London Borough of Hounslow

Capability Policy and Procedure for School Based Staff

Issued by Schools & Commercial HR Team
Effective from 01 January 2022

1 Introduction

1.1 A fully competent workforce and a strong performance management system is key to the ability of the school to provide a first-class education to our children and young people. This policy aims to provide a framework that is fair, equitable and transparent for improving and maintaining employee performance.

1.2 This policy is to be used when an employee's performance is identified as falling below an acceptable level by reason of capability. It sets out a formal procedure to be followed when regular supervisory meetings have not brought about the required improvement.

1.3 For the purposes of this policy, the definition of 'Capability' refers to the ability, aptitude, knowledge, and skills required by an employee to undertake their role to the required standard. This policy and the procedures set out within therefore address the situation where an employee is failing to reach a satisfactory level of performance in their role.

1.4 For the purposes of this policy, the term 'governing body' refers to the appropriate bodies in all schools; including Local Authority maintained schools, academies, and free schools.

1.5 Separate policies exist for dealing with disciplinary matters and management of absence concerns. Such concerns should be addressed under the appropriate policy.

1.6 This policy has been consulted on with the trade unions recognised by the school and is commended to the school's governing body for adoption.

2 Scope

2.1 This policy applies to all teaching and non- teaching employees at the school.

2.2 This policy does not apply to Early Career Teachers (ECTs), who are subject to the 2021 induction regulations: Induction for early career teachers (England) - GOV.UK (www.gov.uk)

2.3 This policy does not apply to employees who are still in their probationary period. Where there are concerns in relation to the performance and of an employee who has not yet completed their probationary period, the Schools' Probation Policy should be consulted.

2.4 This policy and the procedures set out within do not apply to agency workers, including supply teachers or staff working under contract arranged by external providers. Concerns or issues relating to the performance of agency workers should be referred directly to the individual's employing agency.

3 Summary Overview of the Policy

3.1 A robust performance management system involves two processes which run in parallel:

- The informal day to day management of employees and teams by line managers and
- The formal framework within which an employee's performance is assessed and improved, as provided by this policy.

An overview of the full process is set out in the diagram shown in **Appendix 1** of this policy.

3.2 The two processes are mutually supportive and rely on the same factors for success, namely:

- Monitoring of performance against standards or targets
- Feedback on performance
- Delivering negative feedback objectively and constructively, with supporting evidence and allowing the employee to respond
- Coaching training or other support to facilitate improvement

- Reviewing performance
- Recourse to further action if poor performance continues.

3.3 All employees are subject to the ordinary management processes surrounding their performance. This means that line managers are responsible for setting realistic and measurable standards of performance and for explaining these standards clearly to staff. Line managers may from time to time have discussions about performance with one of their reports. Although these discussions are not part of a formal process, written records should be kept.

3.4 The Code of Conduct sets out that all employees are required to undertake all duties within their role effectively. It is the responsibility of all employees to recognise when their own performance has fallen below the required standard, and to attend training and discuss training needs with their line manager should they identify this.

3.6 There are two approaches under the capability procedure:

(i) The standard approach

This will commence with the employee being placed on an Initial Support Programme (ISP), and should concerns continue, the employee being progressed through further stages of the process; stage 1, stage 2 and capability hearing.

(ii) Fast track approach

An employee will be placed on the fast track process where in cases of extreme underperformance where their level of their performance poses a serious threat to students' education or in the case of all school employees their continued underperformance has severe consequences or carries a reputational risk to the School and/ or the Council.

4 The role of the Schools & Commercial HR Team

4.1 The School & Commercial HR Team's role includes the following:

- Providing advice to Headteachers and school managers on informal action.
- Provide advice to Headteachers or Chairs of Governing Boards on taking formal capability action.
- Ensuring that Governors, Headteachers and members of the school management team are aware of the legal aspects and any other sensitive/complex aspects of a case.
- Supporting managers with the compilation of PIPs, and other documentation, including a management case to be used in a formal capability hearing.
- Attendance at capability hearings to provide support to managers presenting to a capability panel or as a HR adviser to the panel. (Please note that HR representatives are advisors to the panel and are not panel members).
- Advising on letters which confirm the outcome of meetings and hearings.
- Advising on interpretation of this and other relevant HR policies.

