



Washwood Heath  
Multi Academy Trust

## Capability Procedure

Prepared by:	Director of HR in consultation with Heads of Academy
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## 1. Commitment & purpose of procedure

- 1.1 Washwood Heath Multi Academy Trust (“WHMAT”) is committed to helping and encouraging all staff to maximise their performance, to ensure the highest level of education for its pupils.
- 1.2 This procedure is therefore designed to provide a fair and consistent method of achieving this requirement, and of dealing with poor performance when it is identified.

## 2. Application of procedure

- 2.1 This procedure applies to all staff across WHMAT except for:
  - ✎ Support staff during their probationary period;
  - ✎ Newly qualified teachers, whose appointment is subject to statutory induction; and
  - ✎ Agency workers.
- 2.2 This procedure is to be implemented only if an employee fails on a regular basis (i.e. more than once), and despite appropriate additional support provided through the appraisal process, to address concerns about performance previously notified to them.
- 2.3 Where the employee is incapable of performing their duties as a result of sickness, injury or disability, WHMAT’s Managing Attendance procedure shall be used.

## 3. Introduction

- 3.1 As part of their acknowledged management responsibilities (including mentoring, coaching, training and appraisal) heads of academy (or other appropriate managers designated by them), may from time to time discuss aspects of capability with an employee on a day to day basis. Such discussions should not be regarded as falling within the scope of the formal capability procedure but should ensure that employees receive fair and honest feedback on their performance, and advice and support on how their performance may be improved.
- 3.2 The CEO shall be responsible for managing head office staff under this procedure since they are line managed by her.
- 3.3 For the purpose of this procedure, lack of capability is defined as a situation in which **an employee fails on a regular basis (i.e. more than once) to perform the duties of their post.**
- 3.3 The procedure is to be implemented with the intention of supporting the employee to improve and to meet the requirements of their job. However, the employee also needs to be made aware that failure to make the necessary improvements within the timescales set out in this procedure **may lead to termination of their employment.** Timescales appear in the flow chart appended to this procedure.

- 3.4 In order to facilitate the smooth implementation of this procedure, the employee should be advised to contact his/her trade union for advice as soon as possible.
- 3.5 Normal standards of capability and normal procedures should apply to employees who are school trade union representatives or local union officers, but the circumstances of the case should be discussed with a local or regional officer.
- 3.6 This procedure will be applied in accordance with any other statutory provisions which may apply from time to time and/or the Advisory, Conciliation and Arbitration Service's Code of Practice.
- 3.7 The records of any case under this procedure will be confidential.
- 3.8 The Board of Directors has decided, by formal resolution, to delegate to the head of academy in each academy, the hearing of final meetings under section 8 of this procedure. However, it is acknowledged that they will not hear cases if they have been previously involved in managing the case, and would not therefore be considered to be impartial. In these circumstances, a panel of 3 governors from the board of directors will be convened.
4. **Informal support under employee appraisal**
- 4.1 This procedure is intended to highlight concerns in performance and provide an opportunity for an employee to improve. **It is strongly recommended that this procedure is only implemented if the appraisal process and appropriate support have failed to improve the employee's performance to the required standards.**
- 4.2 Being subject to a capability procedure should never be a surprise to an employee. **Any concerns should have been raised with the employee in advance as part of the appraisal process.** If it became apparent during or at the end of the appraisal period that the employee's overall performance was below acceptable standards, the head of academy (or other designated manager) should have:
- met with the employee to discuss the nature and level of the concerns;
  - recorded the concerns as part of the relevant appraisal scheme; and
  - agreed with the employee a period of increased informal support of 6 working weeks. In this situation, the head of academy (or designated manager) should agree an informal support plan with the employee to include the areas of concern, the kind of improvement required, the support agreed, the period for improvement, how improvement would be assessed, and when the situation would be reviewed. They should also have explained to the employee what would happen if they did not meet the required standards within the specified timescales (i.e. possibility of moving to first formal meeting under this procedure if necessary improvements have not been made, or continuing with the appraisal process as the necessary improvements have been made).
- 4.3 During the appraisal process, and throughout this procedure, consideration should be given to any mitigating/personal circumstances (including a disability or other health condition) which might explain a dip in the employee's performance. Reasonable adjustments may be considered if an employee has specific needs relating to a disability. A referral to occupational health may also be appropriate.

