



Capability all Staff Policy and Procedure plus Managers Guidance

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HR Manager	Summer 2022

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1. Purpose

The purpose of this procedure is to encourage and ensure that all employees at The Aspire Educational Trust (the Trust) achieve and maintain acceptable and agreed standards of performance and perform their jobs to the best of their ability. It is designed to ensure fairness & consistency and to provide support towards improvement, in the management of employee under-performance.

Capability refers to an employee's ability to perform the work expected of them to the level required in fulfilment of agreed contractual duties. This may be assessed by reference to an employee's skill, aptitude, or ability in relation to the job that they are employed to do, where this appears to be because the employee 'can't' (rather than 'won't') do something.

Very few employees choose to perform their work badly, make mistakes or fail to complete tasks. Consequently, in the event that an employee is underperforming, a manager should examine the circumstances to identify underlying causes and provide additional support to the employee to help them to improve to the required standard of performance, including an agreed support programme under the Trust's Performance Management Policy.

2. Applicability

This procedure applies to all employees of the Trust with the exception of those staff within their probationary period. All employees are included, whether permanent or on a fixed term contract. It does not apply to agency workers, supply, casual, contractors or volunteers.

This procedure is used to manage under-performance due to a lack of aptitude, skill and/or ability, which the performance management process has been unable to address. Instigation of the capability procedure should not come as a surprise to the employee concerned).

Where the employee's health is affecting their performance this may be dealt with under the Supporting Attendance Policy.

This procedure is not intended to be used where poor performance is the result of carelessness, wilful neglect of duty, deliberate failure to carry out reasonable directions or other such actions which can be considered under the Trust's Disciplinary Procedure.

Where, after further investigation or discussion, it is found that the issue is one of incapability due to ill health or disability, or to misconduct, action under

the Capability Procedure may stop and further action will be considered under another appropriate procedure if required.

3. Roles and Responsibilities

The Trust is committed to ensuring consistency of treatment and fairness and will abide by all relevant legislation.

We will help employees' career and professional development through education, training, information and other frameworks that support performance management.

Managers are responsible for:

- ensuring that they agree realistic and measurable objectives as part of usual performance management procedures
- supporting staff to achieve the objectives agreed and the required level of performance
- seeking advice from HR at an early stage should concerns regarding an employee's performance arise
- implementing the parts of this procedure which fall within their area of responsibility (e.g. informal handling of under-performance, referring to the Manager for formal action if required, supporting team members to complete a Support Plan issued)
- implementing this procedure in their academy, and ensuring that the statutory duty to include formal capability proceedings in references for teachers (including those paid on the leadership pay scale) is met

Employees must:

- take responsibility for and be accountable for their actions, in line with their contractual duties professional standards and Aspire's values.
- be responsible for complying with the requirements of this procedure. Where an employee is suffering from an ill health or medical condition, or other personal circumstances that are affecting their performance at work they are encouraged to speak to their manager as soon as possible.

At all stages of the formal process the employee will have the right to be accompanied by a trade union representative or work colleague. The companion should be allowed to address the meeting in order to:

- put forward the employee's case
- sum up the employee's case
- respond on the employee's behalf to any view expressed at the hearing

- confer with the employee during the meeting.

The companion does not, however, have the right to answer questions on the employee's behalf, address the hearing if the employee does not wish it, or prevent the employer from explaining their case.

HR will:

- provide support and advise on the procedure
- provide support and advice to the manager ensuring all options have been considered before starting a formal process
- act as liaison with the Employees Trade Union Representative
- support at all of the formal meetings

4. Principles

The Trust relies upon the effective performance of all its' staff in order to deliver the aims and vision of each academy and the Trust as a whole. To achieve this, each academy will ensure that effective recruitment is undertaken and performance expectations are clearly defined through the Performance Management process for teaching or support staff (as applicable); that performance is monitored and employees are given appropriate feedback, training and support.