5 Role of Trade Unions

5.1 The role of the Professional Association/Trade Union representative or work colleague is to:

- Confer with the employee before and after formal meetings and hearings.
- Assist the employee in preparing their mitigation for a meeting or hearing.
- Accompany an employee to a formal meeting or hearing.

- Respond on behalf of the employee to any views expressed during formal meetings and hearings.
- Present and sum up the employee's case at a hearing, as agreed with the employee
- Ask for adjournment if necessary at a formal meeting or hearing.

5.2 The Professional Association/Trade Union representative or work colleague is not permitted to:

- Answer questions on behalf of the employee, unless the employee has expressed consent.
- Address the meeting if the employee indicates that he/she does not wish them to prevent the case from being explained.
- Prevent any other person at the meeting from making his/her contribution.

6 Initial Support Programme (ISP) – (Informal Stage)

6.1 At the start of any capability procedure there should be clear tangible evidence that the employee's performance will be falling short of the required standards. In order for this process to have been carried out fairly, the line manager will have held conversations with the employee in relation to the shortfall in their performance in one to one meetings, and as part of the overall performance management process. These concerns should have been set out in writing to the employee advising them that their performance is not at the required standard, and that failure to make the required improvements may lead to them being placed on an ISP, and/or them potentially facing formal capability action. This should therefore not come as a surprise to the employee.

6.2 The employee should be invited to an ISP meeting with the line manager to discuss their performance. The employee should be given a minimum of **one working days' notice** of this meeting.

6.3 There is no right to be accompanied by a trade union representative or work colleague at this initial meeting or in any meeting held in the initial support programme phase, as this does not form part of the formal Capability process in which a formal penalty, such as a warning can be issued.

6.4 The line manager will review the evidence of inadequate performance at the meeting and discuss reasons why this may have come about.

i.5 There are two possible outcomes of the meeting:

(i) No further action will be taken if there is insufficient evidence of poor Performance, or:

(ii) The employee will be placed on an initial support programme to help raise their performance to the required level.

6.6 If the employee will be placed on an ISP, the line manager will confirm the aspects of performance that need to be improved, how that improvement will be measured, what support will be put in place to help the employee improve and how often progress will be reviewed. If deemed appropriate, an occupational health referral may also be considered should there be concerns that ill health has been a contributing factor to poor performance. The notes from this ISP meeting will be pulled together in both a performance improvement plan (PIP), and in notes or a detailed outcome letter of the meeting. For guidance on the setting of SMART targets, please see the accompanying guidance document on this.

6.7 The line manager will confirm the outcome of the support plan in writing to the employee within five working days. The initial support programme starts when the employee receives their written plan.

6.8 Progress against the PIP will be regularly reviewed with the employee, ideally in weekly meetings.

6.9 The ISP will normally last between **four to six working weeks**, depending on the circumstances.

6.10 The final review meeting in this phase will be a review of the evidence of the employee's progress. There are two possible outcomes of the meeting:

(i) No further action will be taken if there is evidence that the employee's performance has now reached the required standard, or:

(ii)The employee will be invited to a formal meeting and matters will be progressed to the next stage.

6.11 If action ends at this stage, this will be confirmed in writing to the employee. A note will be placed in the employee's personnel file. **If performance declines within a two-year period after the meeting**, the line manager has the discretion to reinstate the formal capability process as set out in **sections 7 to 9** of this policy, at the point of the procedure that the employee would have been on if there had been no break in the procedure. After this point, all such paperwork will be disregarded.

6.12 If the decision is taken to proceed to the formal capability stage, this will be confirmed in writing to the employee. It will also be made clear to the employee if they are being placed on the fast track procedure or the normal procedure.

7 Formal Capability Process

7.1 After the initial support programme, if a decision is made to continue formal action under the capability procedure, the employee will be placed on the standard approach unless the level of underperformance requires the fast track approach (please see **section 8** of this policy). An overview of the formal capability process is set out in this section.

7.2 An employee has the right to be accompanied and supported during each of the formal stages of the Capability Procedure where formal action may be taken against them under this policy, or at any appeal hearing. The employee may be accompanied either by a trade union representative or workplace colleague.

Stage 1

7.3 The employee should be invited to a Stage 1 Formal Meeting with their line manager to discuss their performance. The employee should be given **a minimum of five working days' notice** of the meeting.