## 5. First formal capability meeting

- 5.1 If following the period of informal support, the head of academy (or other designated manager) still has concerns about the employee's performance, they shall review the facts and information gathered to date, adding to it where appropriate, and then write to the employee inviting them to a first formal capability meeting. **From this stage onwards, the employee may be accompanied by a trade union representative or work place colleague.** In addition, it is advisable for WHMAT to request an appropriate HR representative to attend the meeting to provide technical advice.
- 5.2 The invite letter to a first formal capability meeting shall explain to the employee that the meeting is being held in accordance with the provisions of this procedure. Copies of any documentation to be used at the meeting (including evidence of concerns raised to date, informal support and outcomes of that support), shall be sent with the written invite letter within a reasonable timescale before the meeting to ensure that the employee has enough time to prepare his or her response to the concern(s). A copy should be included for the employee's representative.
- 5.3 The purpose of the meeting shall be to establish the facts and to explore ways of supporting the employee to improve their performance to an acceptable level.
- 5.4 The format will be:
- (a) for the head of academy (or designated manager) to summarise the informal support that has been provided to the employee to date, the reasons for that support, and the outcome of that support/extent to which improvements have been made;
  - (b) to define which areas of the employee's role and/or relevant standards are not being met (these could be new concerns identified or those which the employee has already received informal support for), and the effect this is having on pupils; staff and the provision of education or service in the academy;
  - (c) to invite the employee and/or the employee's representative to comment and/or offer an explanation for the alleged shortfalls in performance identified. This may provide new information or a different context to the information/evidence already collected;
  - (d) for the head of academy (or designated manager) to decide, following a brief adjournment, and, having regard to (a-c) above, either that:
    - some or all of their identified concern(s) about the employee's performance remain. In this situation, the head of academy (or other designated manager) will clarify what those concerns are, and reiterate the evidence on which they are based, discuss appropriate formal support/interventions **for a period of 8 working weeks from this meeting**, and set reasonable targets for the employee, which they will need to demonstrate progress against by the end of this period of support (clarification should be given as to how employee will show that they have met the target by the end of the monitoring period). The head of academy should also arrange for the employee support plan to be reviewed in a second capability

meeting, to be held 8 working weeks after the first capability meeting, and set the date and time for that meeting in discussion with the employee and the employee's representative; or

- no concerns remain, in which case the head of academy (or designated manager) shall confirm in writing that no further action/formal monitoring will be taken at this stage under the capability procedure, and that the employee's performance will continue to be monitored under the appraisal process. However, **the employee will be warned that if new or existing concerns are raised about their performance within 12 months of this meeting, the head of academy may continue with the formal capability monitoring from the stage that they reached previously under this procedure.**

5.4 Notes of the meeting, including the amended employee support plan shall be sent to the employee within five working days of the meeting, together with a copy for his or her representative.

## **6. Second formal capability meeting**

6.1 At the second formal capability meeting, the employee's progress will be reviewed against the targets/standards set out in the employee support plan. Copies of any evidence to be presented on the employee's performance should be sent to him or her in reasonable time beforehand, including a copy for their union representative. **This may include evidence relating to existing performance targets agreed at the first meeting and/or new performance concerns that have arisen during the review period.**

6.2 The format and possible outcomes of the meeting shall be the same as for the first formal capability meeting (see 5.4 above).

6.3 If some or all of the performance concerns remain, a third formal capability meeting will be arranged to review progress 8 working weeks from the date of the second formal capability meeting. The end of that review period and the date for that meeting should be set in discussion with the employee and his or her trade union representative. The head of academy (or other designated manager) will explain to the employee during the meeting and, in the outcome letter following the meeting, that if the improvement has not been achieved by the date of the third capability meeting, the matter may be referred for a hearing before the head of academy, (provided they remain impartial & have delegated authority to hear) or a committee comprising board directors (in the event that they are no longer impartial as they have already been involved in the management of the employee's performance). They should also clarify to the employee, in writing and/or orally, that this may lead to the termination of the employee's employment in accordance with this procedure.

