



**CAPABILITY POLICY and HOW TO GUIDE**

Date of last review:	September 2019
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## 1. Purpose

This Federation expects excellent standards of performance and is committed to supporting employees to fulfil the requirements of their role. The Federation acknowledges that there may be circumstances when an employee does not perform to the required standards. This may happen because the employee does not have the necessary skills, knowledge and/ or experience. The employee may not demonstrate the appropriate behaviours that are required.

This policy defines how the Federation will manage an employee if they are unable to perform to the required standards.

Further guidance is available in the How to Guide and this must also be referred to.

## 2. Scope

This policy applies to:	<ul style="list-style-type: none"><li>• Teachers including Leadership, Upper Pay Range, Main Pay Range and Unqualified Teachers</li><li>• Support Staff.</li></ul>
This policy does not apply to:	<ul style="list-style-type: none"><li>• Volunteers</li><li>• Contractors</li><li>• Agency workers.</li></ul>

This policy is non contractual and does not form part of any employee's terms and conditions.

Employees that have been subject to a TUPE into the Federation may be excluded from this policy where they have transferred under a contractual policy. In such cases, the employee should refer to their own contractual policies and procedures.

Employees with less than two years service may be subject to a shortened procedure.

Employees are actively encouraged to contact their professional association/ trade union representative at the earliest opportunity to obtain advice and support at any point during this procedure.

The Federation expects all parties to maintain confidentiality throughout the application of the policy.

### **3. Performance management**

**Performance management** The Federation will manage an employee's day to day performance with the Performance Management Policy.

**Annual review of performance** Every employee will have an annual review of their performance. The review process enables an employee's performance to be monitored and assessed.

**Pay progression** If an employee is unable to perform to the required standards of the role, this may have an impact on their annual pay progression.

### **4. Managing capability**

**Considerations** The manager must consider whether to start the capability process if an employee does not perform the duties of their role to the required standards. This may happen because the employee does not have the necessary skills, knowledge and/ or experience. The employee may not demonstrate the appropriate behaviours that are required.

There may be other reasons to explain why an employee is unable to perform to the required standards. This may happen due to a physical, cognitive, mental, sensory, emotional, or developmental disability, impairment, condition or illness which may be temporary or permanent.

There may be exceptional circumstances when the manager and/ or employee anticipate a long term capability concern. This may happen due to the employee's health or a disability. In these circumstances, it is anticipated it is unlikely that the employee can achieve the required level of performance. Consideration must be given to whether reasonable adjustments are appropriate. The line manager must seek advice from Education Personnel Services in such cases.

**Policy stages and principles** The possible stages are:

- informal stage
- formal stage one
- formal stage two

- formal stage three - may result in dismissal
- appeal after each formal stage.

There is a shortened procedure for employees with less than two years service as detailed in [Appendix One](#).

As a general principle the manager will seek to use the informal stage prior to progressing to the formal stages.

In exceptional circumstances, it may be appropriate to start at the formal stage without using the informal stage. The manager must seek advice from Education Personnel Services in such cases.

The employee must be given a reasonable period of time to achieve the required improvement before moving to the next stage of the policy.

## 4. Informal stage

**Reference must be made to the How to Guide - Capability for the full procedural information.**

**Informal stage** The manager should speak to the employee by having an informal discussion known as a managerial support discussion. Depending on the circumstances, this could become a series of informal discussions.

**Right of representation** The employee is not usually accompanied at any discussions within the informal stage of the policy. There may be circumstances when the employee asks to be accompanied and consideration should be given to any requests. This should be accommodated where it does not cause a delay to the process.

**Outcome(s) of informal stage** The manager undertaking the managerial support discussion(s) must decide on the outcome.

A record must be made of each discussion. The manager must share the record with the employee. A copy must be kept on the employee's personnel file.

## 5. Formal stage

**Reference must be made to the How to Guide - Capability for the full procedural information.**

**Formal stage** At each formal stage of the policy, the employee must be invited to attend a meeting/ hearing.

**Meetings/ hearing arrangements** The employee must receive in writing the invitation to the meeting/ hearing.

The letter must give the employee **5 working days'** notice of the meeting/ hearing.

**Formal record of the meeting/ hearing**

A formal record must be taken during the meeting/ hearing. This may be made by audio recording the meeting/ hearing or by a note taker. It is the Federation's responsibility to make the appropriate arrangements.

If an audio recording takes place, a copy of the recording must be retained by the Federation. The Federation must comply with all relevant retention and storage requirements.

For governor hearings in maintained schools, there remains a legal requirement to have a written record of the meeting of the Governor Committee.

**Alternative date**

The Federation expects that the employee and their representative will make all reasonable efforts to attend the first scheduled meeting/ hearing date and time.

If it is not possible, the employee may propose an alternative date and/ or time. This should be within **5 working days** of the original meeting/ hearing.

The meeting/ hearing will be rescheduled.

**Sharing of information**

The manager and employee are required to exchange all relevant papers and supporting evidence in advance of the meeting/ hearing. Management documents will be supplied with the invitation letter.