Employees should be provided with appropriate information, support and advice during induction and probation to help them achieve the level of performance expected. ECT are except from the Trust probation period.

Our academies will try to resolve issues of under-performance informally through meetings between the employee and their manager using the Staff Appraisal and Performance Management Policy(also see section five). However, where this approach has been ineffective or the performance concerns are more serious, formal action under the Capability Procedure will be considered.

Support staff are expected to carry out the duties set out in their job description as well as any professional standards eg classroom-based support staff should also adhere to the Professional Standards for Teaching Assistants (2016)

The employee will be advised of the concerns arising from their performance and given the opportunity to respond and present relevant information.

The employee will normally be given at least 10 working days' notice of all formal meetings under this procedure. Meetings will be held at a mutually

agreed time, date and venue. All parties must ensure that there are no unnecessary delays to the process.

All reasonable efforts will be made to accommodate any disability or language issues affecting the employee or their representative, these will be reasonably addressed so that proceedings can take place fairly.

Where there is an indication that underperformance may be due to a disability the manager should contact HR in order to receive advice in line with the Equality Act 2010.

The Capability Procedure will be managed with recognition of the requirement for confidentiality.

The time-scales within this procedure may be amended by mutual consent, taking in to consideration the needs of all parties and the welfare of students.

5. Informal handling of under-performance

Any concerns regarding an employee's performance should be discussed with them at the earliest opportunity. The line manager should seek to identify the nature and causes of any perceived problems. Some difficulties may be temporary because of family/personal circumstances or short-term health problems. The manager should also consider whether the issues are a matter of lack of capability, or of ill health or misconduct which should be dealt with through separate procedures. Line managers should try to resolve issues of minor incapability informally and in a supportive manner using the Staff Appraisal and Performance Management Policy. Further guidance for managers is given in Appendix 1, and some key steps summarised below.

- **Set the level** – the manager should bring to the attention of the employee how they are failing to meet the required level of performance and of the concerns that exist;
- **Seek an explanation** - provide the employee with an opportunity to explain why they are not meeting the required level of performance and to discuss the acceptability of the explanation(s);
- **Require improvement** - advise the employee what they are expected to do to bring about improvements in performance. Outline any management action and support and agree a time limit within which the employee can reasonably be expected to demonstrate improvement a minimum of 13 weeks would be expected to see an improvement
- **Warn of the consequences** - of failure to improve, to meet and sustain the level of performance required, such as formal action under the Capability Procedure.

The main points discussed should be noted and a copy provided to the employee; for example, this could be via email or a letter. This record of events would be dealt with according to the (Data Protection GDPR) Policy. It should be clear that this is not a formal stage but a supportive mechanism, always with the intention to give the employee the tools to succeed.

Where this informal approach has been tried and has not succeeded in improving performance, or where the underperformance is more serious (see section 6 below), formal action should be taken by organising a Stage One Capability Meeting.

Formal Stage One – Capability Meeting

If an employee's performance continues to be unsatisfactory following informal procedures, or where unsatisfactory performance is sufficiently serious to warrant moving straight to formal action, the employee should be invited to a formal meeting to discuss the concerns (with Union assistance).

The employee should be given at least 10 working days' notice of the meeting. The notification letter should include:

- the time and place of the meeting (for support staff this should be within their working hours)
- a statement of the concerns regarding their performance
- the possible consequences of the meeting
- their right to be accompanied by either a work colleague or trade union representative
- copies of any written evidence that might be relied upon

The purpose of this meeting is to establish the facts. The employee should be given the opportunity to respond to the concerns about their performance and make any relevant representations. This may provide new information or a different context to that which has already been collected. The employee will be reminded of any informal discussions (where an informal stage has happened) and the steps that have already been taken to support an improvement in performance. Specific reference will be made to the performance management procedure along with the agreed objectives and any support agreed to meet those objectives.