7.4 At the meeting, the line manager will advise the employee about the areas of their performance which are not at the required standard. The employee and their representative will have the opportunity to advise on any mitigation that the employee may wish to put forward. The following should be discussed:

- Identify the professional shortcomings
- Give clear guidance on the improved standard of performance needed to end the capability procedure

- Explain the support that will be available – if any further support is required after the intensive measures that were put in place in the initial support programme
- A new or revised PIP and SMART targets may be set at this meeting.
- Any additional training or supportive measures which have not yet been considered may also be implemented.
- Explain how performance will be monitored over the following four weeks
- Agree a date for the review meeting where progress will be evaluated
- Make it clearly understood that failure to improve could lead to dismissal
- The employee will be placed on the first review period**, normally of between four to six working weeks, depending on the circumstances**.

7.5 At the end of the review period, the employee will be required to attend a Stage 1 Review Meeting. The employee will be given **five working days'** notice of the formal review meeting, where progress will be assessed.

7.6 If progress is inadequate, the employee will normally be given a **First Written Warning a**nd will then proceed to Stage 2 of the process. **The first written warning will remain live on file for 12 months and will be disregarded after 12 months' satisfactory performance.**

Stage 2

7.7 Should an employee fail to make the required improvements to their performance at Stage 1, they will be placed on Stage 2 of the formal process. The employee will be advised at the end of Stage 1 both verbally and in writing by the line manager that they will progress to Stage 2 of the process and will be invited to attend a Stage 2 meeting.

7.8 The employee should be invited to a Stage 2 Formal Meeting with their line manager to discuss their performance. The employee should be given a minimum of **five working days'** notice of the meeting. The format of the meeting will be the same as set out in **para. 5.4.**

7.9 Upon the conclusion of the Stage 2 meeting, the employee will be placed on the second review period, **normally of between four to six weeks, depending on the circumstances.**

7.10 At the end of the Stage 2 review period, the employee will be given **five working days'** notice of a formal meeting, where progress will be assessed. If progress is inadequate, the employee will normally be given a **Final Written Warning** and proceed to the third and final review period.

7.11 **A Final Written Warning will remain on file for 24 months and will be disregarded after 24 months satisfactory performance.** The employee will also be advised that they will be placed on a final review period, **normally of between four to six weeks**, **depending upon the circumstances**. Should their performance continue to fall below the required standard, they may be referred to a formal capability hearing.

Final Review Period

7.11 At the end of the third review period, the employee will be given **five working days'** notice of a formal meeting, where progress will be assessed. If progress is inadequate, the employee will normally be advised that their underperformance is serious enough to warrant their being referred to a capability hearing. **The process to be followed for capability hearings is set pout in section 9 of this policy.**

8 Fast track process – In cases of extreme underperformance

8.1 Staff will be placed on the fast track procedure, where the level of their **performance poses a serious threat to students' education a significant threat to the reputation of the School or to the Council.** The main differences between the standard stage of formal action under the capability procedure and the fast track procedure are that the fast track procedure has one less formal stage and does not include an initial support programme.

8.2 In deciding whether an employee should be placed on the fast track procedure advice must be taken from the Schools & Commercial HR Team.

8.3 The staff employee will be given **five working days' written notice** of a meeting and notified of their right to be accompanied by a trade union representative or work colleague.

8.4 At the meeting the line manager will review the evidence of the employee's under performance with them. The employee will be invited to explain any mitigating circumstances.

8.5 The meeting will then be adjourned while the line manager comes to a decision. Wherever possible the employee will be advised of the decision as soon as possible on the same day as the meeting.

8.6 There are two possible outcomes of the meeting:

(i) The procedure is ended at this stage if the line manager believes that the mitigating circumstances that gave rise to the underperformance can be rectified satisfactorily so that performance will reach the relevant standard.

(ii) The employee is issued with a Final Written Warning. This warning will **remain live on the employee's file for 24 months.**

8.7 If a Final Written Warning is issued, the line manager should use the remainder of the formal meeting to:

- Identify the professional shortcomings.
- Give clear guidance on the improved standard of performance needed to end the capability procedure.
- Explain the support that will be available – if any further support is required after the intensive measures that were put in place in the initial support programme.
- Explain how performance will be monitored over the following four weeks.
- Set a further review period **lasting for four to six weeks.**
- Agree a date for the final formal meeting where progress will be evaluated.
- Make it clearly understood that failure to improve may lead to dismissal.

