

**Final Report  
of the  
HEALTH INFORMATION TECHNOLOGY  
LEGAL WORKING GROUP**



**Office of the State Coordinator for Health Information Technology**

**February 11, 2011**

# Table of Contents

- I. INTRODUCTION AND SUMMARY OF RECOMMENDATIONS..... 3
- II. OVERVIEW OF HITECH ACT RELATED TO HIT LEGAL WORKING GROUP..... 4
- III. HIT LEGAL WORKING GROUP DUTIES ..... 5
- IV. HIT-LWG FINAL RECOMMENDATIONS..... 8
  - 1. Patients should have a meaningful choice to share their sensitive health information for treatment purposes. .... 8
  - 2. Prohibit patients from being denied health care treatment or health care benefits based on the patient’s decision not to participate in a health information exchange and prohibit payers from requiring participation in a health information exchange as a condition of participating in the payer’s provider network. .... 9
  - 3. Provide immunity for providers in any civil action or arbitration for professional negligence related to participation or non-participation in the health information exchange..... 9
  - 4. Create a new section in the law specifically related to health information exchange which may include “more robust” opt-out language..... 9
- V. CONCLUSION..... 10
- APPENDIX A..... 11
- APPENDIX B..... 12
- APPENDIX C..... 15

## **I. INTRODUCTION AND SUMMARY OF RECOMMENDATIONS**

Maine has been a leader in health information technology (HIT) and health information exchange (HIE) infrastructure and policy. Through the work of HealthInfoNet, a public and private partnership, Maine had one of the first operational health information exchanges in the country, which currently facilitates the exchange of patient health information among providers for more than half of Maine's residents. Although important work has been undertaken by many partners regarding HIT strategic planning for the State over the last several years, this work became more pressing in light of the passage of the Health Information Technology for Economic and Clinical Health Act ("HITECH Act"), contained within the American Recovery and Reinvestment Act of 2009 ("ARRA") (Pub. L. No. 111) and signed into law by the President on February 17, 2009.

In response to the HITECH Act, the Governor's Office established a broad stakeholder Health Information Technology Steering Committee (HITSC) in the spring of 2009 to study the implications of HITECH and to determine the opportunities for HIT adoption and the State's role in implementing the policies of the federal law. As a result of this work, the State was awarded \$6.6 million dollars from the Office of the National Coordinator (ONC) for HIT to promote and facilitate the use of HIE and HIT throughout Maine. As a condition of the award, Maine stakeholders developed the Maine Health Information Exchange Strategic and Operational Plan ("the State HIT Plan", found at <http://www.maine.gov/hit/Revised-Plan-10-1.pdf>), later approved by ONC. Executive Order 09 FY 10/11 signed in April, 2010 formally created the HITSC as well as the Office of the State Coordinator (OSC) for Health Information Technology as a condition of federal HITECH funding.

The Health Information Technology Legal Working Group (HIT-LWG) was originally convened by the OSC in the spring of 2010 to fulfill a goal of the State HIT Plan to review existing legal and policy barriers to the successful adoption of HIT in Maine. The HIT-LWG reconvened during the fall of 2010 to continue this important work. The fall 2010 HIT-LWG was comprised of 14 key decision-makers and stakeholders (the complete membership is included as Appendix A). The group met 5 times from October to December 2010. All of the meetings were held in Augusta and were open to the public. Copies of the agendas and minutes can be found on the Office of the State Coordinator for Health Information Technology's website at: <http://www.maine.gov/hit/>

The HIT-LWG supports the following policy recommendations:

- 1) Patients should have a meaningful choice to share their sensitive health information for treatment purposes (by a 10-2 vote);
- 2) Prohibit patients from being denied health care treatment or health care benefits based on the patient's decision not to participate in a health information exchange and prohibit payers from requiring participation in a health information exchange as a condition of participating in the payer's provider network (Unanimous) (The group believes Recommendations 2 and 3 are non-severable and must be linked together to ensure a voluntary system of participation, and should be proposed as a single recommendation in any proposed legislation);
- 3) Provide immunity for providers in any civil action or arbitration for professional negligence related to participation or non-participation in the health information exchange (Unanimous) (The group believes Recommendations 2 and 3 are non-severable and must be linked together

to ensure a voluntary system of participation, and should be proposed as a single recommendation in any proposed legislation); and

- 4) Create a new section of the law specifically related to health information exchange which may include “more robust” opt-out language (Unanimous).