6.4 Unless there are exceptional circumstances, notes of the meeting, including where applicable the employee support plan, monitoring and evaluation and the explanation about the possibility of terminating the employee's employment, shall be sent to the employee within five working days of the meeting, together with a copy for the employee's representative.

## 7. Third formal capability meeting

7.1 The third formal capability meeting will take place 8 weeks after the second formal capability meeting. Although the date and time should have been agreed at the second formal capability meeting stage, the employee should receive a letter confirming the arrangements for the meeting, giving them at least 5 working days' notice to prepare and secure representation. Copies of the evidence on the employee's performance (support plan with any relevant evidence) should be enclosed with this letter (see manager's toolkit).

7.2 As with the first and second formal capability meetings, the purpose/format will be:

- (a) to summarise the informal and formal support that has been provided to the employee to date, the reasons for that support, and the outcome of that support/extent to which improvements have been made;
- (b) to define which areas of the employee's role and/or relevant standards are not being met (these could be new concerns identified or those which the employee has already received informal support for), and the effect this is having on pupils; staff and the provision of education or service in the academy;
- (c) to invite the employee and/or the employee's representative to comment and/or offer an explanation for the alleged shortfalls in performance identified;
- (d) for the head of academy (or designated manager) to decide, following a brief adjournment, and, having regard to (a-c) above, either that:
  - some or all of their identified concern(s) about the employee's performance remain. In this situation, the head of academy (or other designated manager) will clarify what those concerns are, and explain that the matter will now be referred to a final capability meeting before a committee comprising trust directors (or, before the head of academy provided they have not been involved previously in the management of the employee's case), with a recommendation that the employee's employment be terminated on the grounds of professional capability; or
  - no concerns remain/the employee is now meeting the standards and/or requirements of the role, in which case the head of academy (or designated manager) shall confirm in writing that no further action/formal monitoring will be taken at this stage under the capability procedure, and that the appraisal process will continue. However, **the employee will be warned that if new or existing concerns are raised about their performance within 12 months from this meeting, the head of academy may continue with the formal capability monitoring from the stage that they reached previously under this procedure;**  
or
  - they will extend the employee support plan for a further reasonable period if there is a good prospect of the employee meeting the requirements of the role within this extended time frame.

7.3 The third formal capability meeting shall be recorded in writing and notes (plus supporting evidence) shall be sent to the employee within five working days of the meeting together with a copy for their representative.

## **8.0 Final capability meeting**

8.1 When it has been decided to refer the employee's capability concerns to a committee of trust directors (or, to the head of academy if they have not been involved previously in the management of the employee's performance), a final capability meeting shall be arranged as set out below.

8.2 There may be cases in which an employee is simultaneously the subject of allegations being considered under one or more of the governing body's procedures for conduct, capability or redundancy. If so, advice should be taken from HR.

8.3 A formal invite letter should be issued in writing to the employee, with an explanation of the meeting's purpose and its place in the procedure. The letter should not only state the reasons and format of the meeting, but should also attach copies of any documents to be referred to at the meeting. The letter must remind the employee of the right to be accompanied. The employee should be asked to confirm that he/she will be attending the meeting, who will be accompanying or representing him or her (that person must be either a trade union/professional association representative or work-place colleague), and a list of any witnesses attending. The employee/trade union should also be reminded to provide this information along with any documentation on which he or she wishes to rely at least five working days before the meeting.

8.4 Names of any witnesses from both sides should be circulated in advance and all witnesses should be asked to provide a written statement for inclusion with the documents to be used at the meeting. A second set of papers should be enclosed for the employee's representative. If it is agreed in advance by the parties agree in advance that

8.5 In order to ensure that the employee has enough time to prepare his or her response **at least ten working days' notice of the final meeting should be given**. It is helpful to agree a date with the employee's union before sending the formal invite to attend the meeting. The employee may suggest an alternative time and date as long as it is reasonable and is not more than five working days after the original date. The committee or head of academy (as the case may be) may reject this suggestion but will do so only if it is unreasonable, when they may proceed to hear the case in the absence of the employee or the employee's representative. Advice should be taken from HR on what is reasonable.

8.6 The employee may provide documentation in his or her defence and give the names of witnesses whom he or she is asking to appear on his or her behalf. It is recommended that witnesses attend final capability meetings in support of their written statements (unless it is agreed in advance by the parties that they are happy to rely on written statements rather than witnesses appearing personally). This information should be provided at least five working days before the meeting.

