



CAPABILITY POLICY

November 2024

About this policy

Purpose

This chapter describes the Capability policy and procedure. Refer to the table of contents, below, for a full list of topics covered.

Contents

This document covers the following topics:

1. Policy statement
2. Scope of the policy
3. The policy
- 3.1. Applying the policy
- 3.2. Headteacher performance
- 3.3. General principles
- 3.4. The right to be accompanied
- 3.5. Confidentiality
- 3.6. Timeframe
- 3.7. Sickness absence
- 3.8. Grievance during the Capability procedure
4. Summary of roles and responsibilities
- 4.1. Managers/Headteachers
- 4.2. Members of staff
- 4.3. Hackney Education Human Resources
5. Informal stage
6. Formal stage
- 6.1. Right to be accompanied at formal stages
- 6.2. Formal interview
- 6.3. Written warning
- 6.4. Final written warning
- 6.5. Capability Hearing
- 6.5.1. The hearing
- 6.5.2. Dismissal
- 6.5.3. Regulations governing dismissal
- 6.6. Appeals
7. Monitoring the Capability procedure
8. Toolkit
9. Further information

1. Policy statement

The purpose of this Capability framework is to ensure that pupils and students receive their entitlement to a high-quality educational provision. It requires that the educational offer made by school management, teachers and support staff meets pupil and student needs, and aims to provide a fair and consistent process to bring about improvements in the accuracy and quality of work, where improvement is needed.

Governors and Headteachers have a right to expect high-quality performance from staff, and members of staff have the right to expect appropriate support for their present and continuing professional development (CPD) needs.

2. Scope of the policy

This policy covers all members of staff who are employed within a school on a permanent, fixed-term or secondment basis, including Headteachers and Deputy Headteachers, with the exception of support staff on probation who are covered by the Probation policy and Early Career Teachers (ECTs) who are covered by the ECT policy. For the avoidance of doubt, this policy does not apply to agency workers.

3. The policy

3.1. Applying the policy

This policy and procedure should be used when the quality of work of a member of staff fails to meet an acceptable standard. However, if poor performance is due to wilful intent, sickness or disability, or is the result of drug or alcohol use, it may be necessary to apply this policy in conjunction with other relevant Human Resources (HR) policies. Guidance and advice should be sought from HR at Hackney Education.

In applying this procedure, it is important to distinguish between capability and disciplinary matters. Generally, the Disciplinary policy and procedure applies when a member of staff is capable but underperforming because of carelessness or lack of motivation/cooperation. The Capability policy and procedure applies when acceptable performance standards are not met due to professional incapability, either through ill-health or the absence of necessary skills, experience and knowledge.

3.2. Headteacher performance

Where there are concerns regarding the performance of the Headteacher, no action under this policy should be initiated without reference to the Head of HR at Hackney Education (the local authority). The Chair of Governors must seek advice and guidance from the Head of HR.

If the LA has serious concerns about the performance of a Headteacher, it must send a written report to the Chair of the Governing Body, at the same time sending a copy of the

report to the Headteacher. The Chair must notify the LA in writing of the action proposed in the light of the report.

3.3. General principles

The following general principles apply:

- The procedure will be applied objectively according to the work and circumstances of the member of staff concerned and is designed to ensure that all members of staff are treated consistently and fairly, without discrimination on grounds of gender, race, disability, age, sexual orientation, religion or any protected characteristic.
- Reasonable adjustments will be made to working arrangements for staff with a recognised disability, to ensure that no disabled person is placed at a disadvantage.
- The Headteacher will define the standards of work required and will communicate them clearly to members of staff.
- It is important that monitoring and observations, at all stages of the procedure, should be conducted within reasonable intervals to allow the member of staff to absorb and apply advice, guidance or new knowledge.
- An informal approach of coaching and counselling should be adopted before formal action is implemented. However, for dealing with a serious Capability problem, it may be appropriate to commence the formal stage at the earliest possible opportunity.
- Any decision to initiate the formal stages of this procedure will be taken only after full investigation through the school's Appraisal policy and with proper safeguards for the member of staff.
- Each member of staff has the right of appeal against any action taken against them at the formal stages of the procedure.