## II. OVERVIEW OF HITECH ACT RELATED TO HIT LEGAL WORKING GROUP

Passage of the HITECH Act (Pub. L. No. 111-5, Title IV of Division B and Title XIII) represented a significant investment toward a more universal adoption of HIT in an effort to improve the delivery of care. The HITECH Act directed funds to be used for these purposes, with general oversight by the Office of the National Coordinator for Health Information Technology (ONC) and the Centers for Medicare and Medicaid Services (CMS), both agencies within the federal Department of Health and Human Services.<sup>1</sup> The HITECH Act created the Medicare and Medicaid electronic health record (EHR) incentive programs, which will provide incentive payments to eligible professionals and hospitals that adopt and demonstrate meaningful use of certified EHR technology. Incentives totaling as much as \$27.4 billion over 10 years could be expended under the program, which is administered by CMS. CMS, together with State Medicaid Agencies, is charged with overseeing the incentive program to encourage the adoption and the meaningful use of HIT by hospitals and health care practitioners through enhanced Medicare and Medicaid payments.

The Medicaid program, administered in Maine by the Office of MaineCare Services, developed and submitted to CMS a State Medicaid Health Plan that serves as a roadmap to implement an HIT and incentive payment program for providers and hospitals. MaineCare expects that its plan will be approved in late winter and that applications can be processed and paid in later summer/early fall. Providers may get up to \$63,750 each. A recent report indicates that the total combined Medicaid and Medicare payments spread across Maine hospitals could be \$145 million. It is not the intention of the LWG for the recommendations contained in this report to affect the ability of the State to participate in federal or State initiatives that provide incentive or higher payments to providers that participate in a health information exchange.

In addition, the HITECH Act provided \$2 billion through the Office of the National Coordinator for Health Information Technology (ONC) to support technical assistance, training, and demonstration projects to assist in the nation’s transition to EHRs. The ONC is administering at least nine separate HIT funding opportunities to help carry out the objectives of HITECH. Maine has received funding for:

- **State Health Information Exchange Cooperative Agreement Program.** \$6.6 million awarded to the Office of the State Coordinator for Health Information Technology on February 7<sup>th</sup>, 2009. The HIE grant programs support states and/or State Designated Entities (SDEs) in establishing health information exchange (HIE) capacity among health care providers and hospitals in their jurisdictions. Such efforts at the state level will establish and implement appropriate governance, policies and network services within the broader national framework to rapidly build capacity for connectivity between and among health care providers. State programs to

---

<sup>1</sup> Other US DHHS agencies that received HITECH funding include the Health Resources and Services Administration (HRSA), the Agency for Healthcare Research and Quality (AHRQ), the Centers for Disease Control and Prevention (CDC), and the Indian Health Services (IHS), among others. The Veteran’s Administration has also made significant investments in HIT.

promote HIE will help to realize the full potential of EHRs to improve the coordination, efficiency and quality of care.

- **Beacon Community Cooperative Agreement Program.** \$12.7 million awarded to the Bangor Beacon Community, a cooperative partnership of Eastern Maine Healthcare, Acadia Hospital, HealthInfoNet, Maine Primary Care Association, Eastern Maine Community College and many others. Seventeen communities in the United States were chosen to receive funding under this program to build and strengthen their HIT infrastructure and exchange capabilities to demonstrate the vision of meaningful HIT.
- **Health Information Technology Extension Program.** \$4.7 million awarded to HealthInfoNet on April 6, 2010; an additional \$264,000 awarded to HealthInfoNet on September 20, 2010 to specifically assist rural and critical access hospitals convert to electronic health records. This program provides a grant that establishes a Health Information Technology Regional Extension Center (REC) in Maine that offers technical assistance, guidance and information on best practices to support and accelerate health care providers' efforts to become meaningful users of EHRs.
- **Community College Consortia to Educate Health Information Technology Professionals**  
**Objective:** Kennebec Valley Community College and Southern Maine Community College are part of the Tidewater Community College HIT Consortium for Region 1, which received \$8.5 million for all participating schools (KVCC received \$400,000 for this program). This program, one component of the Health IT Workforce Program, seeks to rapidly create health IT education and training programs at Community Colleges or to expand existing programs. Community Colleges funded under this initiative will establish intensive, non-degree training programs that can be completed in six months or less.

