

Treasure House (London) CIC

HR Capability Policy – (Teaching Staff)



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1. Introduction and Objectives

If a Headteacher is implementing a procedure on conduct, performance, health or attendance they should follow the guidance within the procedure on which route to implement.

It is at the Headteacher's discretion to decide under which Schools' Procedure an issue should be properly dealt with. It is the expectation that good management practice will have been put into practice prior to implementation of a procedure and that advice is sought from the Southwark HR.

For the purpose of this document, capability will be assessed by reference to health or any other physical or mental quality. Lack of capability is defined as a situation in which a teacher fails consistently to perform his or her duties to a professionally acceptable standard. Capability concerns may be about a single matter or a number of separate issues.

The procedure is designed to help and encourage all teachers to achieve and maintain standards of capability, efficiency and attendance. The main purpose of the capability procedure is to encourage a teacher, whose attendance and/or performance is unsatisfactory, to improve. All teachers are entitled to expect fair, consistent and reasonable treatment, taking account of equal opportunity considerations. Capability action may, at its extreme, lead to dismissal.

The Headteacher has overall responsibility for promoting and maintaining standards of work performance and attendance. Informal oral warnings and/or guidance interviews do not form part of the formal capability procedure.

The following capability procedure has been established by the headteachers. In establishing these procedures, care has been taken that the procedure is consistent with the Education Act and Regulations, employment legislation and codes of practice, as well as good personnel practice. The headteachers will have the delegated responsibility to make capability action up to initial dismissal decisions, following which there will be an opportunity to appeal to a panel including associate governors.

The associate governors provide an additional oversight to ensure that the provisions of this procedure are applied fairly.

All proceedings under this procedure shall be held in private and shall be confidential.

The submission of a grievance or a complaint of harassment or discrimination, will not suspend the operation of the capability procedure or prejudice the headteachers' right to pursue capability action against a teacher. Concerns relating to the substance and conduct of the capability action taken against a teacher cannot be dealt with under the schools grievance procedure, but should be raised by the teacher during and as part of the capability process

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Teaching Staff Capability Procedures

This procedure is called the Teacher Ill Health Procedure and relates to the health or any other physical or mental quality of teaching staff.

Non-teaching Staff Capability Procedure:

Capability concerns that relate to the work performance and/or attendance of Non-teaching staff are contained in the Non-teaching Staff Capability Procedure.

2. Representation

At all stages of the capability process teachers have the right to be represented or accompanied by an accredited official of a trade union or a work colleague, and should be so advised. The representative or work colleague may address the meeting and/or interview and confer with the teacher but may not answer questions on their behalf. If the teacher is unable to attend in person, they may request for their Union Representative to represent them.

The teacher should make their own arrangements to be represented or accompanied. Where the teacher's chosen Trade Union representative or colleague is not available at the proposed time and date, the teacher may propose an alternative time. If this suggestion is reasonable and falls within 5 working days of the original date, the meeting must be postponed to that date and time.

3. Issues of Capability of Teacher Representatives

Any capability action being contemplated in respect of staff representatives of recognised trade unions within this procedure should not be instigated without the prior involvement of the full-time official or nominee, of the appropriate Trade Union.

4. Scope of procedure

This Teacher Ill Health procedure applies to the health or any other physical or mental quality of all teaching staff who are permanent or fixed

term teachers within the establishment of a school, whether full-time or part-time, in teaching posts, including Headteachers and Deputies. Headteachers should use their discretion on whether to apply the procedure to long term contractors on the school's payroll.

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Teaching staff on daily or hourly supply have a right to be given a performance interview before a decision is reached on termination of their contract resulting from an unsatisfactory attendance record.

5. Initial Stages

5.1 It is recognised that many matters relating to health may be resolved by informal discussion without recourse to any formal procedure and that such discussion forms an important part of school management. It is recommended that such discussion is dealt with as a *guidance interview* (see para 8).

- a) Where capability concerns are identified a Headteacher shall inquire into this matter. If the capability concern(s) relate to the Headteacher, the other Headteacher must appoint a suitable person whether employed at the school or not, to inquire into the matter (the Headteacher or suitable person is hereinafter known as the Investigator).
- b) The Investigator must satisfy her/himself that there is substance to the capability concern(s).
- c) If it appears to the investigator that the concern(s) are insignificant, no further action will be taken.
- d) Ill health concerns should at all times be treated with sensitivity and confidentiality.

