March 2003: This comparison chart has been developed to explore similarities and differences between the Maryland Confidentiality of Medical Records Act (MCMRA) and the federal Health Insurance Portability and Accountability Act (HIPAA). The chart will be revised and updated periodically.

Maryland Confidentiality of Medical Records Act
Compared with HIPAA Privacy Statute & Regulation

Starting in April 2003, people determining questions regarding disclosure of health information (medical records) in Maryland will need to reference two comprehensive sets of privacy law. Federal Health Insurance Portability and Accountability Act (HIPAA) regulations addressing privacy of health care information, found at 45 CFR §§ 160 & 164, will go into effect on April 14, 2003. Maryland's Confidentiality of Medical Records Act (MCMRA), codified at Health-General § 4-301 *et seq*., has been operative since 1991. This analysis should serve as a guide and a starting point for comparing the two legal frameworks. It is now broken down by category, with some cross-referencing of other categories. Each category is introduced with a general overview. The citations usually reference current legal citations and the acronym "FAQ" is used to reference the most recent guidance by the federal DHHS Office for Civil Rights, which published a 123-page guide to interpretation on December 4, 2002. Each section also includes preliminary comments on issues for possible examination of Maryland law regarding certain topics.

Overview of Legal Authority and Preemption:

A difficult situation exists in the regulation of health care information disclosure. Federal HIPAA regulates only a limited portion of organizations and individuals, called "covered entities," who have access to health care. Maryland law covers only health care providers and facilities on original disclosures of information, but everyone on re-disclosure. Further complicating matters, the selective preemption scheme legislated by the federal government means that individuals holding protected health care information will have to compare both federal and state law to determine which legal rule or principle governs the disclosure of the information.

HIPAA's statutory preemption provision is express, but selective. It establishes a general rule of preemption of state law. However, HIPAA retains state law in several ways, making the rule not applicable in two major areas; providing for administrative determination of two other types of exceptions; and by not preempting state law when the state provision is *"more stringent"* than the federal provision.

Congress adopted a general rule that any HIPAA medical privacy statute, standard, or implementation specification "shall supercede any contrary provision of State law, including a provision of state law that requires medical or health plan records … to be maintained in written rather than electronic form." (42 USC § 1320d-7(a)(1)). However, conflict between state and federal law is not presumed, and whenever possible, state and federal provisions should be construed in a manner that makes them compatible. In practice, HIPAA preemption represents not a wholesale federal preemption of the field of privacy law, but rather a national floor of medical privacy protection.

The law creates three protected areas of state law, or statutory carve-outs, where federal HIPAA does not trump or override state law by preemption. Certain portions of state public health law are protected, with Congress stating that "[n]othing in this part shall be construed to invalidate or limit" the authority, power, or procedures established under any law providing for the reporting of disease or injury, (reporting of) child abuse; (reporting of) birth or death, public health surveillance, public health investigation; and (public health) intervention.

Certain other mandatory state regulatory reporting and state licensure investigatory activities are also expressly saved by statute from federal preemption. These include requiring a health plan to report or provide access to information for management audits, financial audits, program monitoring and evaluation, facility licensure or certification, or individual licensure or certification. Thus, the statute gives state health departments and licensing boards broad access for the uninterrupted conducting of traditional state public health licensure and programmatic financial review activities.

The HIPAA statute contains another savings provision, which was designed to go into effect only if HIPAA privacy was promulgated by Department of Health and Human Services (DHHS) rulemaking, rather than by Congressional passage. Since Congress itself did not pass comprehensive medical privacy law, but instead, by inaction, delegated it to DHHS, an un-codified statutory provision states that the federal regulations "shall not supersede a contrary provision of State law, if the provision of State law imposes requirements, standards, or implementation specifications that are '*more stringent*' than" the comparable federal DHHS standard.

By definition, DHHS has clarified several aspects of this savings clause. First, DHHS sets the bar quite high when it finds a conflict, defining "contrary" to mean either: 1) that an entity would find it impossible to comply with both the state and federal provisions ("impossibility test"); or 2) that the provision of the state law stands as an obstacle to the full purposes and objectives of HIPAA ("obstacle test"). Similarly, the term "more stringent" means that the state law: restricts a disclosure permitted under HIPAA;

grants greater access to a person's own health information; more severely restricts the scope or duration of authorized access by another; requires greater record-keeping; or generally provides greater privacy protection to the individual who is the subject of the record.

HIPAA privacy law also contains two preemption exception categories, each of which will require determinations by the DHHS Secretary in specific situations that the state provision meets statutory and regulatory criteria so that federal preemption will not occur. State law also is not preempted if the DHHS Secretary determines that the state provision at issue addresses controlled substances. Implementation of these exceptions is uncertain in that the regulatory procedures for this process impose no further restrictions on DHHS as to time or criteria by which the exception determination is to be made.