Every effort should be made to reach agreement, however if the employee disagrees that they should be in the Capability Procedure or at a particular stage within the Procedure, the Trust has the right to impose it since the Capability Procedure forms part of an employee's terms & conditions of employment. The points raised by the employee should be documented as part of the Stage One process. Equally, the employee has the right to raise a grievance under the Grievance Procedure, along with the right to trade union representation.

A decision will be taken at the meeting regarding the required action from one of the following options:

- where there are insufficient grounds for pursuing the capability issue, the concerns will be addressed informally and therefore formal action under the Capability Procedure will not proceed. In this instance, a note should be sent to confirm that the employee has not entered formal proceedings

- where it is found that the concerns are as a result of misconduct or ill health, action under the Capability Procedure may stop and further action will be taken under another appropriate procedure if required
- where further investigation proves necessary, the meeting may be adjourned and then reconvened once the investigation is complete
- where there is evidence supporting the concerns, the meeting will continue and will address the points outlined below.

Where the meeting continues, it should address the following:

- identify the areas of concern regarding performance
- confirm the suspension of the usual Performance Management Policy
- give clear guidance on the improved standard required, this must include setting objectives, identifying success criteria or the evidence that will be used to determine improved performance
- set out the timetable for improvement and explain how performance will be monitored and reviewed. The timetable will depend on individual circumstances and should be agreed by both parties wherever possible. It should be reasonable and proportionate to allow the opportunity for improvement to take place but should not be excessively long. A guide for the monitoring and review period is 13 weeks.

Note: in serious cases where it can be demonstrated that the education of pupils and/or the efficient and effective running of the Trust or an academy is being jeopardised or undermined it is expected that the period for improvement would be no more than four working weeks at each stage. This shortening of the period would only occur in the most extreme cases.

- Issue a Support Plan (Appendix 2), setting out the concerns, the agreed actions and timescales, the support that will be provided, and making clear the consequences of a failure to improve within the set period.

At the meeting consideration should be given regarding any reasonable support or training that would assist the employee in achieving a satisfactory standard of performance.

Reasonable measures to assist the employee to meet agreed objectives and perform at the level expected should be discussed and documented. The measures may include any or all of the following

- changes to working practices within the terms of the employee's job description
- increased supervisory support for a specified period of time
- work shadowing a competent employee

- modified workload or tasks for a specified period of time
- further training
- other reasonable relevant support

An important part of the support offered to a teacher would be a clearly defined amount of classroom observation with structured oral and written feedback. The amount of classroom observation should be discussed with the teacher and their trade union representative.

The employee will receive a letter confirming the outcome of the meeting, including details of the Support Plan if issued, within 5 working days of the meeting. Notes of the meeting should be taken and a copy provided to the employee. The employee will be entitled to record any points of disagreement

Following this meeting during the specified time period for improvement, monitoring, evaluation, guidance and support will continue, the frequency of such will be determined on an individual basis by mutual agreement.

A formal review meeting should be held at the end of the specified monitoring and review period.

7. Formal Stage Two – Formal Review Meeting

A formal review meeting will be held at the end of the monitoring and review period in order to evaluate whether sufficient improvement in performance has been made.

The employee should be given 10 working days' written notice of the meeting which must include:

- the time and place of the meeting
- confirmation of the performance concerns that are to be reviewed
- the possible consequences of the meeting
- their right to be accompanied by either a work colleague or trade union representative
- copies of any written evidence that might be relied upon

At the review meeting the person(s) chairing the meeting and employee will discuss the monitoring and review period and any support provided. The person(s) chairing the meeting will assess whether the employee's performance has improved sufficiently. The employee will have the opportunity to comment on their performance during this period.