5.2 Guidance Interview

Although not part of the capability process, a guidance interview is nevertheless a formal interview held with a teacher. One headteacher would normally undertake the interview and can be accompanied, if required, by a personnel practitioner. The teacher must be advised by letter that either an official of a trade union or a work colleague may accompany him/her at a guidance interview.

The guidance interview should follow the following format:

- 1) outline the areas of concern to the teacher, explain the effect their absence is having and why their attendance and/or performance is not acceptable;
- 2) ask the teacher for an explanation for the area of concern;
- 3) discuss ways of resolving or overcoming the concern, e.g. guidance or training, and consider if other support and assistance are required;
- 4) confirm the standards of capability required and/or any targets to be reached; and
- 5) review any arrangements made at a further interview, if necessary.
- 6) The manager must keep a detailed written record of the guidance interview and any agreed outcomes.

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Note: A guidance interview for poor attendance and/or performance is usually appropriate when sickness absence falls below the standard required by the school. Where a teacher is not at work, through sickness or absence, it may not be possible to fully review targets set in guidance interviews, indeed it may not be possible to hold guidance interviews due to the teacher's poor attendance and/or performance. Efforts should still be made to meet with the teacher to discuss the capability concerns. A meeting may be arranged at the employee's place of work or another suitable venue. Staff have the right to be accompanied. If a meeting is not practical then the capability concerns should be put to the teacher in writing and a written response requested.

5.3 Referral to Occupational Health

- a) Professional advice should always be sought if there is reason to believe that a teacher may have an underlying medical condition, or if the level of sickness absence is calling into question his/her ability to work effectively. Reports from an Occupational Health Service provider provide valuable and independent information to consider in determining an appropriate response to concerns. The Occupational Health Service provider should be made fully aware of the reason for the referral, with examples of health concerns outlined briefly. Details of the duties of the post should also be provided for information as this will assist the Doctor in coming to a view over the teacher's fitness to undertake some or all the duties of the post. The teacher must be advised that a medical referral is being made and be provided with a copy of the referral and any other documents provided.
- b) Following careful consideration of the medical report the investigator will establish from this whether or not the teacher has a related underlying medical reason, and if so, how likely it is to improve and over what period of time. A meeting to discuss the report and the options should be arranged. The options that may be considered after taking advice from the Occupational Health Service provider and reaching a **mutual agreement** with the teacher concerned should include:
- Temporary adjustment to duties/workload/hours with timescales for review.
 - Job redesign (temporary or permanent).
 - Short term reasonable time off to attend guidance and support or other 'Support Service' e.g. for drug or alcohol dependency.
 - Provision of guidance, target setting, training with purpose and time limits stipulated.
 - Medical redeployment or ill health retirement.

5.4 Disability and the Equalities Act 2010

The Equalities Act 2010 (EA) (which replaced the Disability Discrimination Act) provides legal protection for disabled people against discrimination. It impacts on sickness absence management in two key ways:

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- a) under the EA, an employer unlawfully discriminates against a disabled person where, for a reason “related” to their having a disability, they receive unjustified less favourable treatment than they would otherwise receive; and
- b) an employer also unlawfully discriminates if they fail unjustifiably to meet any duty to make a “reasonable adjustment” in relation to a disabled person.

Under the EA a disabled person is defined as a person with:

- c) *“A physical or mental impairment which has a substantial and long-term adverse effect on their ability to carry out normal day-to-day activities.”*

The DfES Circular 20/99 provides guidance to Schools on *What the Disability Discrimination Act (DDA) means for Schools and LEAs*. This gives examples of adjustments that may be considered, which include

- altering premises
- allocating some duties to another teacher
- transferring the person to fill an existing vacancy
- altering working hours
- changing the teacher's place of work
- allowing time off for rehabilitation, assessment or treatment
- supplying additional training
- acquiring or making changes to equipment

5.5 Formal Capability Procedure

If after a specified period of support, monitoring and evaluation, the teacher has still not met the standards of capability required and/or any targets required, the investigator may decide to proceed with the formal capability procedure:

If the Investigator is satisfied that the concerns warrant a hearing, he/she will inform the teacher and a capability hearing will be arranged. In all cases concerns about capability should already have been raised with the teacher, usually through guidance interviews. No capability action will be taken against a teacher unless and until the issue has been carefully investigated.