3.4. The right to be accompanied

Management and staff are encouraged to resolve issues informally if at all possible, without the need to involve HR or unions. It is agreed that, throughout the stages of this policy, a member of staff, teaching or support, may be represented at all meetings by either a trade union representative or by a work colleague, always providing that the person does not have line management responsibilities for the member of staff. The member of staff should be informed that this is the case, by the manager, at least five working days before such a meeting is to take place.

Accompanying persons are entitled (with consent of the member of staff) to:

- Put the case forward on behalf of the member of staff.

- Confer with the member of staff during the hearing.
- Sum up the case for the member of staff.
- Respond on behalf of the member of staff to any view expressed at the hearing.

However, accompanying persons are not entitled to:

- Answer questions on behalf of the member of staff.
- Address the hearing if the member of staff does not want them to.
- Prevent the school from explaining the case, or any other person at the hearing contributing to it.

3.5. Confidentiality

Confidentiality should be maintained by all those involved, including the member of staff, at all stages throughout the Capability procedure by ensuring that only those people who need to know have access to details. No other member of staff should be informed that a colleague is subject to action under the Capability procedure. While respecting confidentiality, it is important that the member of staff is free to discuss issues with their trade union representative or work colleague who may be able to assist or support them through what is acknowledged to be difficult circumstances. Written records of capability issues will be treated as confidential and kept no longer than is necessary in accordance with the Data Protection Act 1998.

3.6. Timeframe

The timeframe adopted will be in accordance with the seriousness of the lack of capability of the member of staff. Consideration will be given to whether the issue is a specific or broader professional difficulty, or a very recent concern or spanning a longer period of time.

As a general rule, if a member of staff has not improved to the necessary standard within six weeks of commencing the formal procedure, a capability hearing will be convened.

However, in circumstances where the education or health and safety of the pupils is jeopardised, the period given for improvement may be reduced.

3.7. Sickness absence

Reasonable steps should be taken to enable attendance at meetings and hearings, and certified absence and entitlement to sickness pay do not of themselves represent grounds for deferring this framework.

A member of staff pleading unfitness to attend a meeting or hearing must provide a medical certificate stating physical incapability of attending and/or inability on mental or psychological grounds to participate reasonably in the proceedings. Should the member of

staff be unable to provide a certificate specifically justifying their absence from a capability meeting, failure to attend may constitute a disciplinary offence.

The Chair of the Panel will consider whether the meeting or hearing should go ahead in the absence of the individual. A considerate, sympathetic approach should be adopted but in general any justification for delay should be discussed with Occupational Health (OH) and HR.

If a meeting or hearing is to go ahead in the absence of the member of staff, the member of staff and the relevant trade union representative or work colleague should be notified, giving at least 5 working days' notice of the meeting. In such circumstances a full account of the meeting or hearing should be provided to the member of staff in writing, confirming any decision taken.

If sickness absence occurs before the commencement of the formal Capability procedure, the case should be referred immediately to OH to assess the person's health and fitness for continued employment. Short absences should not delay any part of the formal Capability procedure.

3.8. Grievance during the Capability procedure

During the Capability procedure a member of staff might raise a grievance that is related to their case. The statutory procedures in relation to this situation are complex and the procedure to be followed will primarily depend on whether the outcome of the procedure could be dismissal or action short of dismissal (excluding warnings or paid suspension).

Where a grievance is raised in direct response to the Capability procedure, the Capability procedure should be expanded to include the grievance issue, dealt with during the investigation and/or at the appeal hearing. If the findings are that the grievance issue should "stand alone" then the Grievance procedure should be undertaken. Otherwise the Capability procedure takes priority.

As a general rule:

- Where the employee's grievance relates to (contemplated) dismissal or action under the Capability procedure, the appropriate forum for addressing concerns is the investigation or appeal hearing under the Capability procedure.
- Where an employee claims that action under the Capability procedure is in itself an act of discrimination, it should be pursued under the Grievance procedure as a separate course of action.