Legal Authority and Preemption	CFR 45CFR §	Federal Law	HG Title 4 §	State Law Provision	Comparison
Legal: Authority	**160.101**	**HIPAA (1996) 42 USC § 1320d; regulatory delegation; anti-fraud**	**State health regulatory authority**	**1990 Maryland Laws, Chapter 480, As amended, found at HG 4-301 *et seq.***	**Maryland law is statutory and in health area usually reserved to states; some legal issues remain of federal statutory and regulatory authority**
Preemption Generally	**160.203**	**Federal Statute 42 USC § 1320d Controls**	**State law applies within state**	**Not preempted if "more stringent" or done for certain purposes**	**Selective; federal generally controls, see specific issues**
Preemption Secretarial Exception Process	**160.203(a)(1); 160.204, 160.205**	**42 USC § 1320d-7(a)(2)(A)(i)**	**State may apply for exception from DHHS Secretary**	**If necessary to prevent healthcare fraud, state regulation of insurance, state reporting on healthcare delivery or costs or other compelling public health, safety or public welfare need**	**State may seek exception when conflicting state law provision is necessary to address specified state need.**

Legal Authority and Preemption	CFR 45CFR §	Federal Law	HG Title 4 §	State Law Provision	Comparison
Preemption Exception Controlled Substance law	160.203(a)(2)	42 USC § 1320d-7(a)(2)(A)(ii) if the principle purpose is the regulation of the manufacture, distribution or dispensing of controlled substances under federal or state law	See Art. 27, §§ 276-305	Look to state law on controlled substances	Preemption does not apply to state and federal law addressing controlled substances.
Preemption Specific-Inapplicable-"More Stringent State Law"	160.203(b) 160.202	Public Law 104-191 § 264(c)(2)	Look to specific provisions	State law "more stringent" i.e. provides more protection to individual or gives individual more access to own records	When state law is more stringent, then no preemption occurs and the state law govern.
Legal: Preemption Specific-Inapplicable-State Mandated Reports	160.203(c)	42 USC § 1320d-7(b)	Look to specific provisions	Look to state law for compelled reports	Preemption does not apply to reports of disease or injury, child abuse, birth or death, conduct of public health surveillance, investigation or intervention
Legal: Preemption Specific-Inapplicable-State Regulatory Activities and Reports	160.203(d)	42 USC § 1320d-7(c)	Look to specific provisions	Look to state law for compelled reports	Preemption does not apply to legally mandated reporting or access to info for management audits, financial audits, program monitoring and evaluation, licensure or certification of facilities or individuals
Legal: Effective Date	164.534	April 2003		Now	State law effective now, federal in April 2003

Overview of Coverage:

HIPAA employs the term "protected health information" while MCMRA refers to the more commonly used term "medical record." HIPAA's protected health information (PHI) is individually identifiable health information that is maintained or transmitted in any form or medium. MCMRA's medical record includes any oral, written or other transmission in any form which is entered into the record of and relates to the health care of the patient and which identifies or can readily be associated with the patient. The terms

"medical record" and "protected health information" are quite similar. Both HIPAA and MCMRA regulate information in oral, written, or electronic form. HIPAA is more focused on the claims process. The largest difference between the two terms is the means by which individual identification is addressed in HIPAA, which uses the concept of "de-identification."

The process used to de-identify personally identifiable health information has consequences for health research, since de-identified information is not covered under HIPAA or MCMRA. Researchers are interested in gleaning meaningful results that are supported by sufficient data to answer the research hypothesis; at times, this quest conflicts with privacy in that the data required are often so sufficiently detailed that they would permit identification of patients by a person sophisticated in data analysis. HIPAA contains an enumeration of eighteen criteria, including five-digit zip code, which must be removed to de-identify health information. Since complete de-identification poses some problems for researchers, the August 2002 HIPAA modification includes a new concept of "limited data set" which, for certain research, public health, and health care operations, will allow such activities to continue without the need to contact (or identify) individuals.

Both HIPAA and MCMRA segregate a category of psychotherapy note (in MCMRA called a personal note) that is kept apart from the regular patient record. The concepts do not completely overlap as MCMRA segregates mental health records in general and applies special disclosure restrictions to them.

Coverage:	CFR 45CFR §	Federal Law	HG Title 4 §	State Law Provision	Comparison
Covered Information Generally	164.502(a)	Protected Health Information (PHI)	301(a)-(g)	"Medical record" if: i) in patient record; ii)may identify patient; iii) relate to patient health	Similar broad coverage, federal concept may be a little broader
Coverage: Oral Communication	160.103 164.501	Covered	301(g)	Covered	Both regulate oral communications
Coverage: Information-Electronic Claims	164.104; 42USC §1320d-2	Coverage of entities predicated on a transmission of information in electronic form	301(g)	Indirectly, as most information would be a record, relate to health care and be associated with identity of a patient	Federal coverage is predicated upon the need to strictly regulate the security and privacy of electronic claim information, state law has inclusive phrase "any form or medium of transmission"
Coverage: Genetic Information	160.103 164.501	If meets PHI standards, then is protected	301	If meets "medical record" standard, then protected	Both generally cover.
Coverage: Covered Information-Identified/De-identified	164.502(d) 164.514	Lists 18 elements to "de-identify"	301(g)(ii)	Includes identifiability to be covered	Federal law is more specific regarding ability to identify, but if not identifiable, under HIPAA or MCMRA not covered..