- a) The employee shall be informed in writing of the following:
 1. The date & time of the hearing, giving at least ten working days notice from receipt of the letter.
 2. The specific nature of the concerns over the teacher's capability.
 3. His/her right to respond in writing to the concerns within 7 days of the date of the letter.
 4. His/her right to provide other written documentation in support of his case and name witnesses within 7 working days of the date of the letter.
 5. His/her right to representation, the responsibility to arrange for this lies with the teacher.
 6. Names of witnesses and the person presenting the case.

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7. Enclosing all supporting documents to be used as evidence by management including records of guidance interviews and Occupational Health Service provider reports and a copy of the Schools Capability Procedure.
8. Likely outcome if concerns are proven i.e. warnings, recommendation to remove from the school.
9. That the hearing may proceed in his/her absence if no acceptable reason is offered to the capability committee as to why the teacher and/or representative cannot attend.
10. The notice shall be sent by recorded delivery, or delivered by hand to the teacher.

6. Conduct of Formal Capability Panel

- 6.1 The capability panel will be chaired by the Headteacher. Associate governors may be panel members. Where the head has been directly involved in the procedures leading to capability action, has instigated the proposal to dismiss in question (or the headteacher is being considered for capability action) the initial decision can be delegated to the headteacher (not the investigator) with input from one associate governor and the school's HR adviser but where possible should be delegated to one associate governor with at least one independent person (not involved in the running of the school). One associate governor must remain uninvolved in order to take part in any appeals process that may follow.
- 6.2 When a complaint is to be considered it shall be heard by a panel of no less than three including at least two independent persons.
- 6.3 In exceptional circumstances, where it is not reasonably practicable to comply with the requirement for a minimum of three panel members, the membership of any subsequent appeal committee will comprise no more/less members than on the original capability panel.
- 6.4 A human resources adviser engaged by the meeting at which the capability complaint is considered for the purposes of providing advice to all present of giving advice. Any advice given can be considered by those concerned before a decision is made; but the adviser will not be party to the decision.
- 6.5 If the teacher fails to attend the hearing the case will be heard in their absence, unless the Capability Committee agrees to postpone the hearing to a later date having received acceptable reasons.
- 6.6 Should a teacher fail to attend a capability interview, the panel will have to consider whether or not to proceed in his/her absence. In doing so, the panel should take into account:
 - any reasons given by the teacher or his/her representative for non- attendance;
 - whether the teacher had received sufficient and adequate notice of the interview; and
 - whether the teacher had been informed that the interview may proceed in his/her absence.

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- In most cases, particularly when the individual has not attended due to sickness, it is advisable to allow at least one postponement. The length of the postponement may need to take account of the need for the teacher to arrange representation, prepare his/her response to the concern raised and capability action recommended and the general circumstances surrounding the case. The individual should be informed in writing that the interview will proceed on the new date and advised that if unable to attend in person, s/he should brief a representative or submit written representations.
- In cases where there are grounds for believing that the teacher is deliberately and unreasonably delaying the capability process by refusing to attend a hearing, personnel advice should be sought.
- When neither the teacher nor their representative attends and the proceedings continue, it is recommended that the process be adjourned after the line manager's presentation is completed. The teacher should then be sent a copy of the notes of the interview thus far and any new documentary evidence presented, and offered the opportunity to submit a statement in response (including mitigation). This statement can be given in person at the reconvened interview or in writing if the teacher remains unable or unwilling to attend.
- Where a teacher is represented in his/her absence, it is recommended that the representative is asked to obtain a note signed by the teacher authorising him/her to speak and act on his/her behalf.
- Paragraph 4 on "Representation" details the statutory right and time limits of a teacher to postpone capability meetings and/or interviews

The Capability Panel should have before them copies of the complaint and all relevant papers including those submitted by the teacher concerned.