Advice should be sought from HR for the appropriate course of action in the specific circumstances.

4. Summary of roles and responsibilities

4.1. Managers/Headteachers

In respect of any member of staff they manage, all managers have responsibility to:

- Ensure standards of work are established consistently for every member of staff and that current and agreed job descriptions are in place.
- Advise, coach and support staff to ensure the role and the required standard of performance are understood.
- Ensure appropriate induction and CPD is undertaken.
- Set and monitor standards of performance and provide constructive feedback to assist staff in achieving the required levels of performance.
- Ensure staff understand the Capability procedure and their rights under the procedure if it were to be applied.
- Take action promptly and ensure that performance problems are addressed within a reasonable period of time.
- Investigate problems of work performance that may lead to formal action under the Capability procedure, gathering evidence of the shortfall and of the support provided.
- Keep written records of performance concerns and actions taken at all stages of the Capability procedure.
- Ensure the correct procedures are followed and that all correspondence regarding the capability concerns are stored in line with the Data Protection Act 1998.
- Provide current and relevant data to the LA for monitoring purposes (see Monitoring the Capability procedure on page 16).

4.2. Members of staff

- Demonstrate the level of commitment required to improve performance, including taking all reasonable steps to maintain/update skills levels.
- Achieve an acceptable and sustained level of performance.
- Seek help with any work problem.
- Understand the Capability policy and procedure.
- Co-operate with any investigation into capability, and any further action that may result from such an investigation.
- Attend all relevant counselling, support or review meetings.

- Treat all information discussed during the Capability procedure as confidential, and not disclose such information to any third party (except for obtaining legal advice).
- Inform the appropriate person, in writing, of any wish to appeal against a decision taken under the formal stage of this procedure.

4.3. Hackney Education Human Resources

- As the LA's representative, attend any hearing which may result in the dismissal of a member of staff.
- Provide high level advice as appropriate to the Chair of Governors if the capability of a Headteacher is to be considered.

5. Informal stage

An informal approach of coaching and counselling should be adopted before formal action is implemented. Managers should meet with the member of staff to discuss what areas of their performance need to be improved and what support will be provided. A performance improvement action plan template should be used. Managers can decide over what timescale the informal stage will be monitored, however this is usually around 4 – 6 weeks.

6. Formal stage

6.1. Right to be accompanied at formal stages

A member of staff has the right to be accompanied by a trade union representative or colleague at formal stages of this procedure. If the accompanying person is not available at the proposed time, the member of staff or trade union representative may request a reasonable alternative time, within 5 working days. The five day time limit may be extended by mutual agreement.

6.2. Formal interview

If the "informal" stages of the Appraisal procedure do not result in the desired improvement in performance, it will be necessary to move to the formal stage. The formal stage may also be invoked before any informal discussions or counselling, where it is considered appropriate due to the seriousness of the concerns.

The formal stage will be initiated by the Headteacher/manager already dealing with the matter at the informal stage, and will deal with the performance concerns in a structured and objective manner.

A formal interview will be organised with the member of staff and will normally involve the Headteacher/manager, the member of staff and, if requested, the trade union representative or work colleague who does not have any line management responsibility for the member of staff. HR may also be in attendance.

The member of staff must have at least 5 working days' notice of the formal interview. The notice must state the nature of the unsatisfactory work performance, and that the member of staff has the right to be accompanied by a trade union official or a work colleague.

The notice should indicate that the purpose of a formal interview is to:

- Decide if the performance has failed to reach the school's standards.
- Determine a course of action that will take into account the needs of the school and the interests of the member of staff.

If it becomes clear that further investigation is needed, the interview should be adjourned for an appropriate length of time to allow this to happen.

The interview may provide new information or put a different slant on evidence collected. In this case, there are a number of options for management:

- Drop the matter - if the member of staff has reached the appropriate level of performance, in which case they are to be informed and a record placed on their personal file.
- Extend the review period to give the member of staff further time to improve performance before taking further formal action.
- Arrange informal counselling (except where this has already been undertaken and there has been no improvement).
- Transfer to a more suitable post, if the member of staff is deemed capable of carrying out a different job.