Coverage:	CFR 45CFR §	Federal Law	HG Title 4 §	State Law Provision	Comparison
Covered Entities Generally	160.102 160.103	Defined as: health plan, clearing-house, or provider who transmits health info in electronic form covered transaction	302(a), (d)	Regulates health care providers and facilities on original disclosure, all persons on re-disclosure	Due to limited federal statutory base, only providers, payers, and claims clearinghouses included in federal coverage, except by contract, while state statute covers everyone
Special Area: Developmental Disability Info	160.103 health care provider	Includes care of developmentally disabled	302(b)(3) Coverage at 7-1008 to 1011	MCMRA makes inapplicable	Federal law adds coverage
Special Area: Alcohol and Drug Abuse Treatment	160.103 health care provider	42 CFR Part 2 coincides	302(b)(2) see also HG 8-601(c)	MCMRA makes inapplicable	Both federal HIPAA and alc/drug regulations govern With little conflict
Special Area: Interaction with Federal and State Public Disclosure Law	160.203 164.512(a)	For federal law, try to reconcile, if state, more stringent?	302(a)(2) (ii) also, Ct. & Jud Pro. § 10-617(b)	Prohibits disclosure of medical or psychological information about an individual, except for autopsy	Generally looks to see which law provides the most privacy protection
Special Area: Educational Info	164.501	PHI Exclusion	302(b)	Silent on coverage of educational records, but if not in medical record, not covered	Educational records including health information governed by FERPA
Special Area: Correctional; Juvenile Detention	164.501 164.506 (a)(2)(ii), (3)(i)(B)	Yes, allows disclosure for treatment	307(j)	Yes, allows disclosure to director for treatment	Both laws cover facilities, but allow disclosure of records for treatment
Special Area: Deceased Individuals	164.502(f)	PHI of deceased individual remains confidential	301(g), (j) & (k)(3)	MCMRA definitions include records of deceased as protected	State and federal law consistent
Special Area: Autopsy Reports of Deceased	164.502(f)	Deceased individuals covered	301(j)-(k)	Deceased individuals covered, but autopsy has special rules	Under both laws, deceased PHI is protected, but autopsy subject to administrative discretion and state law
Special Area: Mental Health Records	164.508 (a)(2)	Psych notes separately protected	307, see also 306(b)(7)	Detailed protection scheme	Maryland law more detailed and perhaps more stringent

Overview of General Rule of Confidentiality; Uses for Treatment, Payment, and Health Care Operations:

HIPAA and MCMRA both establish a general rule of confidentiality for health care information. MCMRA requires a health care provider to keep the medical record of the patient confidential and disclose information only as provided by the act itself or as otherwise provided by law. HIPAA enumerates permitted disclosures slightly more specifically by allowing disclosures: to the individual (patient); for treatment, payment, and health care operations; incident to a use or disclosure permitted by the act; and

pursuant to authorizations, agreements or certain public use exceptions. In sum, the general rule of confidentiality in both acts is similarly stated.

As originally stated in the December 2000 rules, HIPAA would have created a general requirement that covered entities acquire written consent from individuals to use protected health information for purposes of treatment, payment, and health care operations. This was made optional in the August 2002 revisions to HIPAA privacy. Making use of the consent form optional eliminated a major conflict between HIPAA and MCMRA. MCMRA contains provisions that permit communication among parties in the health care treatment, payment, and health care operations (TPHO) process by virtue of the creation of the patient/provider relationship. HIPAA segregates the TPHO process from other permissive uses without patient authorization more distinctly than MCMRA, but both now permit similar communications within the treatment process. Adding a requirement for acknowledgement of a notice of privacy practices or even an optional consent form for disclosure of PHI in the TPHO process is not incompatible with MCMRA; these steps are additional administrative burdens found in HIPAA which make more explicit to patients the health care information disclosures and privacy protections found in federal and state law.

General Protection & Rules for TPHO:	45 CFR §	Federal Law	HG Title 4 §	State Law Provision	Comparison
General Presumption of Confidentiality	164.502(a)	General rule of confidentiality	302(a)	Health care provider shall keep the medical record confidential; disclose only pursuant to law or the act	State and federal law contain general rule of confidentiality
Disclosure: Minimum Necessary	164.502(b) 164.514(d)	General rule of only disclosing minimum necessary to accomplish purpose, except for treatment, patient access, pursuant to an authorization, required by law or by HIPAA	307(c)	Minimum necessary applied only to mental health record disclosures	Federal rule of minimum necessary disclosure is more formally restrictive than state law, where it is intuitive, but not express. Broad federal exceptions.
Disclosure: Treatment, Payment, &* Health Care Operations (TPHO)	164.502(a)(1)(ii) 164.506	Allows disclosures for treatment, payment, and health care operations without express written consent	302(d) 305(b)(1)	Generally allows disclosures for TPHO purposes	HIPAA and MCMRA similar in allowing disclosures for TPHO purposes without written consent.

