

# Schools HR Model Capability Procedure



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ISLINGTON

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The procedure was adopted by the governing body of Moreland Primary school November 2020

## Contents

1. Purpose .....	4
2. Application of the procedure .....	4
3. Key principles .....	4
4. Informal Stage .....	5
5. The Formal Capability Procedure.....	6
5.1 Stage 1: Formal Capability Meeting.....	6
5.2 Stage 2: Formal Review Meeting .....	6
5.3 Stage 3: Hearing .....	7
5.4 Stage 4: Appeal .....	8
6. Overlapping Capability and Grievances Procedures .....	9
7. Sickness absence .....	9
8. Expiry of warnings and references .....	9
9. Arranging meetings under this procedure .....	9
10. Inability of employee to attend meetings or hearings.....	10
Appendix A: Hearing Format.....	11
Appendix B: Appeal Hearing Format.....	12

## 1. Purpose

- 1.1 The purpose of this procedure is to manage underperformance arising from a lack of skill, aptitude or ability and to provide a framework for resolving the issue. It aims to encourage employees to achieve and maintain acceptable standards of performance and is designed to ensure fairness and consistency in the management of employee performance.
- 1.2 The primary objective of the procedure is to ensure maximum support through guidance, counselling and training in order that the employees' performance improves.
- 1.3 This model procedure complies with the principles set out in the Teachers' Performance Appraisal Policy and Support Staff Appraisal Policy.

## 2. Application of the procedure

- 2.1 This procedure applies to all employees of the school (both support staff and teachers).
- 2.2 It does not apply to:
  - Support staff who are still in their probationary period and teachers undergoing induction (i.e. NQTs) unless there are serious concerns, in which case this procedure will apply.;
  - Peripatetic staff who are not employed directly by the school;
  - School based staff employed by other external contractors (e.g. catering);
  - Employees of external contractors and providers of services (e.g. contract cleaners).
- 2.3 This procedure should be used where performance falls below the required standards for the job (including, in the case of teachers, the national standards for teachers), and where underperformance is deemed to be due to lack of skill, aptitude or ability.
- 2.4 This procedure should not be used where the Sickness Absence Procedure or the Disciplinary Procedure is appropriate.
- 2.5 Reference to 'Schools HR' is to Islington Schools' HR. If the school uses a different HR provider, that provider's support will be utilised.

## 3. Key principles

- 3.1 All efforts should be made to ensure that there are no unreasonable delays in arranging meetings under this procedure. The employee should be advised that they may be accompanied by a trade union representative or work place colleague at formal meetings.
- 3.2 Where there is alleged incapability on the part of a Headteacher, in a community school, the chair of governors will inform the Director of Children's Services before any action is taken. In the case of the Headteacher, any further action under this policy will be jointly led by the chair of governors and the Director of Children's Services or his/her representative (or another person external to the school agreed by the chair of governors and the Director of Children's Services).
- 3.3 In Voluntary Aided schools, the Diocesan Director should be informed of any proposed action against the Headteacher.
- 3.4 Although normal performance standards apply to trade union representatives as employees, formal action will not be taken against an employee who is an accredited trade union representative until either the Branch Secretary or a full-time official of the union concerned has been informed.

- 3.5 Information relating to capability matters must be kept strictly confidential, including documents circulated as part of meetings and formal proceedings and information shared when accessing training and support.

