



# Capability guidance for support staff

Based on Norfolk model G329

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# Capability guidance for support staff G329

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### 1. Introduction

- 1.1 This guidance links to and supports the Capability model procedure - support staff P329c. The guidance and procedure together provide a fair and efficient process which is in line with good employment practice.
- 1.2 Teacher capability is covered separately under Capability model procedure - teaching staff P329b and Capability guidance for teaching staff G329a.
- 1.3 It is important to distinguish between conduct and capability:
  - Conduct is about behaviour which is often, but not always, deliberate but is usually within the employee’s control. Concerns around conduct should be dealt with under Discipline model procedure P303 and accompanying guidance.
  - Problems with capability will relate to cases where an employee is unable to achieve the level of competence expected because of lack of knowledge/skills and abilities. These capability issues should be dealt with through this guidance and the model procedure P329.

In some cases, an employee’s ability to carry out their role effectively may be impaired by other factors such as health, working relations or private circumstances. The model procedure allows for such circumstances to be taken into account. When an employee’s ability to carry out the requirements of their post is in question because of an identified

underlying medical condition, the relevant parts of the Absence management policy and procedure P313 should be followed.

- 1.3 Good management, clear expectations and appropriate support will go a long way towards addressing weaknesses in performance. Early identification of problems through performance reviews will help avoid the need for formal capability procedures. In some cases an improvement may be achieved informally with a minimum of support and attention. In others a more formal approach will be necessary.
- 1.4 Governing boards must by law have procedures for dealing with lack of capability in employees. The model procedure for addressing concerns over support staff capability (P329) is consistent with the ACAS Code of Practice on disciplinary (and capability) matters.
- 1.5 Case law has determined that at all stages of a formal process, including dismissal, the decision maker should have an awareness of the facts relating to the immediate issues and to any potentially related issues (e.g. a grievance or protected disclosure made by the employee) to ensure any decisions taken are directly related to the immediate issues and not partly or fully resulting from those related issues.

## 2. Responsibilities

- 2.1 Capability model procedure for support staff P329 and this guidance should be considered in conjunction with current legislation, particularly the School Staffing Regulations 2009.
- 2.2 Through the implementation of the procedure, the Governing Board will be mindful of the employer obligation to seek to maintain and protect the mental health and wellbeing of all staff as far as is reasonably practicable.
- 2.3 Where an employee discloses a mental health issue which could be a disability, efforts will be made to seek to agree with the employee any reasonable adjustments to the procedure. This could include allowing the employee to be supported by an individual who does not meet the statutory definition of a companion but does understand the individual's condition and its effects, and/or; having regular breaks during longer grievance meetings, and/or; holding the meeting at a neutral venue.
- 2.4 A governing board committee set up as part of the governing board's normal processes, the Chair of Governors, a nominated individual governor and the Headteacher/Principal, can each have delegated authority for different aspects of the process. Please see Capability model procedure for support staff P329 for a table showing how the responsibilities could be distributed and information regarding decision to dismiss.

Academies will need to refer to their scheme of delegation for dismissal decisions.

- 2.5 The Governing Board should determine and formally record where responsibility will lie. They may do this annually or on a case by case basis.

