

Chapter 4: Administration Procedures Act

Rule 4.2 Hearing Procedure and Declaratory Opinions. Pursuant to Section 25-43-3.104 of the Mississippi Administrative Procedures Law, the Mississippi Board of Education must afford persons the opportunity to submit, in writing, argument, data, and views on a proposed rule. The Board may, in its discretion, schedule an oral proceeding on any proposed rule. However, the Board must schedule an oral proceeding on a proposed rule if, within twenty (20) days after the proper filing of the notice of proposed rule adoption, a written request for an oral proceeding is submitted by a political subdivision, an agency or ten (10) persons.

Pursuant to Section 25-43-3.104, an agency may issue rules for the conduct of oral rule-making proceedings or prepare reasonable guidelines or procedures for the conduct of any such proceedings. If a written request for an oral proceeding is received from an eligible party as described above, the Board prescribes the following procedures for the conduct of oral hearings.

1. An oral proceeding will be scheduled no earlier than twenty (20) days after notice of the proceeding's location and time is properly filed with the Secretary of State for publication in the administrative bulletin.
2. Within three (3) days after filing with the Secretary of State, notice of the location and time for the proceeding shall be mailed to each person who has made a timely request to the Department to be placed on the mailing list maintained by the Department of persons who have requested notices of proposed rule adoptions.
3. Within three (3) days after filing with the Secretary of State, notice of the location and time for the proceeding shall be published in newspapers with general circulation throughout the state.
4. The Board designates the State Superintendent of Education or another presiding officer designated by the State Superintendent to preside at a required oral proceeding on a proposed rule.
5. Oral proceedings shall be open to the public.
6. A record, to include all documents submitted at the proceeding, shall be made by stenographic or other means of all oral proceedings. The record shall be available for cost upon the written request of an applicant.
7. Oral proceedings shall not be conducted pursuant to statutory or formal rules of evidence or procedure. The presiding officer's authority to limit oral testimony includes, but is not limited to, those situations necessary to keep the hearing focused on the proposed rule or to prevent undue repetition in the proceeding.
8. The presiding officer shall make a recommendation to the Board at its next, regularly scheduled meeting. Said recommendation shall include: (i) the proposed rule; (ii) a summary of the oral proceeding; and, (iii) recommendations.

Rule 4.2.1 Declaratory Opinions

1. Scope

Part III of these Rules is promulgated pursuant to MS Code Ann. §25-43-2.103(2) (1972) of the Administrative Procedure Law, and is intended to set forth the Department's rules governing the form and content of requests for declaratory opinions, and the Department's procedures regarding the requests, as required by MS

Code § 25-43-2.103 (1972). These rules are intended to supplement and be read in conjunction with the provisions of the Mississippi Administrative Procedures Law, which may contain additional information regarding the issuance of declaratory opinions. In the event of any conflict between these rules and the Mississippi Administrative Procedures Law, the latter shall govern.

2. **Persons Who May Request Declaratory Opinions.**
Any person with a substantial interest in the subject matter may request a declaratory opinion from the Department by following the specified procedures. “Substantial interest in the subject matter” means: an individual, business, group or other entity that is directly affected by the Department’s administration of the laws within its primary jurisdiction. “Primary jurisdiction of the agency” means the agency has a constitutional or statutory grant of authority in the subject matter at issue.
3. **Subjects Which May Be Addressed In Declaratory Opinions.**
The Department will issue declaratory opinions regarding the applicability to specified facts of: (1) a statute administered or enforceable by the Department or (2) a rule promulgated by the Board. The Department will not issue a declaratory opinion regarding a statute or rule which is outside the primary jurisdiction of the agency.
4. **Circumstances in which Declaratory Opinions Will Not Be Issued.**
The Department may, for good cause, refuse to issue a declaratory opinion. The circumstances in which declaratory opinions will not be issued include, but are not necessarily limited to:
 - a. lack of clarity concerning the question presented;
 - b. there is pending or anticipated litigation, administrative action, or other adjudication which may either answer the question presented by the request or otherwise make an answer unnecessary;
 - c. the statute or rule on which a declaratory opinion is sought is clear and not in need of interpretation to answer the question presented by the request;
 - d. the facts presented in the request are not sufficient to answer the question presented;
 - e. the request fails to contain information required by these rules or the requestor failed to follow the procedure set forth in these rules;
 - f. the request seeks to resolve issues which have become moot, or are abstract or hypothetical such that the requestor is not substantially affected by the statute or rule on which a declaratory opinion is sought;
 - g. no controversy exists concerning the issue as the requestor is not faced with existing facts or those certain to arise which raise a question concerning the application of the statute or rule;
 - h. the question presented by the request concerns the legal validity of a statute or rule;
 - i. the request is not based upon facts calculated to aid in the planning of future conduct but is, instead, based on past conduct in an effort to establish the effect of that conduct;
 - j. no clear answer is determinable;