### III. HIT LEGAL WORKING GROUP DUTIES

The HIT Legal Working Group was originally convened in the spring of 2010 by the OSC and the Health Information Technology Steering Committee (HITSC) as required by the State HIE Cooperative Agreement Program noted above. By law, the funds must be used to conduct activities to facilitate and expand the electronic movement and use of health information among organizations, and must include the following goals, among others (42 U.S.C. § 300jj-33(d)):

- 1) enhancing broad and varied participation in the authorized and secure nationwide electronic use and exchange of health information;
- 2) identifying State or local resources available towards a nationwide effort to promote health information technology;
- 3) complementing other Federal grants, programs, and efforts towards the promotion of health information technology;
- 4) providing technical assistance for the development and dissemination of solutions to barriers to the exchange of electronic health information;
- 5) promoting effective strategies to adopt and utilize health information technology in medically underserved communities; and
- 6) assisting patients in utilizing health information technology

In light of the above goals, the HIT-LWG reviewed Maine's existing privacy and security laws to determine if the existing state laws would allow widespread and robust use and adoption of HIT while ensuring adequate security and privacy measures to protect patient's sensitive health information. The HIT-LWG was charged with addressing the Legal and Policy Domain requirements in the State HIT Plan as required by the ONC, and specifically: any privacy and security issues related to health information exchange within the State and between states; any plans to analyze and/or modify state laws, as well as communications and negotiations with other states to enable exchange; the development of policies and procedures necessary to enable and foster information exchange within the state and interstate; the use of existing or the development of new trust agreements among parties to the information exchange that enable the secure flow of information; and how the state will address issues of noncompliance with federal and state laws and policies applicable to HIE.

The HIT-LWG included key decision-makers and stakeholders, including representatives of the National Alliance of the Mentally Ill (NAMI-ME), the HIV-AIDS Advisory Committee, the Maine Hospital Association, the Maine Medical Association, Maine Family Planning Association, the Attorney General's Office (non-voting), HealthInfoNet, the Maine Civil Liberties Union, Maine Primary Care Association, MaineCare, Eastern Maine Healthcare Systems, mental health providers, and private health care attorneys, among others. The HIT-LWG met five times before the end of the Second Regular Session of the 124<sup>th</sup> Legislature during the spring of 2010, but did not come to consensus on all issues. The group agreed that the review and analysis of existing state law should continue in the fall. The group did begin to coalesce around areas that should be enumerated in the State HIE Plan to support the use of HIE, either as possible amendments to Maine's privacy laws or as recommended changes in HealthInfoNet's practices.

The following areas were highlighted by the spring HIT-LWG to be included in the State HIE Plan as areas of general but not unanimous agreement. The fall HIT-LWG agreed to limit their consideration to these following issues to build upon the work of the spring HIT-LWG:

- Whether to allow the disclosure of mental health information to other health care practitioners and facilities for the purposes of facilitating medical treatment and continuity of care without a patient's written authorization; a patient's health information would continue to be protected by the provisions of Health Insurance Portability and Accountability Act (HIPAA) and Maine law;
- Whether to allow the disclosure of mental health information to other health care practitioners and facilities for the purposes of medical treatment and continuity of care, provided there is meaningful opportunity to opt-out of participating in a health information exchange and prohibit a health information exchange from disclosing the individual's health care information to a health care practitioner or health care facility;
- Whether to allow the disclosure of HIV tests and infection status to other health care practitioners and facilities for the purposes of facilitating medical treatment and continuity of care without a patient's written authorization; a patient's health information would continue to be protected by the provisions of HIPAA and Maine law;
- Whether to allow the disclosure of HIV tests and infection status to other health care practitioners and facilities for the purposes of facilitating medical treatment and continuity of care, provided there is meaningful opportunity to opt-out of participating in a health

information exchange and prohibit a health information exchange from disclosing the individual's health care information to a health care practitioner or health care facility;