General Protection & Rules for TPHO:	45 CFR §	Federal Law	HG Title 4 §	State Law Provision	Comparison
Disclosure: Treatment, Payment, &* Health Care Operations (TPHO) "Business Associates"	164.502(e) 164.504(e)	Allows disclosures to entities outside covered entity workforce provided an agreement is signed to protect the information, not req'd for treatment purposes	302(d) 305(b)	Provides for exchange of information among entities providing health care treatment, payment and other operations functions as a permissive disclosure without authorization	Both laws allow disclosure in the TPHO process without specific authorization.
Treatment: Telemedicine	164.501 treatment	Allows communication among providers	305(b)(4)	Allows communications for treatment	Both laws permissive
Treatment: Emergency Treatment	164.506 (a)(3)(A)	May acquire to treat in emergency situations, but get consent when possible	305(b)(6)	Allows a provider to make a professional determination to disclose to provide for emergency health care needs	Both laws allow for disclosures in emergency circumstances
Payment	164.501; 164.502(a)(1) 164.506(c)	Allows disclosure to carry out payment	305(b)(5)	If a claim has been filed, then permissive disclosure	Similar payment disclosure provisions
Health Care Operations: Generally	164.506(a)	Federal law establishes tpho consent to treat class	303(a) 305(b)(2)	State law allows disclosures by virtue of the treatment situation	State and federal law presume that patients should consent to disclosures, federal law offers a form to be signed
Health Care Operations: Risk Management & Quality Assurance	160.103 164.502 164.506	Generally covers these activities as operations, which if done by an outside party are business associate functions.	302(b)(1) 305(b)(2)	Disclosure for dministrative activities, including risk management, quality assurance and medical review permitted so long as a duty to not disclose is acknowledged	Under HIPAA and MCMRA, these activities are covered and allow for free flow of information within operations category of HIPAA. Business associate agreements likely for some of these functions.

Overview of Disclosures Requiring Authorization:

Both HIPAA and MCMRA contain provisions that allow disclosures of information for specified purposes, often with articulated criteria, to address conventional social or public needs. For example, both allow facilities to disclose "directory information" (*e.g.* Jane Doe is in stable condition) unless the patient directs that it not be done. Similarly, both allow disclosures to family or significant others unless declined by the patient. However, HIPAA requires that a patient be consulted about preferences regarding "directory information" being available, while MCMRA permits such information to be disclosed unless the patient declines

in writing to have such disclosures. Other situations exist outside the treatment process and public uses in which a patient desires or permits the disclosure of health information. MCMRA and HIPAA provide for an authorization to allow such disclosures.

Disclosures Requiring Authorization	45 CFR §	Federal Law	HG Title 4 §	State Law Provision	Comparison
General Rule	164.508(a)(1)	States the general rule that an authorization is required for disclosures except as provided by HIPAA	303(a)	States the general rule that an authorization is required for disclosure unless otherwise provided by MCMRA	An authorization is required under both laws unless rules permit or require disclosure without authorization
Psychotherapy/ Persona l Notes	164.508 (a)(2)	Establishes non-disclosure of psychotherapy notes with exceptions	307(a)(6) 307(d)	Establishes a special category of mental health record subject to different disclosure rules	When dealing with notes in mental health context, similar special protection apply
Marketing	164.508 (a)(3)	Except for face-to-face communications or nominal promotional gifts, marketing requires an authorization	302(e) 305(b)(1)(i)	Generally allows disclosures for "offering" of health care, but record disclosures may not be sold	HIPAA rules now appear to be more restrictive
Facility Directories	164.510(a)	Unless objection after patient communication, general patient information may be disclosed	301(b) 302(c)	May disclose, unless instructed not to disclose	Federal law more detailed, requiring interaction with patient on issue, but provisions compatible
Facility Disclosure: Clergy	164.510(a)	Permits disclosure if patient informed and does not object (FAQ)	301(b)(10	MCMRA is silent on whether data element of patient faith is part of directory information	Possible conflict exists, but provisions may be read compatibly
Person Involved in Patient Care	164.510(b)	Generally allows disclosure of certain information if patient does not object or, using good professional judgment, consent may be inferred.	305(b)(7)	Except for mental health records, disclosures may be made in accordance with professional judgment to immediate family members or persons known to have a close personal relationship	HIPAA and MCMRA largely compatible in this area.

Overview of Permissive Disclosures without Authorization:

Both HIPAA and MCMRA contain provisions that allow for the disclosure of health information by covered entities for certain purposes. Under HIPAA, almost all of these provisions are permissive, but under MCMRA or other state law many are mandatory disclosures (see later section "Disclosures Mandatory by Operation of Law"). For purposes of use in Maryland, these functions are separated in this chart.