- k. the question presented by the request involves the application of a criminal statute or a sets of facts which may constitute a crime;
- l. the answer to the question presented would require the disclosure of information which is privileged or otherwise protected by law from disclosure;
- m. The question is currently the subject of an Attorney General's opinion request or has been answered by an Attorney General's opinion;
- n. A similar request is pending before this agency or any other agency or a proceeding is pending on the same subject matter before any agency, administrative or judicial tribunal, or where such an opinion would constitute the unauthorized practice of law.
- o. Where issuance of a declaratory opinion may adversely affect the interests of the State, the Board, the Commissions appointed by the Board, Department or any of their officers or employees in any litigation which is pending or may reasonably be expected to arise;
- p. The question involves eligibility for a license, permit, certificate or other approval by the Department or some other agency, and there is a statutory or regulatory application process by which eligibility for said license, permit, certificate or other approval would be determined.

5. Written Request Required.

Each request must be printed or typewritten, or must be in legible handwriting. Each request must be submitted on standard business letter-size paper (8-1/2 inches by 11 inches). Requests may be in the form of a letter addressed to the Department.

6. Where to Send Requests.

All requests must be mailed, delivered or transmitted via facsimile to:

Mississippi Department of Education
P.O. Box 771
Jackson, Mississippi 39205-0711
ATTN: DECLARATORY OPINION REQUEST

The request shall clearly state that it is a request for a declaratory opinion. No oral, telephone requests or email requests will be accepted for official opinions.

7. Name, Address and Signature of Requestor.

Each request must include the full name, telephone number, and mailing address of the requestor. All requests shall be signed by the person filing the request, who shall attest that the request complies with the requirements set forth in these rules, including but not limited to a full, complete, and accurate statement of relevant facts and that there are no related proceedings pending before any other administrative or judicial tribunal.

8. Question Presented.

Each request shall contain the following:

- a. a clear and concise statement of all facts on which the opinion is requested;
- b. a citation to the statute or rule at issue;
- c. the question(s) sought to be answered in the opinion, stated clearly;
- d. a suggested proposed opinion from the requestor, stating the answers desired by petitioner and a summary of the reasons in support of those answers;
- e. the identity of all other known persons involved in or impacted by the described factual situation, including their relationship to the facts, name, mailing address and telephone number; and
- f. a statement to show that the person seeking the opinion has a substantial interest in the subject matter.

9. Time for Department's Response.

Within forty-five (45) days after the receipt of a request for a declaratory opinion which complies with the requirements of these rules, the Department shall, in writing:

- a. issue a declaratory opinion regarding the specified statute or rule as applied to the specified circumstances;
- b. decline to issue a declaratory opinion, stating the reasons for its action; or
- c. agree to issue a declaratory opinion by a specified time but not later than ninety (90) days after receipt of the written request.

The forty-five (45) day period shall begin running on the first State of Mississippi business day on or after the request is received by the Department, whichever is sooner.

10. Opinion Not Final for Sixty Days.

A declaratory opinion shall not become final until the expiration of sixty (60) days after the issuance of the opinion. Prior to the expiration of sixty (60) days, the Department may, in its discretion, withdraw or amend the declaratory opinion for any reason which is not arbitrary or capricious. Reasons for withdrawing or amending an opinion include, but are not limited to, a determination that the request failed to meet the requirements of these rules or that the opinion issued contains a legal or factual error.

11. Notice by Department to third parties.

The Department may give notice to any person, agency or entity that a declaratory opinion has been requested and may receive and consider data, facts, arguments and opinions from other persons, agencies or other entities other than the requestor.

12. Public Availability of Requests and Declaratory Opinions.

Declaratory opinions and requests for declaratory opinions shall be available for public inspection and copying in accordance with the Public Records Act and the Department's public records request procedure. All declaratory opinions and requests shall be indexed by name and subject. Declaratory opinions and

requests which contain information which is confidential or exempt from disclosure under the Mississippi Public Records Act or other laws shall be exempt from this requirement and shall remain confidential.

13. Effect of a Declaratory Opinion.

The Department will not pursue any civil, criminal or administrative action against a person who is issued a declaratory opinion from the Department and who, in good faith, follows the direction of the opinion and acts in accordance therewith unless a court of competent jurisdiction holds that the opinion is manifestly wrong. Any declaratory opinion rendered by the Department shall be binding only on the Department and the person to whom the opinion is issued. No declaratory opinion will be used as precedent for any other transaction or occurrence beyond that set forth by the requesting person.

Source: *Miss. Code Ann. § 37-1-3 (Adopted 9/2006)*