- Whether to create a new statute or subsection specifically related to health information exchange (under the existing 22 M.R.S.A. § 1711-C (6)(B)) that would address the right to opt-out, more robust than the current language, and modify the existing subsection to broaden the applicability to include other forms of electronic sharing of information;
- Whether to increase the penalties for breach of Maine's privacy laws to match the heightened penalties in HIPAA as amended by HITECH;
- Whether to require the OSC to convene a working group to examine and make recommendations regarding the education processes for providers and patients to create a more robust opt-out process for participation in a health information exchange, and report by January 1, 2011 to the Joint Standing Committee on Health and Human Services the findings and recommendations of the working group, including any necessary implementing legislation;
- Whether to include best practices for opt-out HIE and whether HealthInfoNet, together with the Office of the State Coordinator for HIT and the Consumer Advisory Committee, should develop a strategy for follow-up consumer education and opportunity to opt-out; also whether the OSC should inform consumers about privacy, security, and audit measures currently in place and the risk mitigation strategy that will be implemented;
- Whether HealthInfoNet through the Regional Extension Center should develop a more comprehensive provider education strategy;
- Whether a granular opt-out mechanism should be included as a topic in the State HIT Plan as an issue for future deliberations; continuity of care and future usefulness of the exchange would be compromised with open-ended granular opt-out of information, though certain categories of information would be appropriate for opt-out; the issue should be studied more as technology advances in this area;
- Whether to prohibit discrimination against patients who do not participate in a health information exchange; and
- Whether in any civil action for professional negligence or in any arbitration proceeding related to such civil action, any proof of a health care provider or patient participation or non-participation in a health information exchange should be inadmissible as evidence of liability arising out of or in connection with the provision of or failure to provide health care services.

The fall HIT-LWG was comprised of most of the same members as the spring LWG (the complete membership is included as Appendix A). The group met five times: October 7<sup>th</sup>, 2010; October 22<sup>nd</sup>, 2010; November 5<sup>th</sup>, 2010; November 18<sup>th</sup>, 2010; and December 21<sup>st</sup>, 2010. All of the meetings were held in Augusta and were open to the public. As noted above, the fall HIT-LWG discussions were limited to the above listed areas of consideration. The HIT-LWG also specifically examined these recommendations as they related to Maine's General Privacy Law (22 M.R.S.A. § 1711-C); the State law on confidentiality of mental health records (34-B M.R.S.A. § 1207); and the State law on confidentiality

of HIV information (5 M.R.S.A. §§ 19201-19208). The work did not include a more exhaustive survey of other provisions of Maine’s laws that may relate to health information exchange or health information technology and did not include a review of other states’ privacy laws. Philip Saucier, consultant and facilitator of the LWG, briefed the Health Information Technology Steering Committee at each monthly meeting since the LWG commenced its work.

#### **IV. HIT-LWG FINAL RECOMMENDATIONS**

Pursuant to its charge, the HIT-LWG reviewed the privacy and security implications of the HITECH Act and the continued development and implementation of health information technology and health information exchange in Maine. The HIT-LWG makes the following four recommendations. (Suggested statutory language to implement each recommendation is included as Appendix B to this report.)

##### **1. Patients should have a meaningful choice to share their sensitive health information for treatment purposes.**

Under current Maine law, the health information exchange operated by HealthInfoNet utilizes an “opt-out” system for all “general” health information, excluding HIV-AIDS and certain mental and behavioral health information. Thus, when a patient visits a participating facility or provider, his/her general health information flows directly to the HIE, which then may be shared with another participating provider or facility for treatment purposes. If a patient chooses not to participate in the exchange, he/she may “opt-out” through a mechanism administered through HealthInfoNet.

However, state confidentiality laws treat HIV information (5 M.R.S.A. §§ 19201-19208), and mental health information (34-B M.R.S.A. § 1207), as sensitive health information that have special protections and thus are not generally shared with other providers. Due to these restrictions, in practice many HIV and mental health providers exclude all patients’ information, and a patient must give prior authorization for treatment purposes before HIV and mental health information is shared (with some exceptions). A majority of the HIT-LWG supports allowing HIV and mental and behavioral sensitive health information to be shared in the HIE through an “opt-in” mechanism. This is a compromise position that would maintain the existing opt-out law for general information, but allow for a true opt-in for HIV and mental health information.