Permissive Disclosures Without Authorization	45 CFR §	Federal Law	HG Title 4 §	State Law Provision	Comparison
Disclosure: Permissive Disclosures Generally	**164.502 164.506 164.512**	**Generally makes disclosures for most purposes permissive**	**305**	**Puts many of disclosures necessary for health care operations in the permissive category**	**Federal law allows, while state law mandates, disclosures often required for state or federal administrative or legal purposes**
Disclosure: Appointment Reminders	**164.502(i) 164.520(b)(1)**	**OK, if put in separate reference in Notice of Privacy Practices**	**305(b)1)**	**Appointment reminders have been used in many health care activities as part of ordinary operations. In certain sensitive areas, appointment reminders have not been used.**	**State and federal law do not conflict in this area. Maryland practice has been to allow use of appointment reminders unless it would be professionally unwise in certain sensitive areas.**
Disclosure: Employer Access	**164.512 (b)(1)(v)**	**Allow access for work related illness issues**	**303,307; Insurance 4-403**	**By consent or mandatory process, allows disclosure; Regulates disclosure by insurers, employer not listed**	**State law appears to give broader protection to employees regarding their medical records**
Disclosure: Facility Directories	**164.510(a)**	**Unless objection after asked of patient, general patient information may be disclosed**	**301(b); 302(c)**	**May disclose, unless instructed not to disclose**	**Federal law requires addressing issue with patient, but provisions compatible see also Permissive Disclosures Requiring Authorization**
Disclosure: Family or Friend involved in Patient Care	**164.510(b)**	**Follows pt. direction, but if patient not able then provider judgment**	**305(b)(7)**	**Unless patient precludes, to immediate family members or person with a close personal relationship, if in accordance with good medical practice.**	**Both provisions similar. see also Permissive Disclosures Requiring Authorization**
Research	**164.512(i) 164.501 164.508(f)**	**If PHI is to be used, patient authorization required, except if an IRB approves waiver based on specified factors**	**301(g) 305(b)(2)(i)**	**Allows research of non-identifying info and other research or educational purposes if duty not to re-disclose signed & subject to IRB requirements**	**Federal law more detailed and restrictive and therefore would govern research uses**
Specialized Governmental Functions- Federal Officials, Correctional Services, Public Benefit programs	**164.512(k)**	**Specific provisions covering the military personnel, security and protective services, State Department medical suitability, correctional services and public benefit programs**	**305(b)(3) 307(k)(i)**	**Allows disclosures for purposes of state or federal officials performing lawfully authorized duties**	**Federal law has more specific provisions regarding its own employees. Both provide for disclosures to correctional facilities for purposes of treatment.**

Permissive Disclosures Without Authorization	45 CFR §	Federal Law	HG Title 4 §	State Law Provision	Comparison
Transplant	164.512(h)	Allows disclosures to facilitate transplants	305(b)(8) 5-408	Allows disclosure for purposes of evaluating for possible donation	Similar provisions allow disclosures for transplant evaluation purposes.
Whistleblower	164.502(j)(1)	Allows disclosures to specified persons if employee perceives unlawful or unprofessional conduct in workplace	305(b) 1) 305(b)(3)	Allows disclosures to legal counsel or governmental agency performing its lawful duties	If done in good faith and for professional motives, whistleblower activities may be protected under both laws
Worker's Compensation	164.512(l)	Allows disclosures for administration of workers' compensation programs	303(b); 305(b)(3)	An injured employee would file a claim and authorize disclosure of necessary medical records.	Both State and Federal standards allow disclosures to enable workers' compensation programs to function.
Workplace Crime victims	164.502(j)(2) 164.512(f)(2)	Allows victims of crimes in health facilities to disclose information to law enforcement personnel about perpetrator	305(b)(3)	Allows disclosures for public employees performing their authorized activities	Allow disclosures for investigations of crimes on

Overview of Mandatory Disclosures:

There are a large number of public activities (courts and administrative agencies, licensure and health disciplinary agencies, law enforcement, coroner and medical examiner's offices, Secret Service, child and adult abuse investigation agencies, health care regulators, organ transplant agencies, researchers, workers' compensation systems) that need health information in order to function. Each law authorizes release of health information for these purposes under varying criteria

Public uses are generally covered by HIPAA either via the preemption bypass provisions in 45 CFR §160.203 or under 45 CFR §164.512, and, in MCMRA, under Md. Ann. Code, Health-General § 4-306. HIPAA makes only two disclosures mandatory, to the patient and to the DHHS Office of Civil Rights, which is the enforcement agency for HIPAA. MCMRA makes the restricted disclosures for public uses mandatory. ***State mandated disclosures that are not preempted or prohibited by HIPAA remain mandatory***.

Mandatory Disclosures:	45 CFR §	Federal Law	HG Title 4 §	State Law Provision	Comparison
Disclosure: Mandatory/ Permissive Generally	**164.502 (a)(2)**	**Mandatory only: 1) to patient, 2) to OCR for enforcement**	**306**	**Disclosures for public purposes mandatory**	**HIPAA makes many of the public use disclosures permissive, but state law compels disclosures for many purposes. Unless preempted by HIPAA, state compelled disclosures are mandatory.**
Disclosure: Legally Compelled	**164.512(a)**	**Allows disclosure for legally compelled activities**	**305(b)(3) 306(b)(1)-(9); 307**	**State law gets more specific in the types of compelled disclosures, and has the broad governmental duty provision**	**State law is mandatory in specific instances, permissive in others. Generally, HIPAA does not override state law for legally compelled disclosures**
Disclosure: Access by Governmental Generally	**160.300 164.512(b) 164.512(f)**	**Allows federal access for HIPAA enforcement; otherwise more detailed rules**	**306**	**Listing of activities authorizing disclosure, with relatively simple rules**	**Federal law is more specific and restrictive in parts, but gives self mandatory access to enforce HIPAA**
Public Health	**164.512(b)**	**Detailed list of permitted public health operations**	**305(b)(3) See Mandatory State Reporting Statutes**	**Allows public health access**	**State law less complicated, but similar disclosures permitted**
Disclosure: Abuse and Neglect	**164.512(c)**	**Allows disclosure for reporting of suspected abuse and neglect**	**306(b)(1)**	**Compels disclosure for suspected abuse or neglect**	**Federal law permissive, but read in conjunction with mandatory reporting duty**
Disclosure: Health Oversight- Provider Licensing and Discipline	**164.512(d)**	**Health oversight permitted disclosure**	**306(b)(2)**	**Compels disclosure for health disciplinary oversight**	**Federal law permissive, but does not override state law**
Disclosure: Judicial and Administrative Proceedings	**164.512(e)**	**Allows disclosure by court order or by subpoena if certain notice provisions followed**	**306(b)(6)**	**Compels disclosure for judicial purposes provided copy of discovery served on patient or judicial waiver based on good cause**	**Similar provisions apply in both statutes, but vary slightly in details**
Disclosure: Law Enforcement Investigation	**164.512(f)(1)**	**Allows compliance with formal process if info material and relevant and specific and limited in scope**	**306(b)(3), (7)**	**Allows disclosures for sole purpose of investigation but requires agency written standards**	**State law compels, while federal law allows disclosure for compulsory law enforcement investigation**