8.8 At the end of the review period, the employee should be invited to a review meeting. The employee should be given a minimum of **five working days'** notice of this meeting. This meeting will be a review of the evidence of the employee's progress. There are two possible outcomes of the meeting:

(i) No further action will be taken if there is evidence that the employee's performance has now reached the required standard, or:

(ii)The employee will be invited to a formal Capability Hearing.

8.9 If action ends at this stage, this will be confirmed in writing to the employee. A note will be placed on their personnel file. If performance declines within a two-year period after the meeting, the line manager has discretion to reinstate the capability procedure at the point the employee would have been on if there had been no break in the procedure. After two years, all such paperwork will be disregarded.

8.10 If the decision is taken to proceed to a capability hearing, the format set out in **section 9** of this policy will apply.

9 Capability Hearing

9.1 This is a formal hearing which may result in dismissal should the employee's performance be deemed to fall short of the required standard.

9.2 The employee will be invited to attend the capability hearing, being given **at least five working days'** notice. The invitation letter will explain the purpose of the hearing, which will be to consider the employee's competency to carry out the job for which they are employed and whether there are grounds for dismissal on the grounds of capability.

Non-attendance by Employee

9.3 If the employee does not attend the hearing, it may either proceed in their absence or be adjourned, taken into consideration the reasons for the non-attendance. The panel chair may decide that a postponement of the hearing should be granted and will advise of a new date for the hearing, which will usually be **within 5 working days** of the initial date of the hearing.

9.4 If non-attendance is due to a medical reason, the employee must inform the school as soon as possible. Written confirmation together with a medical certificate will be required. The employee may also be referred to Occupational Health to ascertain whether they are fit to attend the hearing.

9.5 If it is decided to adjourn the disciplinary hearing, then a new date and time will be arranged. If the employee again fails to attend, the hearing will normally go ahead in their absence after considering all the circumstances of the case. This should be confirmed in the letter to the employee setting out details of the new date and time for the hearing. Where an employee is unable to attend, they may arrange for representation at the hearing in their absence or make a written submission.

9.6 As a capability hearing could result in the dismissal of an employee, it should be chaired by the Headteacher/Principal. Where the Headteacher/Principal has been involved in the capability process, the hearing may be chaired by the schools' Chair of the Governing Board. The panel will consist of members of the Governing Board and/or appropriate members of the school's management team. A member of the Schools and Commercial HR Team may also be present as an adviser to the panel.

9.7 The employee's line manager or the manager who had undertaken the ISP, Stage 1 and 2 meetings will attend the hearing to present the management case. In some cases, where a member of the Schools and Commercial HR Team had attended the Stage 1 and/or 2 meetings, they may also attend with the presenting manager in the role as HR support.

The Capability Hearing

9.8 The arrangements for and format of a capability hearing is as follows:

- The Chair of the Panel reiterates the purpose of the hearing
- Introductions and roles during the hearing to be given by all parties
- The manager will first present their case, setting out evidence that clearly identifies where the required level of performance has not been met, the support programme offered and calling any witnesses (if applicable)
- Questions to be put to the presenting manager and their witnesses by the Chair and panel and then the employee
- The employee and/ or their representative to present their case, calling witnesses (if applicable)
- Questions to be put to the employee by the Chair and the panel and then the presenting manager
- Management and the employee will be asked to sum up their respective cases with management summing up first
- Both sides will then leave the Hearing whilst the Panel considers the information presented

9.9 An employee may choose to submit written evidence prior to the hearing. This must be provided to the Headteacher/Chair of the Governing Board Capability Hearing Panel **at least 5 working days** before the date of the hearing and include the names of any witnesses (if relevant) whom the employee proposes to call. It is for the employee or their representative to organise for their witnesses to attend the hearing. Where the witnesses are school employees, the Headteacher will arrange for them to be released from duties.

Decision

9.10 The decision taken by the panel will be one of the following:

(i) An acceptance that the employee has made significant improvements.

The letter of notification will advise that satisfactory performance must be maintained for a period of **at least 12 months**. Any further lapses would result in a capability hearing being reconvened.

(ii) A final opportunity to improve performance.

This would normally be where some improvement has been made and the panel chair takes the view that a further short review period would achieve the required level of performance. The review period will **not exceed 6 to 8 weeks**, and will be determined by the panel chair, and will involve monitoring by the line manager. The written letter of notification will issue a **Final Written Warning** confirming that a failure to meet the required standards will lead to the employee's dismissal. Should this occur, the capability panel will be reconvened.