- 2.6 Schools (not academies): The Director of Children’s Services (or their representative) has the right to attend meetings at which a dismissal decision may result (including appeals against dismissal).
- 2.7 Norfolk County Council expects Community schools to adopt Capability model procedure for support staff P329. Voluntary Controlled and Voluntary Aided Schools may seek the advice of the appropriate Church Authority at any stage. Voluntary Aided schools have the right to adopt lack of capability procedures as advised by the appropriate Church Authority. Foundation schools are advised to adopt the model procedure.
- 2.8 Academies may adopt this procedure or adapt it before adopting it or create one of their own.
3. The role of governors
  - 3.1 Governors should not normally be involved with the capability procedure before the dismissal stage. The exceptions to this are where a governor or governors are involved in considering an appeal against a warning.
  - 3.2 It is important to be prepared for the possibility of dismissal. The use of governors to hear any grievances or appeals against warnings should be limited to ensure a sufficient number of impartial governors remain available for the dismissal committee and no fewer for the appeal. Normally a panel would consist of three governors but where this number is not reasonably practicable it can be reduced to two.
4. The role of advisers
  - 4.1 Maintained schools may take advice from Local Authority advisers or other advisers with specialist experience. This advice may relate to the process itself or to the provision of support and/or monitoring. An example of this could be where advice is taken from Education Finance where concerns about performance involve the financial aspects of an employee’s work.
  - 4.2 An HR Consultant would normally support the Headteacher through the capability procedure. If concerns have not been resolved through low level action (i.e. outside the scope of the procedure), advice should be sought early on to ensure the procedure is conducted appropriately.
5. Representation at formal interview, evaluation meetings and the dismissal hearing
  - 5.1 An employee has a statutory right to be accompanied by a representative (i.e. a union representative or work colleague) at formal meetings. If the employee’s chosen representative is not available at the time proposed for the interview, meeting or hearing, and the employee proposes an alternative date that is reasonable and falls within five working days of the proposed day, the school/academy should rearrange the event to the time proposed by the employee.

This would of course be conditional upon the availability of the Headteacher/Principal and other individuals who need to be present (e.g. HR Consultant). Where the identity of the representative is known, consultation over suitable dates can prove helpful to avoiding delays.

## 6. Notice

- 6.1 Notice of five working days (or seven consecutive days out of term time) must be given for the formal capability interview. The date of successive evaluation meetings should be fixed at the preceding interview or meeting and notice should only be necessary if it is rearranged.

Notice of at least five working days (or seven consecutive days out of term time) must be given for a staff dismissal committee or dismissal appeal hearing. Meetings, interviews and hearings should not take place outside of term time.

## 7. Support for the employee

- 7.1 Those monitoring performance should offer feedback and instruction to help the employee improve. If training courses or assistance from colleagues would be helpful, these should be arranged as soon as possible but should not interrupt the timing of the procedure. Clearly, if support is identified as being necessary to bring about improvement, it needs to be provided early on in the process so that sufficient time is allowed to realise the benefits of that intervention.

- 7.2 Examples of help to meet targets when providing structured support include:

- pastoral support from an appropriate employee
- counselling by senior colleague or Norfolk Support Line
- job coaching;
- observations of good practice elsewhere
- observation and advice by other colleagues or advisers
- issue of notes or examples of work for guidance
- relevant INSET
- attachment of a mentor within the school/academy.

- 7.3 Evidence of all support must be collated so notes of observations and meetings can inform the next review meeting.

## 8. Monitoring arrangements

- 8.1 Monitoring should cover a range of relevant duties and functions. An objective record of the monitoring should be kept and used to assist with the evaluation of performance.

- 8.2 Examples of the ways progress can be monitored include:

- observation of work by Headteacher/Principal or other nominated employee. The number of observations should be proportionate to the extent of the performance issues.

- reviewing work samples
- regular meetings to review documentation

## 9. Written records

9.1 A written record should be made of all interviews with the employee and any action taken following such an interview. Formal warnings should be disregarded (i.e. no longer remain 'live') when the employee has demonstrated satisfactory performance for the specified period. These periods are six months for an oral or written warning and one year for a final written warning.

## 10. Employees who are absent through illness during the procedure

10.1 Urgent action should be taken if long-term absence intervenes during a capability procedure. If long-term absence appears to be linked to the action being taken by the school/academy to address the employee's poor performance, the case should be referred immediately to occupational health (via EducationHR by telephone on 01603 307760 or by emailing [EHRenquiries@norfolk.gov.uk](mailto:EHRenquiries@norfolk.gov.uk)) to assess the employee's health and fitness for continued employment. The school/academy must take a considerate and sympathetic approach but, in general, the length of time they may wait for the employee's health to improve before considering whether to terminate employment on health grounds should take into account occupational health guidance and HR advice.