A decision should be made after all the facts and any representations from the member of staff have been considered. The Headteacher/manager should adjourn the meeting to consider the appropriate option before delivering a decision.

Where continued concern about the standard of performance is justified, a written warning or a final written warning should be issued. The decision taken on which level of warning to issue will depend on the seriousness of the concern.

Note: In cases of particularly serious concern, where the education, health and safety or welfare of a child is in jeopardy, it is possible to move directly to a final written warning. This will invoke an assessment period not exceeding four weeks. Examples of this might be where a teacher's classroom control is so poor that no order can be established to enable teaching to take place, or where all the children under a teacher's care fail to progress in that teacher's lessons. The Headteacher/manager should provide evidence and seek to explain why there are exceptional circumstances and concerns.

Where a warning is to be issued, the Headteacher/manager should use the remainder of the 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 and how performance will be monitored over the following weeks. The Performance Improvement Action Plan template should again be used to record this.
- Depending on the level of warning issued, identify the timetable for improvement and agree a date for the next/final evaluation meeting.
- Make it clearly understood that failure to improve may lead to dismissal.

A letter should be sent to the member of staff soon after the formal interview, confirming the result of any investigation, the main points discussed at the interview, the decision, information about the next stages and possible outcomes if no improvements are forthcoming, and attaching a copy of any warning given.

6.3. Written warning

If performance is still deemed unsatisfactory a written warning will normally be the next step. A written warning should explain:

- The nature of the unsatisfactory performance.
- The improvement/action required and targets set.
- Any training/support to be provided.
- The assessment period.
- Information about the next stages and possible outcomes if no improvements are forthcoming.
- The right of appeal.

A written warning will invoke an assessment period of around six weeks. The warning letter will also make it clear that if the member of staff's performance becomes satisfactory before or by the end of the assessment period, the warning will be disregarded and expunged from the file after twelve months. A report of the warning should be placed on the member of staff's file and they shall be given a copy. The acknowledgement of the member of staff together with any observations/notes of dissent shall also form part of the record.

The first assessment stage should be as follows:

Weeks 1 to 5 Regular observation, monitoring and evaluation of performance, with guidance, training and support as necessary. If at any point during this

stage the circumstances suggest a more serious problem, a decision may be taken to move directly to a final written warning.

Week 6 An evaluation meeting should be organised to assess performance over the previous weeks.

An evaluation meeting will follow the assessment period.

At least 5 working days' notice must be given for the evaluation meeting and the member of staff may be accompanied by a union representative or work colleague. HR may also be in attendance. If the level of performance has been satisfactory and there is confidence that it can be sustained, the Capability procedure can end and a letter from the Headteacher/ manager will confirm this. If some improvements have been made, the meeting could be adjourned whilst further monitoring takes place.

6.4. Final written warning

If performance continues to be unsatisfactory a meeting should be organised and a final written warning issued. The warning should contain all of the information for a first written warning.

The warning letter will also make it clear that if the member of staff's performance becomes satisfactory before or by the end of the assessment period, the final written warning will be disregarded and expunged from the file after twelve months. A report of the warning should be placed on the member of staff's file and they shall be given a copy. The acknowledgement of the member of staff together with any observations/notes of dissent shall also form part of the record.

Formal monitoring, evaluation, guidance and support should continue for a further period, usually a further 6 weeks. Arrangements for this should be explained at the meeting. The member of staff must be told clearly that failure to achieve an acceptable sustained standard of performance may result in dismissal.

The decision and main points of the meeting should be recorded in a letter to the member of staff. Any appeal against a final written warning must be made within 5 working days and must not interrupt the progress of the procedure, unless the appeal decision leads to the matter being reconsidered.

The Second Assessment stage should be as follows:

Weeks 6 to 11 Regular monitoring and evaluation of performance, with guidance, training and support as necessary.

Week 12 A final evaluation meeting should be organised to report the assessment of performance over the previous weeks.

A final evaluation meeting will follow the second assessment period.