Following discussion at the meeting, the person(s) chairing the meeting may decide that:

a) the employee's performance has improved sufficiently and no further action is required under the procedure.

b) that some progress has been made and there is confidence that more is likely, so the monitoring and review period will be extended. The person(s) chairing the meeting will confirm the continuing areas of concern and the improvement required. Consideration will be given to any further support that can be provided. A further period for monitoring and review will be given, normally of no more than 13 weeks. At the end of this period a further review meeting will be convened.

c) that there has been no, or insufficient improvement made and performance remains unsatisfactory so a second Support Plan will be issued. The employee should be informed that failure to improve sufficiently within the set timescale, may result in dismissal. The person(s) chairing the meeting will confirm the continuing areas of concern and the improvement required. Consideration will be given to any further support that can be provided. A further monitoring and review period will be given, normally of no more than six weeks. At the end of this period a further review meeting will be convened.

The employee will be informed of the outcome of the review meeting in writing, including details of the Support Plan if issued, normally within five working days of the meeting. Notes of the meeting will be taken and the employee provided with a copy.

Where a second Support Plan is issued, a further review meeting will take place at the end of the second monitoring and review period, where the following decisions can be made:

- the employee has reached a satisfactory standard of performance and no further action is required under the procedure
- there has been no, or insufficient improvement made and performance remains unsatisfactory a member of the SLT will arrange a dismissal hearing under stage three

8. Formal Stage Three - dismissal hearing

A dismissal hearing will be arranged where the employee did not make enough improvement in performance or meet agreed objectives during the specified monitoring and review period(s). Further details on who should Chair the hearing is given in section 10, and details of the procedure for the hearing at Appendix 3.

The employee will normally be given **10 working days'** notice in writing of a dismissal hearing. The Chair of the hearing will confirm arrangements to the employee in writing, including:

- the deficiencies in the employee's performance and the reasons for contemplating dismissal
- the date, time and location of the hearing. If the date / time is not convenient for any party an alternative date will be agreed, this will not normally be more than 5 working days after the date originally proposed by the Chair.
- the name of the person (or panel) chairing the hearing
- the right to be accompanied and/or represented by a trade union representative or work colleague
- the requirement to provide the Chair with a copy of the documents that they will be relying upon and the names of any witnesses that they will be calling at the hearing at least 5 working days before the hearing
- advising the employee that the hearing could result in dismissal
- copies of documents that the manager presenting the case will refer to at the hearing, and names of any witnesses that they will call.

At the hearing the person(s) who chaired Stage Two will be given the opportunity to put forward the case for dismissal, and the employee will be given the opportunity to present their case against the dismissal. Both parties may call witnesses and ask questions. HR will attend the hearing to provide procedural advice.

The hearing will normally be adjourned whilst the person(s) hearing the matter (see section 10) consider the evidence put forward and reach a decision.

The outcome of the hearing may be either dismissal on the grounds of lack of capability or alternative action in the light of evidence presented at the hearing. Where an employee is dismissed they should be dismissed with appropriate notice. The employee will be notified in writing of the outcome normally within 5 working days and of their right of appeal.

A postponement may be granted if the employee or their representative is unable to attend on the proposed date. A postponement should not be for more than 5 working days after the original date proposed, however, an extension to this time limit can be made by mutual agreement. Where a hearing is rearranged, and the employee is unable to attend a second time and there is no necessary reason such as medical or OHU referrals, the hearing will normally convene, as arranged, and a decision taken in the employee's absence.

Alternative actions might include:

- a further period of monitoring and review. If the required level of performance is not achieved and this leads to a further dismissal hearing it should be heard, if possible, by the same person / panel
- redeployment to a different post within the academy if a vacant existing post is available as an alternative to dismissal (by mutual agreement); if the post is on a lower grade there will be no entitlement to protection of salary
- reduction of responsibility (by mutual agreement); this may be linked to the redeployment option or could apply to the post currently held by the employee – again salary protection will not apply in such circumstances.

9. Formal Stage Four - Appeal

The employee has a right of appeal against any warning issued by the head teacher at any stage of the capability procedure and against any decision taken at a capability hearing.