By a 10-2 vote, the HIT-LWG recommends that Maine’s HIV and mental health privacy laws should be amended to allow HIV and mental health information to be released directly without authorization to the health information exchange (HIE) and provide patients with the opportunity to allow their HIV and/or mental health information to be shared with other providers for treatment purposes. The opt-in mechanism would be managed by the health information exchange by shielding access to the HIV and mental health sensitive health information until a consumer makes an opt-in decision. The HIV and mental health information would not be shielded if access is necessary for diagnosis or treatment of that individual in an emergency as determined by a patient’s health care provider. This option continues the current protocol that when a patient opts-out of participating in the health information exchange for general health care information, all health care information – general and sensitive – including HIV and mental health information, would be removed from the health information exchange.

At least two HIT-LWG members (Maine Primary Care Association and DHHS-MaineCare Services), although voting in support of this recommendation, would prefer to amend Maine’s laws to allow an

opt-out system for all types of health information. This approach was generally supported by other members of the majority as well.

The Maine Civil Liberties Union, as a member of the minority report, would recommend that the laws be amended to require an opt-in standard for all types of health information, in place of the current opt-out system in place today for general health information.

**2. Prohibit patients from being denied health care treatment or health care benefits based on the patient's decision not to participate in a health information exchange and prohibit payers from requiring participation in a health information exchange as a condition of participating in the payer's provider network.**

By a unanimous vote, the HIT-LWG recommends that Maine's health information exchange law be amended to prohibit patients from being denied health care treatment or health care benefits based on the patient's decision not to participate in a health information exchange and to prohibit payers from requiring participation in a health information exchange as a condition of participating in the payer's provider network. Maine's tremendous success in adopting HIT and HIE is due in part to a voluntary system of participation and this recommendation would strengthen this policy. The group believes Recommendations 2 and 3 are non-severable and must be linked together to ensure a voluntary system of participation, and should be proposed as a single recommendation in any proposed legislation.

**3. Provide immunity for providers in any civil action or arbitration for professional negligence related to participation or non-participation in the health information exchange.**

By a unanimous vote, the HIT-LWG recommends that Maine's health information exchange law be amended to provide immunity to providers in any civil action or arbitration for professional negligence related to participation or non-participation in a health information exchange. As noted above, Maine's tremendous success in adopting HIT and HIE is due in part to a voluntary system of participation, and this recommendation would strengthen this policy. The group believes Recommendations 2 and 3 are non-severable and must be linked together to ensure a voluntary system of participation, and should be proposed as a single recommendation in any proposed legislation.

**4. Create a new section in the law specifically related to health information exchange which may include "more robust" opt-out language.**

By a unanimous vote, the HIT-LWG recommends that Maine's health information exchange law be amended to create a new section for HIE by removing those portions of 22 M.R.S.A. § 1711-C(6)(B) related to health information exchange and creating a new section using the same language. This recommendation acknowledges the increased prominence of health information exchange in Maine and elevates the existing statutory provisions and any future amendments to its own section.

## **V. CONCLUSION**

The Health Information Technology Legal Working Group is pleased to offer its recommendations. These recommendations, related to privacy and security of health information as required under the HITECH Act will help promote the adoption of HIT and improve the quality and continuity of care while ensuring strong and adequate privacy and security of health information. While the HIT-LWG makes these four recommendations in this report, it recommends that a full, exhaustive review of Maine's privacy and security laws continue. As the adoption of HIT becomes more widespread and the provision of healthcare becomes more integrated to achieve better health outcomes, it is important to ensure that a patient's health care information has stringent privacy and security protections that consumers feel confident about, and which result in high quality and effective healthcare.