Mandatory Disclosures:	45 CFR §	Federal Law	HG Title 4 §	State Law Provision	Comparison
Disclosure: Law Enforcement-Crime & Public Emergency	**164.512(f)(2)**	**Allows fugitive location release**	**305(b)(3) 306(b)(7) 307(j)**	**Allows governmental agencies to perform lawful duties; For mental health patient elopements, gives facility director discretion to reveal information to allow recapture.**	**Both have express public safety disclosure provisions; HIPAA**
Disclosure: Medical Examiner	**164.512(g)**	**Information may be disclosed to medical examiners**	**HG 4-212 State Gov't 10-617(b)**	**Mandatory disclosure to MedicalExaminer.. Medical and psychological info protected at death, but autopsy report of a medical examiner is public**	**HIPAA does not regulate medical examiners, and allows info to be disclosed. State law governs.**
Disclosure: Public Safety Threat	**164.512(j)**	**Allows disclosures to lessen threat to person or the public, to persons who may be able to lessen the threat, except if learned through therapy or self-initiated admission**	**305(b)(3); 306(b)(7); 307(j)**	**Allows governmental agencies to perform lawful duties; For mental health patient elopements, gives facility director discretion to reveal information to allow recapture.**	**Federal law appears to be more restrictive regarding public safety disclosures which originate as a result of therapy. State law is less clear regarding authority to disclose in non-mental health situations**

Overview of Patient Access and Rights:

Both HIPAA and MCMRA grant an individual a qualified right of access to one's health information, a right to seek amendment of the health information, the right to seek amendment of the health information, and to receive a copy of the record for a fee. HIPAA includes additional patient rights, including the right to receive an accounting of disclosures and a notice of privacy protections. MCMRA permits non-state providers to charge a per copy fee of up to 50 cents per page, a preparation and retrieval fee of up to $15, and actual postage and handling fees, all subject to annual adjustment under the Consumer Price Index. HIPAA allows covered entities to impose a reasonable, cost-based fee, provided that the fee includes only the cost of copying, postage, and preparation of any summary if requested by the patient.

HIPAA defers to Maryland law regarding who may exercise disclosure rights for un-emancipated minors. MCMRA ties the ability of minors to exercise disclosure rights to the minor's capacity under Maryland law to consent to treatment. Specifically, a minor has the same capacity as an adult to consent to treatment for drug abuse, alcoholism, venereal disease, pregnancy, contraception, injuries from rape or sexual offense, and initial media screening of the minor into a detention center. A minor at least 16 years old has the right to consent to treatment for mental or emotional disorders. A rule based on patient circumstances applies to

the provision of abortion services. Physician professional judgment plays a key role in the decision of whether to disclose information to the parent on the treatment of a minor for mental health and abortion services.

Patient Access & Rights	45 CFR §	Federal Law	HG Title 4 §	State Law Provision	Comparison
Patient Complaints: Right to File	160.306(a)	Patients have a right to file a complaint with the Secretary of DHHS.	State Agency Statutory Regulatory Authority	Patients have assumed they have a right to complain about MCMRA violations to respective state agencies	Patients will be able to complain to the covered entity, and state and federal officials.
Patient Complaints: Elements of Complaint	160.306(b)	Complaints must be in writing and filed with the Secretary within 180 days of the incident.		Must meet requisites of State agency complaint forms	The federal provision requires that complaints be timely. State agencies may still accept later filed complaints.
Patient Complaints: Investigation	160.306(c)	Allows, but does not compel, the investigation of complaints by a federal agency, the DHHS Office for Civil Rights	State Agency Statutory Investigatory Authority	Complaints have been investigated by state health and insurance regulatory agencies, boards and commissions, and by OAG Consumer Protection Division for a decade.	Both state and federal entities will investigate complaints about wrongful disclosure of information.
Patient Access: Generally	164.524 164.526	Access and comment allowed	303 304(b)	Access and comment allowed	Both laws provide for comment and correction
Patient Access: Psychotherapy Notes	164.524(a)(1) 164.501	Psychotherapy notes usually outside disclosure	307(a)(6)	Personal notes usually outside disclosure	Notes usually have special protection if kept outside of the patient record
Patient Access: CLIA Lab Results	164.524(a)(1)	PHI subject to CLIA	17-201.1 COMAR 10.10.06.04	Authorizes release to lab or person ordering, and should tell ordered patient is getting	Person ordering test should know patient may get results of test, not incompatible.
Patient Access: In Writing?	164.508	If in Notice of Privacy Practices, then request for access may need to be in writing	304(a)	Request in writing	Both allow covered entities to require that requests for access be in writing
Right to Request Restrictions on Uses & Disclosures	164.522	Gives a right to ask for special protections and how entity may respond		No comparable right, but similar requests have been made.	HIPAA right established and governs
Patient Access: Timeframe	164.524(b)	Thirty days to respond with one extension possible	304(a) 309(a)	Twenty-one working days	Maryland law prevails with no extension permitted