Such appeals will be considered by the appeals committee according to the authority in Section 10.

The employee may exercise the right to appeal within 15 days of receipt of any warning and the staff appeals committee shall meet to hear the appeal within 15 days of the appeal being lodged.

The employee shall be informed in writing of the date and time of the meeting at least five days in advance. It can either confirm the warning or decision, cancel it or impose a lesser penalty.

The employee will normally be given 10 working days' notice, in writing, of the date of the appeal hearing. This letter will give the name of the person chairing the appeal hearing (and the names of panel members - see section 10). It will remind the employee of their right to be accompanied at the hearing by either a trade union representative or work colleague. An HR representative who has not previously been involved will attend the hearing to provide procedural advice.

Both parties must indicate at least 5 working days in advance of the appeal hearing which, if any, witnesses they wish to call and provide copies of any documentation that will be relied upon at the hearing. In exceptional circumstances an alternative time-scale may be agreed.

The appeal hearing should consider the evidence presented in relation to the grounds for appeal put forward by the employee; it is not expected that the appeal will constitute a full re-hearing.

The Chair of the Stage Three hearing will attend the appeal to present the management case in relation to the grounds of the appeal and may be accompanied by the person who acted at stages 1 and 2 in the procedure.

The employee will be able to present evidence that is directly relevant to the grounds of the appeal. Management will have the opportunity to respond.

The appeal hearing may:

- confirm the decision of the dismissal hearing
- overturn the decision of the dismissal hearing, and specify an additional period of time within which performance must improve
- may recommend alternative action (for example, redeployment)

The employee will be informed of the appeal decision in writing, normally within 5 working days. The decision of the appeal hearing is final.

10. Authority to act under the Capability Procedure

Employee being managed under this procedure	Responsible for stage 1 & 2 Meetings	Stage 3 Hearing	Stage 4 Appeal
All academy and Central based employees	Principal/Manager	Panel of three made up of managers either from the Academy or the Trust	Panel of Three from SLT including a member of the LAC or Trust Board
Principal	SLT of the Trust	Panel of Three from the Trust SLT including Trust Board Member and HR support	Panel of Three including Trust Board member and HR support
SLT of the Trust	CEO	Panel of three from Trust Board	Panel of Three from Trust Board
CEO	Chair of Trust Board	Panel of Three from the Trust Board	Panel of Three from the trust board. (can involve external consultant if required)

11. Sickness

If long term sickness appears to have been triggered by the commencement of monitoring or the formal Capability Procedure, the case will be dealt with in accordance with the Supporting Attendance Procedure and monitoring and/or formal procedures resumed on return to work. In some cases, it may be appropriate for formal procedures to continue during a period of sickness absence.

12. Review

This procedure will be reviewed to respond to any changes in employment legislation, and in any event at least every three years.



Capability - Managers Guidance

Manager guidance on managing under-performance

This guidance is intended to help support managers who are managing concerns around an employee's performance under the Trust's Performance Management Policy. If subsequently acting under the Capability Procedure, it is important that the Manager can evidence the steps previously taken to try and support the required improvement.

Any concerns regarding an employee's performance should be discussed at the earliest opportunity, and Managers should try to resolve issues of incapability informally and in a supportive manner.

Employees should receive constructive feedback on their performance throughout the year, as part of the Performance Management process, and as soon as practicable after agreed lesson observation has taken place. Feedback should highlight areas of strength as well as any areas that require support. The performance management process should be a two-way process and the employee is expected to be fully engaged in the process.

Appropriate action should be taken promptly as soon as it is noticed that an employee is not performing certain aspects of their job satisfactorily. Delaying or doing nothing may cause the performance problem to escalate and cause delay in providing the necessary support.

The employee should be advised to seek professional advice from their trade union representative as the Trust acknowledges that this may help to find a resolution. However, there is no right to be accompanied to meetings taking place as part of the usual performance management process.

