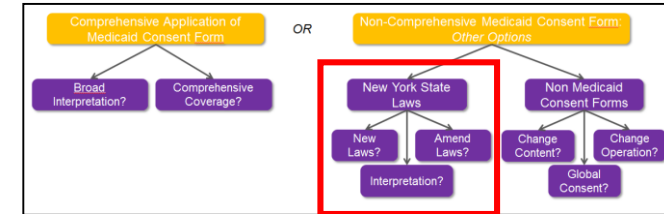


Beyond the Medicaid Consent Form, what are the other options to disseminate data globally?

New York State Laws

Non Medicaid Consent Forms

New York State Laws



? Is it possible to interpret these laws more broadly?

- DOH Legal Interpretation
- Regulatory Interpretation
- Legislative Action

? Can the existing NYS law be changed?

? Is it possible to enact new laws?

? Is it possible to eliminate current laws?



Issue

Whether (a) interpretation or changes to laws can be effectuated, and/or (b) whether laws should be eliminated or enacted



Solution/Potential Considerations

Meeting Three: Which laws; What interpretations; What specific text should change; What specifically should be eliminated or enacted

Non Special Circumstances

- Public Health Law § 18: *Written patient Authorization*
- Education Law § 6530: *Professional Misconduct related to revealing PHI*

Special Circumstances

- Public Health Law § 2782: *HIV related patient records*
- Public Health Law § 17: *Minors*
- NYS Mental Hygiene § Law 33.13
- NYS Mental Hygiene § Law 22.05

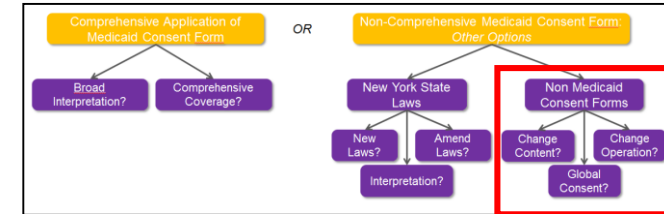


Potential Alternatives

- Non Medicaid Consent Forms
- Other



Non-Medicaid Consent Forms



Can other consent forms be changed?

Can the text of the form be changed?

RHIO/SHIN-NY Consent

Health Homes Consent

Medicaid Release of PHI

Can the operation of the form be changed?

Can the consent be made opt-in/out-out?

Can the time and place that consent is given be changed?

Can a global or other consent form be created?



Potential Considerations

Meeting Three: Which forms; What text; What operations; Global consent?

Medicaid Consent Forms

- RHIO/SHIN-NY (Opt-In)
- Health Homes Consent (Opt-In)
- DSRIP Opt-Out
- Medicaid Release of PHI
- Provider Releases
- Other

Non Medicaid Consent Forms

- Medicare ACO Data Consent (Opt-Out) (claims data only)
- Other


Care Management Implications

- Difficult of Obtaining Consent
- Purpose for Receipt of Consent
- Reasonable Work Arounds
- Limited Providers in SHIN-NY