8.7 Where the meeting is before a committee of trust directors, the clerk to the governing body is required to ensure that all parties to the meeting receive copies of all documents in good time before the meeting (at least five working days before). Evidence submitted after the distribution of these documents may or may not be accepted as evidence; in such



circumstances a decision will be made by the chair of the committee (or the head of academy if he or she is conducting the meeting) in the meeting itself, and not before. There is no requirement on the employee to submit any documentation, other than a statement from any witness who may be called by the employee. However, if the employee does not intend to submit any documentation there should be a positive statement from the employee and/or the employee's representative to this effect.

- 8.8 The head of academy (or other designated manager who has led on the formal meetings to date) should normally present the case.
- 8.9 The final meeting will follow the format set out in the manager's toolkit.
- 8.10 After considering the relevant evidence, the committee (or the head of academy if he or she is conducting the meeting) has the following options and shall decide on one of them:
- ✎ take no further action against the employee because their performance has improved sufficiently. Going forward, the employee's performance will be monitored using the appraisal process. However, **the employee shall be warned that if new or existing concerns are raised about their performance within 12 months of this meeting, they reserve the right to continue with the formal capability process from the stage previously reached;**
  - ✎ determine that a further defined period for improvement should be allowed;
  - ✎ redeployment to an alternative role in the MAT, if available/appropriate/agreed by the employee (by agreement with the employee, it may be appropriate to consider whether there is a vacant post in WHMAT, which may be more suited to their capabilities. This would be a permanent change in role, and, if at a lower salary, the substantive lower salary would apply);
  - ✎ determine that the employee should be dismissed on the grounds of professional incapability, subject to appropriate notice.
- 8.11 The committee (or head of academy, where appropriate) shall announce its decision to the parties in person, unless they request it to follow in writing. An oral announcement shall be confirmed in writing (with reasons) within five working days of the meeting, including the right of appeal.
- 8.12 The person who has conducted the final meeting will take advice from HR on the duties to be undertaken by the employee during their notice period. It may be that a period of paid garden leave is in the best interests' of WHMAT and/or the employee.

## 9. Appeals

- 9.1 An employee has the right of appeal against the decision made by the committee (or head of academy, where appropriate). An appeal shall be to an impartial committee, comprising a minimum of three trust directors.
- 9.2 An employee may appeal by giving written notice of the appeal and of all the grounds on which it is being made to the clerk to the governing body within five working days of receiving written confirmation of the decision reached at the final capability meeting above. The grounds for the appeal should be accompanied by any additional evidence to be presented in support of the appeal. There is no requirement to submit any documentation if

the employee does not wish to, other than a statement from any witness who may be called by the employee. However, if the employee does not intend to submit any documentation there should be a positive statement from the employee and/or their representative to this effect and the employee will not be able to use at the appeal any evidence not previously circulated to the parties in advance.

- 9.3 On receipt of an appeal letter, the clerk to the governing body will immediately notify the head of academy, or committee that made the decision at final meeting stage, so that they can prepare a written response to the appeal grounds in consultation with HR. This response should be provided to the Clerk within a reasonable period so that they can set up the appeal.
- 9.4 The clerk to the governing body will then arrange an appeal in a reasonable time. The clerk shall give at least five working days' formal notice of the date, time and location of the appeal to all participants. All documents relevant to the appeal shall be enclosed with the letter. The employee/trade union rep may suggest an alternative time and date as long as it is reasonable and is not more than five working days after the original date. The appeals committee may reject this suggestion if it is unreasonable and may proceed to hear the case in the absence of the employee or their representative, it also has the discretion to defer the date of the meeting in order to reach mutual agreement on a convenient date.
- 9.5 The witnesses may include, as appropriate to the circumstances of the case, the head of academy, or chair of the committee who took the decision against which the employee is appealing during the final capability meeting.
- 9.6 The format for the appeal is included in the manager's capability toolkit.
- 9.7 The appeal committee may dismiss the appeal, uphold the appeal, amend the period defined for further improvement, or substitute a defined period for further improvement for a dismissal from the academy.
- 9.8 The employee raising their appeal may choose whether to hear the appeal committee's decision in person, or receive it subsequently in writing, but this choice shall not prevent the committee from choosing to adjourn and reconvene before making a decision. An oral announcement shall be confirmed in writing by the clerk to the governing body within five working days of the appeal. If an appeal against a dismissal is upheld, the outcome letter to the employee shall clarify that the employee will be reinstated without a break in service.