10.2 Steps should be taken to enable the employee to attend evaluation meetings, but where the employee is unable to attend, these may proceed in the employee's absence if delay would otherwise compromise the maximum time set aside for the procedure. In such circumstances, the employee should be invited to make a written submission and a full account of the evaluation should be provided in the letter confirming the decision taken.

10.3 Short absences should not delay any part of the formal stage of the capability procedure.

## 11. Decisions on continuing the procedure and recommending dismissal

11.1 The decision to continue a capability procedure or recommend dismissal should be taken by the Headteacher/Principal but advice should be taken from EducationHR on this and the views of appropriate others involved in the process (e.g. the employee's line manager) should be considered.

11.2 Dismissal and any appeal hearings must be arranged in accordance with current legislation and statutory guidance. The current legislative requirements are covered by the model procedure and these guidance notes.

## 12. Confidentiality

12.1 The general principle is that capability procedures are confidential and all parties involved should respect this. However, on rare occasions, a formal meeting or a potential dismissal

situation can lead to media enquiries. Where this is the case, Headteachers/Principals or governors should seek advice from EducationHR.

12.2 Records must be kept no longer than necessary and in compliance with the Data Protection Act 2018.

13. Disputes about the procedure

13.1 Any disagreements about the interpretation of the model procedure, or the application of any related matters not covered in it, must not delay the various elements of the capability procedure or the overall timetable determined as appropriate for handling any particular case.

14. Appeals against formal warnings

14.1 Appeals must be heard by a panel of governors/trustees. Appeal panels should always be composed of an odd number of members to allow a majority vote to take place. Measures should be taken to ensure that those included in the decisionmaking panel are independent and not a risk of making bias decisions or creating a perception of bias. Involvement in hearing appeals against warnings does not necessarily mean that a governor/trustee is tainted and thereby ineligible to serve on a dismissal or dismissal appeal committee.

14.2 Appeals should normally be restricted to considering the reasonableness of the decision made, any relevant new evidence, or any procedural irregularities.

14.3 An employee is entitled to be accompanied at an appeal hearing by a representative.

14.4 The appeal decision should be confirmed in writing and the employee told there is no further appeal against the decision.

14.5 Where the reasonableness of the decision is being challenged, the question to be answered is whether the decision to apply the particular sanction was, in the view of the Appeal Committee, soundly based. If the Appeal Committee finds that the decision was not soundly based, they have the option of overturning the decision but would need to state how their determination should impact on the capability procedure being followed.

14.6 Where an appeal is upheld the matter should be referred back to the Headteacher to be reconsidered or for further appropriate action.

14.7 Where monitoring would otherwise be continuing, it should not be halted while an appeal is pending.

15. Grievances

15.1 In exceptional circumstances an employee may raise a grievance about the behaviour of a Headteacher/Principal or other manager during the course of a capability procedure.

15.2 Depending on the circumstances it may be appropriate to suspend the capability procedure until the grievance can be considered. Such a delay should only be considered where there is a strong indication that the employee has been mistreated and consideration should be given to bringing in another manager to deal with the capability case (e.g. Deputy Headteacher). Any records should be passed to the new manager and if appropriate the case should be continued within the same timetable.

Appendix 1 – Table of changes

Date of change	Paragraphs affected	Summary of update
10/11/2021	2.2, 2.3	Additional paragraphs to include consideration for employees with mental health issues.
19/08/2020	6.1	Notice period for capability hearings reverted to 5 days as it was previously changed in error.
15/06/2020	1.5, 6.1, 8.2, 9.1, 12.2, 14.1	Amended to include 10-day notice period for capability hearings as well as the need for decision makers to have an awareness of the facts surrounding the proceedings. Amended the time periods for which written warnings can remain 'live' and that appeals panels for warnings should be constituted of an odd number of members.
24/08/2017	1.1, 2.2, 2.3, 2.6, 4.1, 5.1, 7.2,9.1, 12.1	Updated to include academy terminology and reflect the updated Capability model procedure.
01/03/2017	All	New formatting due to launch of new HR website, HR InfoSpace – no change to content.