(ii) To dismiss the employee with notice.

9.11 If the decision is made at the final capability hearing to dismiss the employee, the decision will be confirmed to the employee in writing, along with the reason for it. The letter confirming the outcome of the hearing must be sent to the employee **within five working days** of the date of the hearing. The effective date of termination will be the date when the letter is written if that is later than the date of the formal meeting. Dismissal will be with contractual notice, which will not normally be worked.

10 Right of Appeal

10.1 An employee has the right to appeal against any formal disciplinary action that has been taken against them under this policy from Stage 1 to a capability hearing. Formal action includes all action ranging from being issued with a First Written Warning to and including dismissal.

10.2 An appeal may be lodged under one or more of the following grounds:

(i) **Procedure:** Where failure to follow the correct procedure has had a material effect in the decision made by the panel.

(ii) **The facts of the case:** Where the panel formed a conclusion based on a material point of fact, which no reasonable person would have reached.

(iii) **The sanction imposed was disproportionate:** Where no reasonable panel would have decided on the sanction imposed, given the circumstances of the case.

(iv) **New Evidence:** New evidence has become available that could not have reasonably been presented to the panel at the time of the hearing, and which would have had a material effect on the outcome of the hearing.

Lodging an appeal

10.3 Appeals must be lodged in writing to the Chair of the Governing Board **within 10 working days** of the date of the outcome letter from a formal meeting or capability hearing.

10.4 The employee should set out the grounds of their appeal in writing, providing as much information as possible. Any accompanying information should be included either with the written appeal or no later than **five working days** ahead of an appeal hearing to allow all parties the opportunity to carefully consider the information.

Appeal hearings

10.5 Appeal hearings should take **place within 10 working days** of the date of receipt of the employee's written appeal. In cases where it is not possible to meet this timescale, for example, logistical reasons or availability of panel members, the employee should be informed of this and the reason for the delay.

10.6 Appeals will be heard either by the Chair of the Governing Board or a senior member of management who has had no prior involvement in the case. The appeal panel will also consist of at least two other ordinary panel members and a HR representative who have had no prior involvement with the case. The chair of the original capability review panel will be the presenting manager at the appeal hearing and will be required to respond to the points of appeal and the reason for their arriving at the disciplinary sanction.

10.7 The format of the appeal hearing, and right of the employee to be accompanied and call witnesses will be the same as the format for the initial capability hearing as set out in **paras. 9.8 to 9.9**. The only difference will be that the appellant will present their case to the appeal panel first, and then the presenting manager will present their case afterwards.

11 Withholding Increments

11.1 Employees who are subject to the informal process who have not reached the maximum spinal column point of their grade should be informed that their next increment point may be withheld if they fail to achieve the required improvement within the agreed review period.

11.2 Any employee subject to the formal process who has not reached the maximum spinal column point of their grade should be advised that their next increment point will be withheld, and that failure to make the required improvements may also result in increment points being withheld for subsequent performance years, in addition to action being taken against them under this policy.

11.3 Any decision to withhold an increment must be supported by clear evidence of a failure to reach the required standard.

12 References

Teaching employees

11.1 When providing references or responding to reference requests for employees who have been subject to formal capability action, the School and Local Authority have a responsibility to comply with The School Staffing (England) Regulations 2012.

11.2 This legislation requires that if a teaching employee has been subject to formal capability action within two years of the date of the reference request being made, the school is legally obliged to disclose this on the reference, and to provide details of the concerns. This also includes references provided as part or following the conclusion of a settlement agreement.

11.3 For clarity, this is action taken under this policy from a formal Stage 1 up to and including action taken as a consequence of a capability hearing.

11.4 The requirement to disclose formal capability action on a reference also applies to teaching employees who have left the school. If a reference request is made within two years of formal capability action being taken (as in 11.1), the school will be obliged to disclose this.

Non-teaching employees

11.5 Although this legislation does not cover support staff, the school has a duty to provide any prospective new employers with an accurate, balanced and fair reference.

11.6 Capability action taken against a member of support staff can be cited on a reference where there were genuine substantial concerns and where action was taken from Stage 1 up to and including a capability hearing.

Summary Overview- Schools' Capability Procedure