At least 5 working days' notice must be given for the final evaluation meeting and the member of staff may be accompanied by a union representative or work colleague. HR may also be in attendance. If the level of performance has been satisfactory and there is confidence that it can be sustained, the Capability procedure can end and a letter from the Headteacher/manager will confirm this. If some improvements have been made, the meeting could be adjourned whilst further monitoring takes place.

If performance is still unsatisfactory after a final assessment period, the member of staff should be told that the matter will be referred to a capability hearing. The result of the assessment, main points of the meeting and date of the capability hearing (if known), should be recorded in a letter to the member of staff.

6.5. Capability Hearing

6.5.1. The hearing

The member of staff should be given at least 10 days written notice before the hearing is to take place (to allow the individual time to arrange to be represented), the date, time and location of the hearing, the details and nature of the capability concerns, and the right to be accompanied by a trade union representative or work colleague. Both parties should present documentation and provide details of relevant witnesses 2 days prior to the hearing. The submission of late evidence (in particular, evidence submitted on the day of the hearing) will only be admitted at the discretion of the hearing panel, and only under exceptional circumstances if there are mitigating circumstances.

At the hearing, the Chair of the Panel will outline the capability concerns, and introduce any witnesses as necessary. The member of staff and/or accompanying person will then be invited to offer explanation, call witnesses if appropriate, or speak in mitigation. The member of staff should be given an opportunity to provide a concluding statement. All parties should be allowed to ask questions throughout the proceedings. In some cases it may be necessary to defer proceedings for further information, and reconvene at a later date.

The panel will adjourn to determine whether or not to dismiss. The decision does not need to be taken immediately if the Headteacher/panel requires additional time to assess all the information; however the member of staff should be notified of the decision as soon as possible after the hearing.

The Governing Body will then confirm the decision in writing to the member of staff concerned. The HR representative from the LA who advised the panel will also advise on the required content of the letter.

6.5.2. Dismissal

Where the decision is taken to dismiss, the letter confirming this must include the reasons for dismissal, the date employment terminates and the right of appeal. Where a Governing Body determines that any person ultimately employed by the London Borough of Hackney should cease to work at the school, notification of the decision and the reasons for it must be sent to the LA. The Director of Education at the LA must then issue the dismissal notice to the employee, confirming the decision made by the Governing body.

If a decision is made to dismiss under this Capability procedure, the date of the dismissal will normally be the date on which the decision is communicated to the member of staff. For example, if the decision is in writing, the dismissal will be effective from the date of the letter. The member of staff would not normally be expected to work notice in such circumstances and may therefore be entitled to payment in lieu of notice in accordance with the contract of employment.

6.5.3 Regulations governing dismissal

Under the Education Act 2002, the Governing Body has overall responsibility for all staff dismissals at the school. With the exception of the dismissal of a Headteacher, it may delegate these responsibilities to the Headteacher, an individual governor or a group of governors with or without the Headteacher.

Where the Headteacher has been directly involved in any Capability procedure which may lead to dismissal of the member of staff, the Governing Body may consider applying alternative arrangements for delegating initial dismissal decisions, which may include decisions being made by an individual governor or group of governors with or without the Headteacher.

Where the Headteacher is not exercising delegated responsibility for dismissal (or the Headteacher is being considered for dismissal) the decision should be delegated to a hearing of at least three governors unless there are not enough governors who have not been involved in any previous action or decision connected with the dismissal. In this case the decision should be delegated to two governors, one of whom will be nominated to chair the hearing. If this alternative arrangement is decided, the Headteacher has a right to attend to offer advice regarding cases involving staff. A representative from HR at the LA will advise the panel on procedural matters and matters of precedent.

Headteachers will normally be expected to lead on all initial staff dismissal decisions and appeals against the decision should be heard by governors. It is recommended that the Headteacher involves other governors in dismissal procedures, for example in hearing representations at a dismissal hearing, but the final decision should be made by the Headteacher.