Patient Access & Rights	45 CFR §	Federal Law	HG Title 4 §	State Law Provision	Comparison
Patient Access: Exercise of Patient Rights	164.502(g)	Uses concept of "personal representative" to cover exercise of rights for un-emancipated minors, deceased individuals, and special rules for abuse situations	301(k)	Uses concept of "person in interest" to cover situations where a person may not be legally authorized to exercise rights under statute.	Generally compatible, but should closely examine each situation where someone else is exercising a person's right to access.
Patient Access: Minors	164.502(g)	Looks to state law for minors and consent	301(k)(4) Title 20-102,103,104	Grants minors right to control records where may consent to treatment	State law grants greater privacy protections to minors
Patient Access: Copying Costs: Page Copying, Postage & Search and Processing Fees	164.524(c)(4)	Reasonable cost of copying and postage allowed	304(c)(3)	Preparation fee, cost of copying, and postage allowed	Copying costs and postage allowed under both MCMRA and HIPAA, Preparation fees, including fees for recovering the documents, may not be charged to the patient
Patient Access: Denial	164.524(a)(3)	May be denied if would be reasonably likely to endanger physical safety of individual or another person	304(a)(2)	Only for mental health records, may deny access based upon professional belief may be injurious to patient's health	Maryland law governs since it restricts patient access less.
Patient Request to Amend Records	164.526	Establishes a process for amendment of PHI	304(b)	Establishes a process for change or correction of medical record.	Similar processes, but federal rule is more specific and will govern.
Right to an Accounting	164.528	Gives patients a right to an accounting of certain disclosures		No express provision in MCMRA, although it could be implied.	HIPAA procedures govern.

Overview of Patient Remedies:

MCMRA and HIPAA have virtually identical criminal penalties. Knowingly obtaining or using identifiable health information, a unique health identifier or disclosing individually identifiable health information to another in violation of HIPAA or MCMRA subjects the person to a fine of up to $ 50 thousand, and one year of imprisonment. If done under false pretenses, a fine of up to $ 100 thousand and 5 years imprisonment may be imposed; if with intent to sell information for commercial advantage, personal gain or malicious harm, the fine may be up to $ 250 thousand with up to 10 years imprisonment.

MCMRA and HIPAA employ different civil remedies. HIPAA has an administrative fining process through the DHHS Office of Civil Rights. Violation of HIPAA subjects the person who violates the regulations to a civil fine of up to $ 100 per incident and a

maximum fine of $ 25,000 per year. In Maryland, state occupational and facility disciplinary officials process reported violations of MCMRA. In addition, under MCMRA, a person who violates the act may be sued in state court for actual damages. No comparable private right of action exists under HIPAA.

MCMRA grants broad immunity from suit to health care providers who disclose or fail to disclose a medical record if acting in good faith. HIPAA contains a somewhat less generous exculpatory clause that prohibits imposition of a civil penalty if the person, acting with reasonable diligence, did not know that the action violated federal law.

Remedies	45 CFR §	Federal Law	HG Title 4 §	State Law Provision	Comparison
Remedies: Good Faith Immunity	**160.304**	**Incidental disclosure provision; mitigation through due diligence; procedural implementation**	**308**	**Maryland law provides a strong defense against litigation based on a technical violation**	**State law provides protection to medical community against technical violations; federal regulations do not**
Remedies: Private Right Of Action		**No federal private right of action**	**309**	**State law authorizes a private right of action.**	**State law provides for a private right of action, federal law does not.**
Remedies: Enforcement Agency	**65 Fed. Reg. 82381 (12/28/00)**	**DHHS Office of Civil Rights**	**309**	**Private; DHMH licensing and disciplinary agencies; criminal enforcement (county)**	**Federal law provides for a designated enforcement agency; state enforcement is spread among different entities**
Remedies: Civil Penalties	**164.102; 42 USC § 1320d-5(a)**	**Administrative penalties of $100 per violation and calendar limit of $25,000**	**309(f)**	**No public civil enforcement penalties, but actual damages**	**Federal law provides for modest civil penalties, but does not allow a private right of action for actual damages**
Remedies: Criminal Penalties	**164.102; 42 USC § 1320d-6**	**Knowing acquisition or disclosure of PHI allows $50,000 fine, 1 year jail, add false pretenses, $100,000 5 years, intent to sell for gain or harm, $250,000, 10 years**	**309(d)& (e)**	**Knowing, willful acquisition under false pretenses or deception or wrongful disclosure $50, 000, 1 year, with false pretenses, $100,000 5 years, intent to sell for gain or harm, 10 years, $250T**	**State and federal criminal penalties are virtually identical**

Overview of Administrative Procedures and Forms:

The major area in which HIPAA exceeds MCMRA involves the administrative requirements. Health care businesses and professionals have to determine what type of entity designation under HIPAA best fits their health care operation. The entity must then designate a privacy official who educates on HIPAA, implements procedures, and receives complaints. Personnel must be trained in HIPAA. Appropriate administrative, technical, and physical safeguards must be put in place to protect the security of PHI. An entity must be able to demonstrate that it sanctions workforce members who violate HIPAA.