The hearing will be aimed at enabling the Capability Panel to come to a decision as to what has taken place and then to make a decision about the appropriate action and/or sanction.

The committee must provide an opportunity for both sides to put their case fully and make sure that both sides have a fair and reasonable hearing. In particular the Capability Committee must allow both sides the opportunity to attend, to be represented, to be accompanied by a Trade Union representative or work colleague (as appropriate), to bring witnesses and to put questions about matters, relating to the evidence only, to witnesses brought by the other side. Witnesses should only be called into the room to give evidence and answer questions, after this they should leave the room immediately.

The Chair will open the proceedings by:

- stating the purpose of the hearing
- introducing all present;
- saying how the hearing will be conducted and any time constraints which may apply;
- confirming that all have the same documentation;
- confirming the number and names of witnesses attending on both sides;
- asking for any points of clarification to be stated;
- reading the capability allegations and asking whether the teacher accepts the facts.

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- If the allegation(s) is/are accepted then the Committee should proceed immediately to hear mitigation.

6.7 At the hearing, the capability panel will decide whether late evidence from either side will be accepted. The views of both sides should be heard when considering whether to accept late evidence, along with general considerations of reasonableness and fairness. If late evidence is accepted in the form of written documentation, the hearing will normally be adjourned for a brief period to provide reading time.

At the hearing, the Capability Panel will decide whether late evidence from either side will be accepted. The views of both sides should be heard when considering whether to accept late evidence, along with general considerations of reasonableness and fairness. If late evidence is accepted in the form of written documentation, the hearing will normally be adjourned for a brief period to provide reading time.

The Chair will then ask each side to present their case and is responsible for ensuring that all presentations, evidence and questions are relevant and questioned if any area is unclear.

The order of the proceedings is as follows:

- The Headteacher representative presents his/her case
- Any witnesses to support the case are called one at a time,
- questions are asked of the witnesses (first the panel, then the teacher or his/her representative),
- witnesses are dismissed but are asked to remain in the building in case they need to be recalled (unless this is agreed to be unnecessary),
- the panel and the teacher side ask questions on the presentation, if necessary.
- The teacher presents his/her case in response to the Headteacher's presentation.
- Any witnesses to support the case are called one at a time,
- questions are asked of the witnesses (first the panel, then the Headteacher)
- witnesses are dismissed but are asked to remain in the building in case they need to be recalled (unless this is agreed to be unnecessary),

On completion of the presentations, the Chair will ask the Headteacher and then the teacher's side to summarise their case and the evidence submitted. No new evidence can be submitted at this point.

The hearing may also be adjourned at the deliberation stage, in order to allow for further investigation if the Committee feels that there are points which need clarification. Opportunity may be given to re-examine the evidence/witnesses.

7. The Decision

- 7.1** All parties other than assigned officer(s) advising the Panel shall withdraw when the Panel considers its decision.
- 7.2** Having considered all the evidence, the Panel shall propose appropriate capability action as necessary, the level of formal action will be determined by the seriousness of the concern(s). The decision will be given orally to the teacher in the presence of his/her representative and will also be confirmed in writing, with a copy to the representative.

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7.3 The formal action arising from the Capability Hearing may be:-