Potential Alternatives

Other



Conclusions & Recommendations

Up Next: Meeting Three

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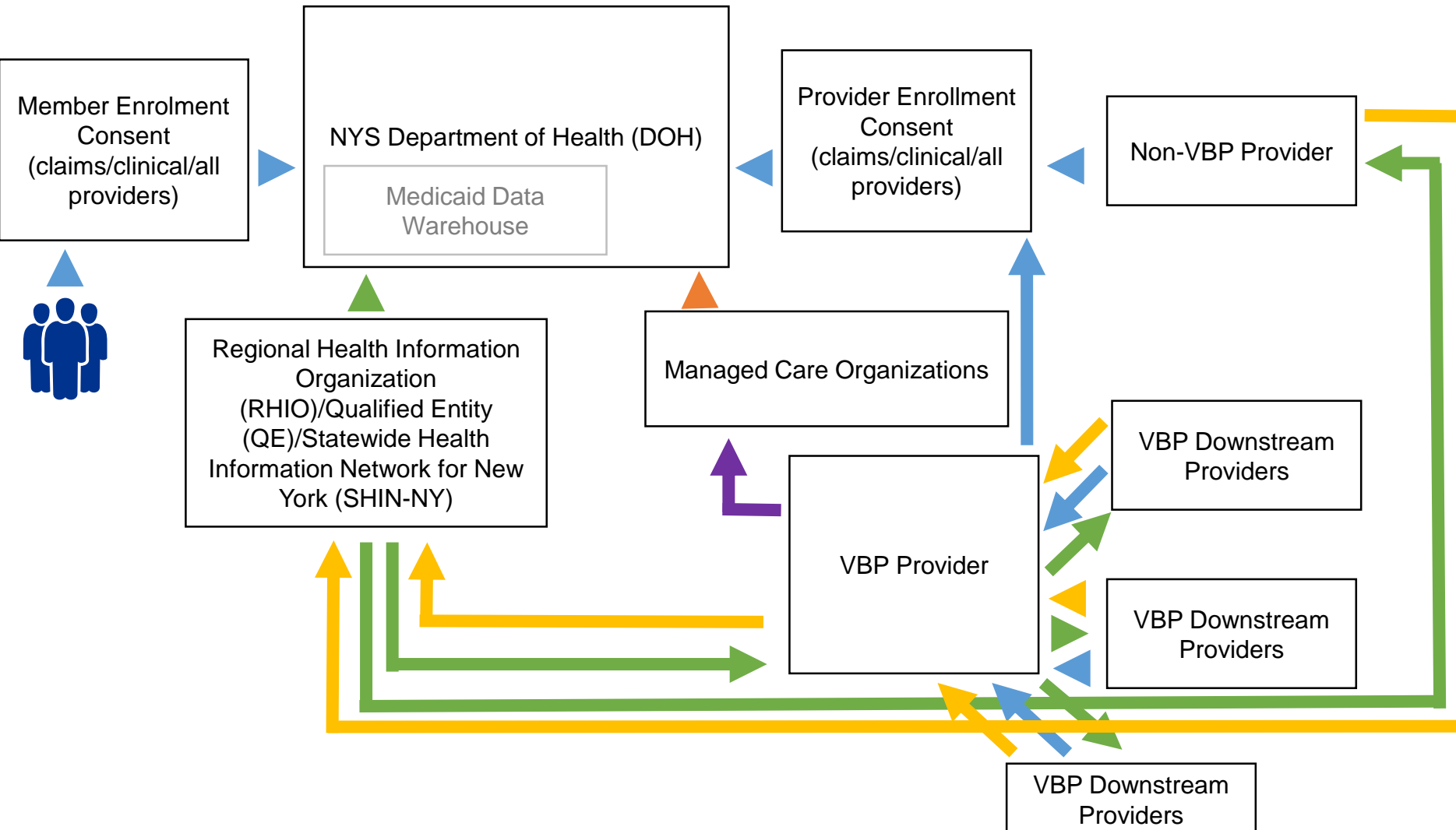
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Appendix: Data Flow