Forms such as the already mentioned business associate agreement, notice of privacy practices (similar to the financial privacy notice recently required from financial institutions under the federal Gramm-Leach-Bliley Act), and authorization to disclose will need to be drafted. Other custody agreements may also need to be drafted.

Authorization Form- Both HIPAA and MCMRA specify elements in an authorization for the authorization to be valid. HIPAA requires that an authorization contain: 1) the information to be disclosed; 2) who is authorized to disclose the information; 3) to whom the information is to be disclosed, 4) the purpose of the disclosure (not necessary if the treated individual initiates the authorization); 5) an expiration date for the authorization; a note that the authorization may be revoked; 6) a warning that any released information may be beyond the reach of HIPAA; 7) a signature and date, and, if any, 8) a personal representative's capacity. In addition, the authorization must contain acknowledgements that the authorization may be revoked at any time in writing; that benefits may not be conditioned on signing the authorization,; and that information disclosed may be re-disclosed without protection under HIPAA. MCMRA requires five elements: 1) the document be in writing; 2) it be signed and dated; 3) the name of the disclosing provider; 4) the party to whom disclosed; and 5) the period of time the authorization is valid. While both require an expiration date, MCMRA, with a couple of exceptions, sets a maximum time frame of one year for the validity of an authorization. These forms are compatible and may be designed to accommodate the requirements of both HIPAA and MCMRA.

Administrative Procedures & Forms	45 CFR §	Federal Law	HG Title 4 §	State Law Provision	Comparison
Record Retention and Destruction	160.201 164.502	No federal retention schedule for records, just for administrative activities (Six years)	403(b)& (c)	Five year period except for minors, then age 18 plus three years	State law governs on retention of patient records, federal law on administrative records pertaining to HIPAA compliance.
Business Associate Agreements	164.502(e) 164.504(e)	Need legal document to obligate confidentiality for health care partners	302(d)	Not needed since covered under re-disclosure provisions	Federal law requires extensive legal paperwork in terms of business associate agreement

Administrative Procedures & Forms	45 CFR §	Federal Law	HG Title 4 §	State Law Provision	Comparison
Procedures: Business Associates Generally	160.103 164.502(e) 164.514(e)	Concept needed due to limitation of statutory jurisdiction	No need for comparable provision	Prohibition on re-disclosure protects under state law	Limitation of federal jurisdiction mandates this administrative legal duty
Compliance: Monitoring of Persons to whom Data is Released	164.504(e)	Must act if failure by business associate	302(d)	State law controls under re-disclosure statute	Federal jurisdictional limits force contractual monitoring of data release, while state law covers it by statute, sep. contract not required
Consent to Disclose for Treatment: Generally	164.506	HIPAA suggests a written consent to disclose to treat form	303,305(b) (1)	State law does not require an express consent to disclose for treatment purposes form	Federal law now makes optional use of a consent form to disclose for treatment, while state law employs it for disclosures
Consent to Disclose for Treatment: Elements of Patient Consent	164.506(c)	Informs about use, refers to notice of practices, permits patient to ask for restrictions on access, allows prospective revocation	No form required	Not comparable as consent to treat form not required	The federal consent to disclose for treatment form has no comparable state law equivalent. Since use of the consent form is no longer mandatory, there is no conflict as entities could use the federal consent idea, but need not.
Consent to Disclose for Treatment: Patient Consent Expire?	164.506(c)	No	No form required	No comparable provision	Federal consent to treat form is open-ended
Authorization: Elements	164.508(c)	Eight elements: specific info, people to whom disclosed, who may make, expiration date, right to revoke, use that may be made (redisclose warning) signature and date and pr capacity	303(b)	Five elements: writing, dated and signed, name of provider, to whom disclosed, period of time valid	Federal law requires a few more elements, and notes weakness under federal law of redisclosure lack of control
Authorization: Expire?	164.508(c)	Expiration date or event needed	303(b)(4)	One year maximum	Both require an expiration date, state law controls
Notice of Privacy Practices	164.520	Makes notice of privacy practices a key element of privacy protection		No similar state provision.	HIPAA rules on privacy notice govern, but should reference state privacy law.
Procedures-Privacy Officer And other administrative implementation	164.530	Establishes privacy officer role; requires training, sanctions for violation, procedures, and document retention period		Implied that someone makes disclosure determinations, and procedures for health information offices, but federal law is more prescriptive.	No comparable state provision. New designation required in order to comply. HIPAA procedures must be employed in health information offices