#### 4. Informal Stage

- 4.1 **The steps outlined in 4.2 to 4.8 below apply to Support Staff only; the transition to capability stage, under the Teachers' Performance Appraisal Policy, should be followed for teachers.**
- 4.2 All employees should have their performance reviewed in line with the relevant appraisal policy. Where the appraiser/line manager has concerns about the performance of an employee they should initially manage these within the appraisal process and/or normal day-to-day management processes.
- 4.3 If informal support within the appraisal process does not produce the required improvements to performance within a reasonable timescale, as appropriate to the role and performance concerns, the appraiser/line manager will decide whether the matter should be dealt with under this procedure.
- 4.4 It is recommended that concerns are raised with employee as soon as possible; the decision to move to the formal capability procedure can be made at any time during any appraisal cycle, usually from the mid-appraisal period.
- 4.5 Before embarking on the formal capability procedure, the appraiser/line manager should ensure that through normal appraisal and supervision:
- The employee has been alerted to concerns;
  - A programme of support has been arranged for the employee in line with the school's appraisal procedures (e.g. regular meetings, monitoring, objectives set, training and mentoring), and has been well documented and can be provided in written form; and
  - A reasonable timescale for improvement has been set and the employee has been informed of the programme of support in writing.
- 4.6 Where there are continued concerns, a meeting will be held with the employee, who is able to be represented by their trade union representative or work place colleague. The appraiser/line manager will chair this meeting and a Schools' HR representative may attend to advise on the procedure; where there is alleged incapability on the part of a Headteacher the chair of governors will attend the meeting. A school appointed note taker will also be present at the meeting.
- 4.7 If an employee or their representative cannot attend the meeting, the employee can suggest another date so long as it is reasonable and is not more than ten calendar days after the date originally proposed by the Headteacher/line manager. If the employee and/or their representative do not attend the rescheduled meeting, then it may be held in their absence.
- 4.8 Following this meeting, if it is evidenced that there is insufficient progress following support put in place the employee will be notified in writing that the appraisal / informal process will no longer apply and that their performance will be managed under the school's capability procedure.
- 4.9 This notification will trigger the commencement of the formal capability procedure. The notification will include:
- An invitation to attend a formal capability meeting, giving **at least 5 working days'** notice of the meeting.
  - Details about the concerns regarding performance and their possible consequences.

- Copies of relevant written evidence.
- Confirmation that the employee has the right to be accompanied by a trade union representative or work colleague.

## 5. The Formal Capability Procedure

### 5.1 Stage 1: Formal Capability Meeting

- 5.1.1 The Headteacher (or senior manager nominated by the Headteacher or the chair of governors in the case of the Headteacher) will chair the meeting. The meeting is intended to establish the facts.
- 5.1.2 If an employee or their representative cannot attend the meeting, the employee can suggest another date so long as it is reasonable and is not more than ten calendar days after the date originally proposed by the Headteacher/senior manager. If the employee and/or their representative do not attend the rescheduled meeting, then it may be held in their absence.
- 5.1.3 At the meeting, the Headteacher/Senior manager will identify the nature of the performance concerns, the steps and support put place during the appraisal process / informal stage, the standards required and where the shortfall in their performance has occurred. This should include written evidence of the concerns identified.
- 5.1.4 The employee (or his/her representative) will be given the opportunity to respond to concerns raised about their performance and to make any relevant representations.
- 5.1.5 The meeting will be adjourned for the Headteacher/senior manager (or chair of governors) to consider the evidence presented and consider his/her decision. The Headteacher/senior manager (or chair of governors) will decide either:
- That the matter should be dropped or dealt with informally. In this case the Capability Procedure will cease and the appraisal process will re-start; or
  - To issue a first written warning; or
  - In exceptional circumstances, to issue a final written warning or to invite the employee to a Hearing where termination of employment may be considered (see section 5.3 below). Advice must be sought from Schools' HR if such action is contemplated.
- 5.1.6 Where a written warning is to be issued, the meeting will continue and the Headteacher (or senior manager/chair of governors) will:
- Give clear guidance on the improved standard of performance required (this may include the setting of new objectives)
  - Explain the support that will be available to help the employee improve his/her performance
  - Set out the timetable for improvement and explain how performance will be monitored and reviewed. The timeframe for the review period will be appropriate with the nature of the post and performance concerns and is usually 4 – 7 weeks.
  - Warn the employee formally that failure to improve within the monitoring and review period could lead to dismissal, and
  - The right of appeal against the decision to issue a written warning (see section 5.4 below).
- 5.1.7 The decision will be confirmed in writing **within five working days** of the meeting.