## **10. Exceptional circumstances**

- 10.1 Where very serious concerns have been identified about an employee's performance (e.g. where the welfare or safety of the children are at risk), the head of academy may need to fast track this procedure and start at the third formal capability meeting stage (see section 7). If so, the head of academy shall write to the employee explaining that he or she considers that this is an extreme case in which the education of pupils is seriously jeopardised by the employee's current performance, setting out the evidence supporting this allegation, and inviting the employee to a meeting, at which the employee may be accompanied by a trade union representative or work place colleague.
- 10.2 It shall be explained to the employee that the meeting is being held in accordance with the provisions of this section of the procedure. Copies of any documentation to be used at the meeting shall be sent with the written notice. To ensure that the employee has enough time

to prepare his or her response to the concern(s), reasonable notice of the meeting should be given. This should be at least five working days. It is advisable to agree a date with the employee's union before sending the formal invite letter.

10.3 The purpose of the meeting shall be:

- (a) to define the aspects of capability which lead the head of academy to allege that the education of pupils is jeopardised and why it is not appropriate to use or continue to use the other sections of this procedure;
- (b) to allow the employee and/or their representative to comment and/or offer an explanation;
- (c) for the head of academy to decide, having regard to (a) and (b), above whether to confirm or withdraw the allegation(s) of lack of capability which seriously jeopardise the pupils' education;
- (d) for the head of academy, in the light of (c) above, to take one of the following options:
  - take no further action under this section of the procedure. Going forward, the employee's performance will be monitored using the appraisal process. However, **the employee shall be warned that if new or existing concerns are raised about their performance within 12 months of this meeting, they reserve the right to continue with the formal capability process from the stage previously reached;**
  - start capability meetings at the third formal capability meeting, thereby omitting the first and second meetings. Under such circumstances, the employee must be informed of the reasons for taking such action.

Under (d) above the head of academy may decide to arrange for direct supervision of the employee's work for a specified period during the review period.

10.4 A copy of the notes of the meeting shall be sent to the employee within five working days of the meeting together with a copy for their representative.

10.5 The head of academy should arrange for a review meeting to be held weekly during the review period. The dates of these meetings should be set in discussion with the employee and their representative.

## 11. Sickness

11.1 If long term sickness absence appears to have been triggered by informal or formal support/monitoring under this procedure, the monitoring period will be suspended temporarily pending a referral to occupational health. However, the purpose of the referral will be to a) seek advice on the employee's fitness to attend a formal meeting under this procedure; b) to get advice on likelihood/timescales for their return to work; and c) to determine the most appropriate way for the employee to engage with this process going forward. It is recognised that, because of the nature of this process and their ill-health concerns, that the member of staff may find it difficult to attend formal meetings required as part of this procedure. Opportunities may therefore be given for the member of staff to submit a written statement, as opposed to appearing in person at formal meetings, or to be represented by a colleague or trade union representative.

- 11.2 The capability procedure will not be suspended indefinitely due to sickness absence, other than in emergency circumstances e.g. unforeseen hospitalisation, urgent medical treatment or significant personal circumstances, and at the discretion of the board of directors. Decisions taken will take into account the impact of the continued absence on WHMAT.

## **12 Transition back to appraisal**

- 12.1 Where, following an informal or formal period of monitoring under this procedure, it has been decided that the employee's performance has improved to the required level and/or is now in line with appropriate standards, and that formal capability should cease, the employee should continue to be supported and reviewed in line with the normal appraisal scheme. If, however, the employee's performance deteriorates again to a level causing concern during the first 12 months following the formal capability procedure coming to an end, the appraisal process will be suspended, and the employee will move back to the formal capability procedure. In these circumstances, the employee's performance monitoring will continue from the point that it had reached previously under this procedure.

## FLOWCHART - CAPABILITY PROCEDURE