## **APPENDIX A**

### **HIT Legal Working Group Membership Fall 2010**

<b>Area of Representation</b>	<b>Member</b>	<b>Organization</b>
1. Physicians/Providers	Andrew MacLean	Maine Medical Association
2. Privacy	Shenna Bellows	Maine Civil Liberties Union
3. Health Information Exchange	Dev Culver	HealthInfoNet
4. Family Planning	George Hill <sup>2</sup>	Family Planning Association of Maine
5. Substance Abuse	Jonathan Edwards	Washington County Psychotherapy Associates
6. Beacon Community Grant/Large Hospital System	Jason Tankel	Eastern Maine Healthcare Systems
7. Health Law Expert	Steve Johnson	Kozak & Gayer
8. Attorney General's Office (Non-Voting)	Thomas Bradley	Attorney General's Office
9. HIV/AIDS	Matt Twomey	HIV/AIDS Advisory Committee & CMHS
10. Behavioral Health	Carol Carothers	National Alliance on Mentally Illness-Maine Chapter
11. Maine Department of Health and Human Services	Dawn Gallagher	Office of MaineCare Services, Department of Health and Human Services
12. Health Information Technology	James Leonard	Office of the State Coordinator for HIT
13. Hospitals	Sandra Parker	Maine Hospital Association
14. Underserved/Rural Providers	Kevin Lewis	Maine Primary Care Association
Facilitator: Philip Saucier, Esq., Bernstein Shur.		

<sup>2</sup> George Hill did not vote on the final HIT-LWG recommendations.

## **APPENDIX B**

The following is proposed statutory language related to the HIT-LWG Final Recommendations:

### **A. Patients should have a meaningful choice to share their sensitive health information for treatment purposes.**

#### **1. 34-B M.R.S.A. § 1207, sub-§1, ¶ I, would be enacted to read:**

(l). Nothing in this section precludes the disclosure of any information concerning a client, excepting psychotherapy notes as defined in 45 CFR 164.501(2010), to a health information exchange that provides and maintains an individual protection mechanism by which a client may choose to opt-in to allow the health information exchange to disclose that client's health care information covered under this section to a health care practitioner or health care facility for purposes of treatment, payment and healthcare operations, as those terms are defined in 45 C.F.R. Section 164.501. A health information exchange also must satisfy the requirement in 22 M.R.S.A. § 1711-C(6)(B) of providing a general opt-out to a client at all times.

A health information exchange may disclose a client's health care information covered under this section even if the client has chosen not to opt-in to the health information exchange when in a health care provider's judgment disclosure is necessary (1) to avert a serious threat to the health or safety of others, if the conditions, as applicable, are met as described in 45 Code of Federal Regulations, Section 164.512(j)(2010), or (2) to a provider for diagnosis or treatment to prevent or respond to imminent and serious harm to the client.

#### **2. 5 M.R.S.A. § 19203, sub-§11, would be enacted to read:**

**11. Access by health information exchange or other entity.** Nothing in this section precludes the disclosure of any HIV test results to a health information exchange that provides and maintains an individual protection mechanism by which an individual may choose to opt-in to allow the health information exchange to disclose that individual's health care information covered under this section to a health care practitioner or health care facility for purposes of treatment, payment and healthcare operations, as those terms are defined in 45 C.F.R. Section 164.501. A health information exchange also must satisfy the requirement in 22 M.R.S.A. § 1711-C(6)(B) of providing a general opt-out to an individual at all times.

A health information exchange may disclose an individual's health care information covered under this section even if the individual has chosen not to opt-in to the health information exchange when in a health care provider's judgment disclosure is necessary (1) to avert a serious threat to the health or safety of others, if the conditions, as applicable, are met as described in 45 Code of Federal Regulations, Section 164.512(j)(2010) , or (2) to a provider for diagnosis or treatment to prevent or respond to imminent and serious harm to the individual.

**3. 5 M.R.S.A. § 19203-D, sub-§6, would be enacted to read:**

**6. Access by health information exchange or other entity.** Nothing in this section precludes the disclosure of any medical records containing HIV information to a health information exchange that provides and maintains an individual protection mechanism by which an individual may choose to opt-in to allow the health information exchange to disclose that individual's health care information covered under this section to a health care practitioner or health care facility for purposes of treatment, payment and healthcare operations, as those terms are defined in 45 C.F.R. Section 164.501. A health information exchange also must satisfy the requirement in 22 M.R.S.A. § 1711-C(6)(B) of providing a general opt-out to an individual at all times.