In community and maintained schools, the Local Authority is ultimately the employer for these education establishments and any decision to dismiss an employee must be confirmed by the Local Authority before it is effective. Therefore, the Director of Education at Hackney Education must issue the dismissal notice to the employee, confirming the decision made by the Governing body. Please see further guidance on Dismissal Procedures in Schools.

The Governing Body should also set up a Staff Appeal Committee, also with a minimum of three members, to hear any appeal against a dismissal decision. The Staff Appeal Committee will be able to overrule the Staff Dismissal Committee.

The membership of the two committees will comprise different members of the Governing Body in each case.

It is also recommended that the hearing should comprise the Headteacher (who will chair the hearing) and at least one governor, other than the Chair of Governors who may be needed to attend any appeal hearing. Again, a representative from HR at the LA will advise the panel on procedural matters and matters of precedent.

Note: Where the Headteacher is exercising delegated responsibility, this cannot be delegated on to another person by the Headteacher.

6.6. Appeals

The Governing Body must give any member of staff against whom an initial dismissal decision has been made, an opportunity to appeal against that decision. This must be delegated to an appeal hearing of at least three governors who have not been involved in any previous action or decision connected with the dismissal. Where there are not enough such governors available, the appeal may be heard by two governors, but there should be no fewer than the number that made the initial decision.

The purpose of an appeal is for the member of staff to request the overturning of a decision, which they deem as unfair or unreasonable, for example because they believe the penalty/action was unduly severe, new evidence has come to light, or the proper procedure was not followed in the original hearing.

Written notice of appeal must be submitted within 5 working days of being notified of the decision and should clearly state the grounds for appeal, as above.

Appeal hearings should be held within fifteen days after receipt of the appeal. Ten days notice of the date of the meeting is to be given to all parties. The Staff Appeals Committee can confirm the decision to remove, impose a lesser penalty or order that no action be taken.

The member of staff should be given 10 days written notification of the date, time and location of the hearing and the right to be accompanied by a trade union representative or

work colleague. Both parties should present documentation and provide details of relevant witnesses 2 days prior to the appeal hearing. The submission of late evidence (in particular, evidence submitted on the day of the appeal hearing) will only be admitted at the discretion of the hearing panel, and only under exceptional circumstances if there are mitigating circumstances.

A representative of the capability hearing and the HR representative from the LA who advised that panel, should attend the appeal hearing to present evidence and the outcome of the panel's decision. Another HR representative from the LA will advise the appeal panel.

During an appeal hearing the member of staff shall be given a full opportunity to state the grounds for their appeal and present new evidence (if any). All parties should be allowed to ask questions throughout the proceedings.

Once the relevant issues have been thoroughly explored, the appeal hearing will be adjourned in order for a decision to be taken. The decision does not need to be taken immediately if the panel requires additional time to assess all the information; however the member of staff should be notified of the decision as soon as possible after the hearing.

The Governing Body will then confirm the appeal decision in writing to the member of staff concerned. The HR representative from the LA who advised the appeal panel will also advise on the required content of the letter.

The decision of the appeal panel will be final and binding on all parties concerned. No further appeals are allowed and there is no further recourse under this procedure.

It is the responsibility of the school to retain all relevant records for a period to be determined by the panel. The appeal hearing panel will inform the LA of the outcome of the appeal.

7. Monitoring the Capability procedure

This policy will be regularly monitored to ensure that the purpose of the policy is being achieved, those using the procedure abide by the operating principles and procedures, and that the standards expected of school management and staff are being achieved.

To comply with the specific employment duty as set out in the Race Relations Act 1976 (Statutory Duties) Order 2001, Hackney Education will monitor, by reference to racial groups, the numbers of staff from each such group who are subject to the formal Capability procedure and publish the results of its monitoring on an annual basis. In addition, HR will also monitor use of this procedure by gender and age.

8. Toolkit

Related policies

Probation policy

Induction policy

Disciplinary policy and procedure

Appraisal policy

Grievance

9. Further information

Further information and advice may be obtained from your HR service provider with regard to the day to day management and early stages of capability management, and from HR at Hackney Education where a meeting or hearing may potentially lead to dismissal.