- a) No further action
- b) The decision of the panel may be to give a further period of time for improvement.
- c) Referral back to Occupational Health for further information
- d) Where there are underlying medical reasons (that have been established through referral to the Occupational Health Service provider):-
 - Temporary or permanent adjustment to duties/workload/hours
 - Explore Job Redesign
 - Medical redeployment (dependent on suitable vacancies being available)
 - Decision to cease working at the school, recommendation to terminate with notice, where the level of absence is unacceptable and unlikely to improve to an acceptable standard, and where the teacher has **not** been certified as 'permanently unfit' by the Occupational Health Service Doctor.
 - Decision to cease working at the school, recommendation to terminate employment on the grounds of ill-health (medical/ill health retirement), where the teacher has been certified as 'permanently unfit' by Occupational Health Service Doctor. Where there is no possibility of improvement within the foreseeable future and where the teacher is not fit for alternative employment (i.e. redeployment is not an option).
- e) Where there are insufficient medical reasons, or where it has been established, after referral to the Occupational Health Service, that there is an unnecessary high level of sickness absence:-
 - Improve attendance and/or performance
 - non-medical transfer on efficiency grounds (by mutual agreement where possible);
 - **Stage 1 Warning:** To be given in cases where guidance has been given and there is an accumulation of poor attendance. (Stage 1 warnings will remain live for six months).
 - **Stage 2 Warning:** appropriate for concerns of a more serious nature or where there is an accumulation of poor work performance or attendance. (Stage 2 warnings will remain live for nine months)
 - **Final Written Warning:** To be given in those cases where the nature of the concern is considered to be insufficiently serious to justify termination but sufficiently serious to warrant only one written warning. This warning may be the first and last and may be implemented at any stage according to the seriousness of the concern(s), i.e. there does not have to be an earlier record of capability action. (Final written warnings will remain live for nine months)
 - **Decision to cease working at the school:** Some concerns will be sufficiently serious to warrant a determination that the teacher should cease working at the school without the teacher having received any prior warnings. In other cases, a determination to cease working at the school will be appropriate where there have been earlier warnings to which the teacher has not made an adequate response. It should be noted, however, that when a capability panel determines that a teacher should cease working at the school, it must be confident that all reasonable measures have been explored which could lead to improvement in attendance and performance standards required.

Notice of dismissal will be issued only by the Headteachers within 14 days of receipt of the notification of the decision of the Panel.

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Copies of warning letters shall be placed in the teacher's record, only after the teacher has been sent copies of them. When such letters are placed in the record, the period of time for which they will form part of the record, shall be set out as shown in paragraph 4.2 (c).

Employment tribunals have established that there may be exceptional circumstances where it is not appropriate for capability warnings to be disregarded, even though they have expired. Examples of where expired warnings may still have some relevance in future capability action and should therefore remain live would be:

- where a teacher's capability record shows that the teacher maintains a satisfactory level of attendance and/or performance only for as long as warnings are active and a definite pattern can be shown to have built up; and
- where a teacher is claiming to have an exemplary capability record since his/her first day of employment.

8. Appeal

- a) The purpose of the Appeal is to consider the decision made by the initial hearing, questioning the Headteacher presenter and/or consideration of any new evidence or mitigating circumstances presented by the teacher.
- b) The Appeal Panel may alter, nullify or confirm the decision.
- c) Notice of appeal must be received within ten working days of receipt of the decision letter. This time limit will be strictly observed.
- d) Arrangements for the appeal will be made on receipt of the appeal request. Wherever possible the appeal should be heard within 20 working days of the lodging of the appeal and the teacher should have at least 10 working days notice of the Appeal Hearing.

9.1 The Appeals Committee

- a) No member of the Committee, the decision of which is subject to appeal, shall be a member of the Appeal Committee.
- b) All papers presented to the hearing, together with the decision of the Chair of the Committee any subsequent correspondence must be available to the Appeals Panel. Any new evidence which the teacher wishes to introduce, should be copied to all parties at least three working days in advance of the Appeal Hearing.
- c) The Appeals Committee will consider the grounds for the appeal, pay particular attention to any new evidence that has been introduced by the teacher and hear representations from both the headteachers and the teacher or representative in order to determine whether the decision of the hearing was fair and reasonable in view of the evidence available.
- d) The decision of the Appeals Committee is final and binding on all parties.

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9. Records

The maintenance of accurate and contemporaneous records is essential, particularly in the event of referral to an Employment Tribunal. The panel dealing with the capability should normally be accompanied by a note-taker. Notes are not necessarily verbatim, and there is no requirement for agreed minutes. It should be noted that consideration by an employment tribunal may be an extended time after the matter was considered internally.

Records should be held in a secure and confidential manner, often the issues raised by a teacher are particularly sensitive and it is essential that information is kept in accordance with the Data Protection Act 1998.

Documentation which should normally be retained includes:

- correspondence with employees on dates of meetings, etc;
- all papers presented at the Capability Panel hearing;
- notes of meetings (contemporaneous or otherwise)
- information collated by the panel or used to assist in making a decision;
- confirmation of the decision, or other supplementary correspondence;
- clarity on how decisions were reached and capability action determined.