A health information exchange may disclose an individual's health care information covered under this section even if the individual has chosen not to opt-in to the health information exchange when in a health care provider's judgment disclosure is necessary (1) to avert a serious threat to the health or safety of others, if the conditions, as applicable, are met as described in 45 Code of Federal Regulations, Section 164.512(j)(2010), or (2) to a provider for diagnosis or treatment to prevent or respond to imminent and serious harm to the individual.

**4. 22 M.R.S.A. § 1711-C, sub-§6, sub-¶ A, would be amended by adding the following language to the end of the subparagraph:**

This subparagraph does not prohibit the disclosure of health care information to a health information exchange that satisfies the requirement in subparagraph 6(B) below of providing a general opt-out to an individual at all times and that provides and maintains an individual protection mechanism by which an individual may choose to opt-in to allow the health information exchange to disclose that individual's health care information covered under 34-B M.R.S.A. § 1207.

**B. Prohibit patients from being denied health care treatment or health care benefits based on the patient's decision not to participate in a health information exchange and prohibit payers from requiring participation in a health information exchange as a condition of participating in the payer's provider network.**

22 M.R.S.A. § 1711-C(18)(A). Participation in a health information exchange.

A. A health care provider shall not deny a patient health care treatment and a health insurer shall not deny a patient a health insurance benefit based solely on the provider's or patient's decision not to participate in a health information exchange. Except when otherwise required by federal law, a payer of health care benefits shall not require participation in a health information exchange as a condition of participating in the payer's provider network.

**C. Provide immunity for providers in any civil action or arbitration for professional negligence related to participation or non-participation in the health information exchange.**

22 M.R.S.A. § 1711-C(18)(B) Participation in a health information exchange.

- B. Civil Actions, Arbitrations and Related Proceedings. No recovery may be allowed against any health care practitioner or health care facility upon the grounds of a health care practitioner's or a health care facility's non-participation in a health information exchange arising out of or in connection with the provision of or failure to provide health care services. In any civil action for professional negligence or in any proceeding related to such civil action, or in any arbitration, any proof of a health care practitioner's, a health care facility's or a patient's participation or non-participation in a health information exchange is inadmissible as evidence of liability or non-liability arising out of or in connection with the provision of or failure to provide health care services. This paragraph does not prohibit recovery or the admission of evidence of reliance on information in an electronic health information exchange when there was participation by both the patient and the patient's health care practitioner.

**D. Create a new subsection specifically related to health information exchange which may include “more robust” opt-out language.**

- Unanimous Report: Create a new subsection by removing those portions of 22 M.R.S.A. § 1711-C(6)(B) related to health information exchange and creating a new § 1711-C(18) using the same language. The recommendations above would also be folded into this new HIE section if enacted.

## **APPENDIX C**

Actions Steps included in the 2010-2012 State Health Plan related to the work of the HIT-LWG:

---

### **Goal VII.9: Assure the security and privacy of health information**

#### **Tasks**

1. **HealthInfoNet and the Office of State Coordinator**

The Privacy and Security Sub-committee, a multi-stakeholder group representing consumers, health systems, and healthcare advocacy organizations in coordination with the Consumer Advisory Committee, will conduct quarterly reviews of policies, procedures, and performance of the health information exchange to assure that the health information exchange meets federal Health Insurance and Portability Accountability Act (HIPAA) requirements and standards; and that policies and protocols for assuring that all health care information shared and stored electronically adhere to the most strict privacy, security, and confidentiality requirements as defined by the collaborative work of HealthInfoNet, the State Government (including the Attorney General) and where possible the guidelines provided through federally supported projects. Quarterly reviews to begin in July 2010.

2. **The Office of the State Coordinator**

A study will be conducted of state and federal healthcare laws to determine inclusion of protected groups in the health information exchange without violating confidentiality of protected information. The study will begin in August and conclude December 2010. The results of the study will inform any recommendations for changes to state statute to be brought to the Legislature in 2011. The process involves a review of statutes by the Legal Work Group with recommendations reviewed and input by the Consumer Advisory Committee and the Health Information Technology Steering Committee (HITSC) before any presentation to the legislature in the first session of 2011.

Maine State Health Plan, Governor's Office of Health Policy and Finance and the Advisory Council on Health Systems Development, pages 44-47 (July 2010).