It should be recognised that capability problems may be related to issues outside the employee's direct control and may be symptomatic of underlying work problems or other personal issues. Particular care should be taken when

disability or health issues are involved and advice should be sought from HR / Occupational Health Service as appropriate.

Where there are concerns about any aspects of an employee's performance, the manager should meet with them to:

- give clear feedback about the nature and seriousness of the concerns
- give the employee the opportunity to comment and discuss the concerns and provide information on any issues impacting on the situation
- agree any support (e.g. coaching, mentoring, structured observations, training, professional courses) that will be provided to help address those specific concerns
- make clear how, and by when, progress will be reviewed (it may be appropriate to revise objectives and/or agree other appropriate & clear targets, and it will be necessary to allow enough time for improvement. The amount of time will need to reflect the seriousness of the concerns)
- explain the implications and process if no, or insufficient, improvement is made (i.e. entry in to the formal capability procedure).

It is recommended that a note of the discussion is confirmed in writing (e.g. by email with receipt acknowledged by the employee, or in Performance Management documentation).

If the discussion outlined above results in the required improvement, it would be helpful to 'draw a line under it' by confirming that the issue(s) have been addressed and the performance management process will continue as normal providing the improved performance is maintained.

Where this informal approach has been tried and has not succeeded in improving performance, or where the underperformance is more serious, formal action should be taken by organising a Stage One Capability Meeting.

Appendix 2

Support Plan

Employee name:

Date of meeting:

Concerns/Area of performance	Level of Improvement Required	Support to be provided (nature of support)	Who should make the arrangements, who is responsible	Timescales for improvement	Review Dates

*Actions agreed under this improvement plan/support plan need to be SMART: **s**pecific, **m**easurable, **a**chievable, **r**elevant and **t**ime related. In other words, it should be very clear what is required by whom and by when and clear how it will be evaluated.*

I understand that the consequence of my performance not improving to the required level within the agreed time period will be the continuation of the Capability Procedure, which could include my dismissal.

Signed:

Date:

Employee

Signed:

Date:

Manager

Appendix 3

Capability Procedure Stage Three Hearing

Introduction

- introduce those present, and explain why they are there. Someone who is not directly involved in the hearing should be appointed to take notes on the proceedings and Human Resources may be present throughout the hearing
- explain the purpose of the meeting i.e. to establish as fully as possible the facts, and to consider the case for dismissal in accordance with the Trust's Capability Procedure
- explain how the meeting will be conducted
- the manager presenting the case for dismissal should state precisely what the capability issue is and outline the case for dismissal by going through the evidence that has been gathered
- ensure that the employee and his/her companion are allowed to see any statements made by witnesses and to raise questions

Employee's reply

- give the employee the opportunity to state their case against dismissal, and to respond to the evidence that has been put forward. They should be able to ask questions, present their own evidence and call witnesses. The employee and their companion should be given the opportunity to confer privately if necessary

General questioning and discussion

The person(s) hearing the matter should:

- use this stage to establish all the facts
- ask the employee if there are any special circumstances to be taken into account
- keep the approach formal and polite, and encourage the employee to speak freely; it should be a two-way process
- use questions to clarify the issues and check that what has been said has been understood
- if new facts emerge, it may be necessary to adjourn the hearing to investigate.

Summing up

- summarise the main points of the discussion after questioning is completed, to remind all parties of the nature of the capability issue,

the arguments and evidence put forward, and to ensure nothing is missed

- ask the employee if they have anything further to say

Adjournment before decision

- adjourn before a decision is taken about whether dismissal is appropriate to allow reflection and proper consideration. This also allows for further checking of any matters raised especially if there is any dispute over the facts

Giving the decision

- unless a mutual agreement has been reached otherwise, the meeting will be reconvened and the employee be informed of the outcome of the hearing.
- the decision will be communicated in writing within 10 working days