### 5.2 Stage 2: Formal Review Meeting

- 5.2.1 A Formal Review Meeting will be convened at the end of the period of support, to consider the outcome. The employee will be given **at least 5 working days** of the date and time of the review meeting together with any relevant documents, in line with paragraph 4.9.

- 5.2.2 If an employee or their representative cannot attend the meeting, the employee can suggest another date so long as it is reasonable and is not more than ten calendar days after the date originally proposed by the Headteacher/Senior manager. If the employee and/or their representative do not attend the rescheduled meeting, then it may be held in their absence.
- 5.2.3 The Formal Review Meeting should follow a similar format to the Formal Capability Meeting (section 6.1 above). Its purpose is to consider the progress that has been made by the employee during the monitoring and review period.
- 5.2.4 The Headteacher (or senior manager/Chair of Governors) will chair the meeting and will consider the evidence gathered during the monitoring and review period, and any evidence presented and other representations from the employee, before reaching a decision.
- 5.2.5 The meeting will be adjourned for the Headteacher/senior manager (or chair of governors) to consider the evidence presented and consider his/her decision. The Headteacher (or senior manager/Chair of Governors) may decide whether:
- The employee has made sufficient improvement. In this case the Capability Procedure will cease and the appraisal process will re-start; or
  - Some progress has been made. In this case a further monitoring and review period will be set out; or
  - No, or insufficient improvement has been made during the monitoring and review period. In this case the employee will be issued with a final written warning or the employee will be invited to a Hearing.

### 5.3 Stage 3: Hearing

- 5.3.1 The hearing will be chaired by the Headteacher. Where the Headteacher has been involved in the capability process up until this point, a panel of 2/3 governors will hear the case.
- 5.3.2 The employee will be given **at least 10 working days' notice** of the date, time and location of the hearing, together with:
- The names of those who will be present at the hearing;
  - Names of witnesses to be called;
  - Confirmation of the right to be accompanied by a trade union representative or work colleague and to state his/her case and present evidence at the meeting (employees will be required to provide copies of any written evidence he/she intends to present and names of any witnesses at least 2 working days before the hearing);
  - Information about the nature of unsatisfactory performance, and detail of the process and support to date;
  - Copies of any relevant reports, written evidence or statements;
  - The possible consequences for the employee in terms of the capability procedure, including that dismissal could be an outcome;
  - A copy of the capability procedure;
- 5.3.3 If an employee or their representative cannot attend the hearing, the employee can suggest another date so long as it is reasonable and is not more than ten calendar days after the date originally proposed. If the employee and/or their representative do not attend the rescheduled meeting, then it may be held in their absence.
- 5.3.4 At the hearing, the management case will be presented by the relevant manager conducting the earlier stages of the process (Senior Manager/Headteacher/chair of governors) and the employee and his/her representative will be given the opportunity to respond and to discuss any contributory factors they feel may have affected their performance (see appendix A).

5.3.5 The Headteacher/Governors panel will consider the evidence gathered during the monitoring and review period, and any evidence presented and other representations from the employee, before reaching a decision. They may decide that:

- An acceptable standard of performance has been achieved. In this case, the Capability Procedure will end and the appraisal process will re-start; or
- Some progress has been made. In this case a further monitoring and review period will be set out; or
- That performance remains unsatisfactory. In this case, a decision, or recommendation to the Local Authority, will be made that the employee should be dismissed or required to cease working at the school. Before the decision to dismiss is made, the school will consult the local authority (and the Diocese in the case of Church schools).

5.3.6 The decision will be confirmed in writing **within 5 working days** of the hearing. In the case of the recommendation that the employee should be dismissed, the employee will also be notified of:

- Reasons for the decision to dismiss, or to recommend dismissal;
- The date on which the employment contract will end,
- The appropriate period of notice; and
- The right of appeal.

5.3.7 Once the decision to dismiss has been taken, the governing body will issue notice of dismissal (for foundation or voluntary aided schools) or notify the local authority of its decision (for community and voluntary controlled schools). The local authority must issue notice of dismissal **within 10 working days** of notification from the governing body of the decision.