Option One: Condition of Medicaid Enrolment

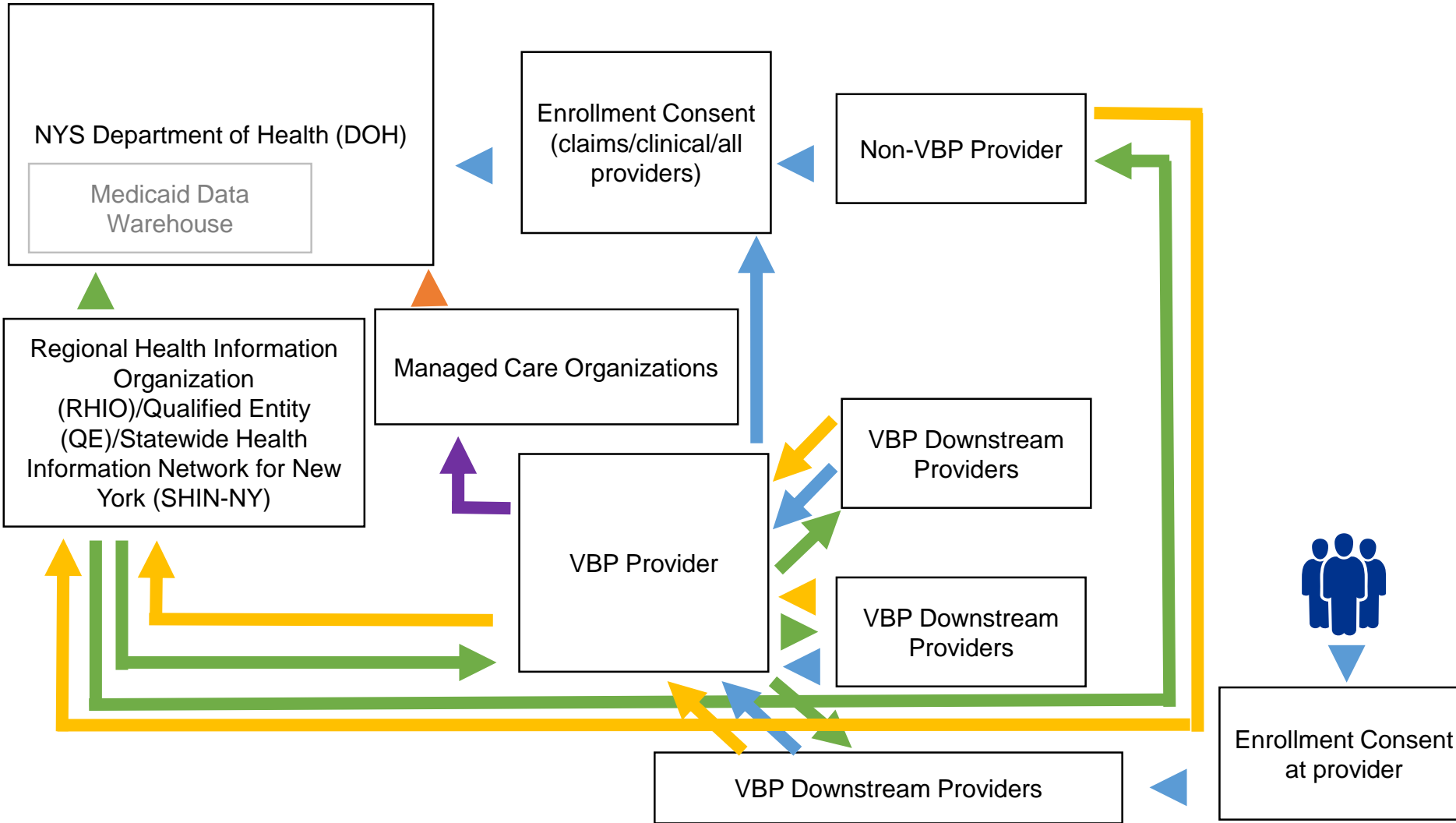


- Pro:** All data consents required, for all networks, at one point of contact and time
- Con:** Privacy concerns
- Unknown:** Legality-violation of STCs with federal gov't..Other?
- Unknown:** Informed consent?
- Unknown:** Special populations (HIV/AIDS, Minors, Other)
- Unknown:**
- Other?**

Key: ▶ Consent Flow ▶ Encounter Flow ▶ Claims/Clinical Out ▶ Claims/Clinical in ▶ Clinical Out

Consent Agreement implications explained (see slide 19)

Option Two: At first provider visit



- Pro: Educational opportunity
- Con: What to do with those who do not consent?
- Unknown: Opt-In; Opt-Out?
- Unknown: Scope of consent-provider's network or all Medicaid
- Con: If only provider's network, RHIO/SHIN-NY and other consents still necessary
- Unknown: Special Populations (HIV/AIDS, Minors, Other)
- Other?

Key: ▶ Consent Flow ▶ Encounter Flow ▶ Claims/Clinical Out ▶ Claims/Clinical in ▶ Clinical Out

Consent Agreement implications explained (see slide 19)