5.3.8 The period of notice will be the statutory minimum or contractual notice (for teachers, this will be notice in accordance with the Burgundy Book), whichever is the longer.

#### 5.4 Stage 4: Appeal

5.4.1 An employee can appeal against formal sanction (a written warning given or on a decision to dismiss) issued under stage 1 (5.1), stage 2 (5.2) and stage 3 (5.3) of this procedure.

5.4.2 The appeal should set out the grounds on which the employee believes that the decision was flawed or unfair **within 5 working days** of the receipt of the written warning(s) or dismissal letter. The grounds of appeal must be made in writing to the clerk to governors (or the employer in the case of the Headteacher).

5.4.3 An appeal meeting will be arranged as soon as possible. The employee will be given **at least 10 days notice** of the date, time and venue of the appeal hearing. Appeals against warnings may be heard by the headteacher or one or more governors. Appeals against dismissal will always be heard by the Governors' Appeals Panel (consist of 2/3 governors who have not previously been involved in the case). References to the Governors' Appeals Panel hereafter may therefore be interpreted accordingly, depending on the nature of the appeal.

5.4.4 If an employee or their representative cannot attend the appeal hearing, the employee can suggest another date so long as it is reasonable and is not more than ten calendar days after the date originally proposed by the Headteacher/senior manager. If the employee and/or their representative do not attend the rescheduled meeting, then it may be held in their absence.

5.4.5 The employee will provide, **at least 3 working days** before the appeal hearing, all documents that he/she intends to present at the appeal hearing. Copies of all the papers to be presented will be sent to panel members **2 working days** before the hearing.

- 5.4.6 The purpose of the appeal hearing is for the Governors' Appeals Panel to consider the grounds for appeal and to review the fairness of the outcome of the original meeting or hearing. The format for conducting appeal hearings is included as **Appendix B**.
- 5.4.7 The decision of an appeal panel at each stage will be final. The decision will be confirmed in writing **within 5 working days** of the hearing.
- 5.4.8 The following general points should be noted:
- An appeal at the formal meeting and review stage will not interrupt the procedure (unless the appeal decision leads to reconsideration);
  - An appeal will not involve a re-hearing of earlier evidence.

#### Other points to note

### 6. Overlapping Capability and Grievances Procedures

- 6.1 An employee may raise a grievance after capability proceedings have started against him/her.
- 6.2 The Headteacher or chair of governors or person managing the Procedure should consider the implications of the grievance on the capability. If the grievance has been raised before the appeal stage of the procedure and the matters of grievance are linked to those of the capability, then the grievance should be considered within the capability appeals procedure. If the grievance concerns matters that are unrelated to the capability, then a separate process under the Grievance Procedure will need to start.

### 7. Sickness absence

- 7.1 Short term sickness absences will not normally interfere with monitoring or other formal procedures relating to this policy. However, in all circumstances the schools sickness absence procedure must be followed to support the staff member return to work. The agreed support will continue to be offered upon the employee's return to work and, dependent on the length of absence, this period may be excluded from the period of support, monitoring and review.
- 7.2 If sickness absence appears to be triggered by the start of monitoring or the Capability Procedure, this will be dealt with in accordance with the school's Sickness Absence Procedure. The employee will be referred to Occupational Health for an assessment of his/her fitness for work.

### 8. Expiry of warnings and references

- 8.1 Any warnings given will remain on file for 12 months or until an appeal has overturned the warning. If an employee is subject to the Capability Procedure, or has a warning in place at the time of the reference request, this must be referred to in any employment reference.

### 9. Arranging meetings under this procedure

- 9.1 Dependent on the nature and seriousness of the matter / allegation / outcomes being considered at the meeting, consideration should be given to allowing reasonable time period prior to and after the meeting for the employee to meet with / be briefed / debriefed by their trade union representative.
- 9.2 Where additional time may be required after the meeting, in the first instance, the employee or trade union representative will speak to the manager / Headteacher or the Schools HR representative. The request will be considered at that time, taking into account the needs of the school and pupils.

## **10. Inability of employee to attend meetings or hearings**

- 10.1 If an employee is unable to attend a formal meeting he/she may choose to provide written permission to the effect that his/her representative may act on full authority and he/she will accept any decision that their representative has been party to. He/she may also provide a written response.
- 10.2 Alternatively, if he/she cannot attend for a genuine reason, and are not willing for his/her representative to act on their behalf and is not able to provide a written response, it may be reasonable to arrange another meeting. However, if the employee fails to attend or provide a written response for a second time, management can make a decision based on the facts and evidence gathered during the review period in the employee's absence.

## Appendix A: Hearing Format

The conduct of the hearing will be the responsibility of the Headteacher or one of the members of the Governors' Panel, elected to act as its Chair. The order of proceedings can be adjusted to suit the circumstances if necessary, providing the overall principles, aimed at securing a fair hearing, are adhered to.

The Chair will introduce all those present, ensuring it is clear in what capacity people are attending the hearing, outline the purpose of the hearing and any procedural arrangements.

### 1. Management case

Management present their case first. Management can then be questioned on the presentation by:

1. The other side (employee's)
2. Chair
3. Other members of the panel
4. Any adviser to the panel.

Any follow up questions after this round of questioning should be routed through the Chair for their agreement.

**When the management case is completed then it is for the other side to present their case.**

### 2. Employee's case

The employee and/or their representative will present the case. They can then be questioned on the presentation by:

1. The other side (management)
2. Chair
3. Other panel members
4. Any adviser to the panel.

Any follow up questions after this round of questioning should be routed through the chair for their agreement.

**The chair should ensure that questions asked are not leading questions and that either side are not making statements when they should be asking questions and vice versa.**

### 3. Summing up

The chair should agree with both sides how much time is required to prepare a closing statement.

- The manager may make a closing statement
- The employee (or their representative) may make a closing statement.
- No new evidence should be introduced at this stage.

### 4. Decision

The chair will inform the employee **in writing** of the outcome of the hearing in line with the timescales set out in the school policy.

### 5. Right of appeal

Inform employee of right of appeal against any formal decision. The appeal must be lodged with the clerk to the governors in line with the timescales set out in the school policy. The decision of the panel to be confirmed in writing

## Appendix B: Appeal Hearing Format

The conduct of the appeal hearing will be the responsibility of one of the members of the Governors' Appeals Panel, elected to act as its Chair. The order of proceedings can be adjusted to suit the circumstances if necessary, providing the overall principles, aimed at securing a fair hearing, are adhered to.

The Chair will introduce all those present and outline the purpose of the hearing and any procedural arrangements.

### 1. Employee's case

The employee and/or their representative will present the grounds for the appeal. The employee can then be questioned on the presentation by:

1. The other side (management side)
2. Chair and other panel members
3. Any adviser to the panel.

Any follow up questions after this round of questioning should be routed through the chair for their agreement.

**When the employee's grounds for the appeal have been completed then it is for the other side to present their case.**

### 2. Management case

Management (Chair of the hearing panel and/or investigating manager) present their outline explaining why the original decision was correct. Management can then be questioned by:

1. The other side (employee's side)
2. Chair and other members of the panel
3. Any adviser to the panel.

Any follow up questions after this round of questioning should be routed through the chair for their agreement.

**The chair should ensure that questions asked are not leading questions and that either side are not making statements when they should be asking questions and vice versa.**

### 3. Summing up

The chair should agree with both sides how much time is required to prepare a closing statement.

- The employee (or their representative) may make a closing statement including any mitigating circumstances
- The manager may make a closing statement
- No new evidence should be introduced at this stage.

### 4. Decision

The chair will inform the employee in writing the outcome of the hearing in line with the timescales set out in the school policy.

### 5. Right of appeal

Inform employee of there is no further right of appeal.

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To obtain more information on the **Model Capability Procedure**, please contact:

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