The employee or their representative must submit all relevant papers and supporting evidence to arrive with the chair at least **3 working days** before a meeting/ hearing.

**Right of representation**

The employee has the right to be represented/ accompanied at a formal stage meeting/ hearing or appeal meeting. This can be by a professional association/ trade union representative or a work colleague.

It is the employee's responsibility to:

- arrange their own representative
- liaise with their representative to agree the formal meeting/ hearing or appeal meeting date and time
- advise management of the representative's details.

There is no right to legal representation at any stage of this policy.

**Attending formal meetings/ hearings**

If the employee is not well enough to attend the meeting/ hearing, it may be deferred until they are able to attend. A meeting/ hearing will not be deferred indefinitely because the employee is unable to attend.

**Outcome of a formal meeting/ hearing** The chair of the formal stage meeting/ hearing must fully consider all evidence presented and decide on an outcome.

A written warning may be issued and this can be:

- a first written warning of 12 months OR
- a final written warning of between 12 – 24 months
- **For employees with less than two years service** - a final written warning of between 12 – 24 months.

At a stage three hearing the employee may be dismissed on the grounds of performance capability.

The chair must confirm the outcome in writing within **5 working days** of the meeting/ hearing. A copy of the outcome letter and any warning must be placed on the employee's personnel file.

If the outcome is dismissal, any sums owing to the Federation from the employee will normally be deducted from their final pay.

**Review meetings** Following the formal stage meeting/ hearing the manager must hold scheduled review meetings with the employee.

**Progression through the formal stages** The manager can progress to the next formal stage and re-enter the formal stage at the appropriate point if:

- the employee's performance does not meet the standard required
- there is a further performance concern even though this may be different to a performance concern(s) referred to in a previous stage
- if an improvement is not sustained for a 12 month period following a formal stage one meeting
- if an improvement is not sustained for a 12 - 24 month period following a formal stage two meeting
- the employee has not been successfully redeployed and/ or has refused a reasonable offer of alternative employment.

## 6. Appeal stage

**Reference must be made to the How to Guide - Capability for the full procedural information.**

**Appeal stage** The employee has the right to appeal against the outcome of a formal meeting/ hearing.

**Right of appeal** The employee must submit their appeal in writing within **10 working days** following receipt of the written outcome of the formal meeting/ hearing. This must include the full reasons for the appeal.

Following an appeal of a formal stage three hearing, there is no further right of internal appeal.

<b>Appeal meeting</b>	The employee must be invited to attend a meeting. The employee must be given <b>7 working days</b> notice of the meeting.
<b>Meeting arrangements</b>	The principles of <a href="#">meeting arrangements</a> will apply.
<b>Formal record of the meeting</b>	The principles of the <a href="#">formal record of the meeting/ hearing</a> will apply.
<b>Alternative date</b>	The principles of <a href="#">alternative date</a> will apply.
<b>Sharing of information</b>	The principles of <a href="#">sharing of information</a> will apply.
<b>Right of representation</b>	The principles of the formal stage <a href="#">right of representation</a> will apply.
<b>Outcome of the appeal meeting</b>	<p>The chair must fully consider all evidence presented and decide on an outcome.</p> <p>The outcome cannot impose a higher sanction than issued at the formal meeting/ hearing.</p> <p>The chair must advise the employee of the outcome at the appeal meeting unless otherwise agreed. The outcome must be confirmed in writing within <b>5 working days</b> of the meeting.</p> <p>A copy of the outcome letter must be placed on the employee's personnel file.</p>

## 7. Gross Incompetence

**Reference must be made to the How to Guide – Capability for the full procedural information.**

<b>Definition</b>	<p><b>Gross incompetence</b> - occurs where an investigation identifies that an employee has failed, either by a single error or series of errors, to perform the duties of their role. The outcome is that this causes or has caused serious harm or puts others (colleagues, general public or service users) or the Federation's reputation and performance at serious risk.</p> <p>Gross incompetence only applies in exceptional circumstances. The manager must seek advice from Education Personnel Services in such cases.</p>
<b>Policy stages</b>	<p>The possible stages are:</p> <ul style="list-style-type: none"> <li>• formal stage three hearing - may result in dismissal</li> <li>• appeal.</li> </ul>

**Suspension or alternative arrangements**

Before making a decision about suspension or alternative arrangements, the appropriate manager must seek advice from Education Personnel Services.

Suspension or alternative arrangements are neutral and precautionary acts. They may be considered at any point during this policy once it is established that the circumstances may be gross incompetence.

The appropriate governance arrangements must be adhered to in deciding whether suspension or alternative arrangements are appropriate.

During suspension or alternative arrangements the employee must adhere to all relevant requirements.

Written confirmation of the decision regarding suspension must be provided to the employee.

Suspension or alternative arrangements must be regularly reviewed.

There is no right of appeal against the decision to apply alternative arrangements or suspension.

**Formal stage 3 hearing**

The principles of the [formal stage meeting/ hearing](#) will apply.

**Hearing arrangements**

The principles of [meeting/ hearing arrangements](#) will apply.

**Formal record of the hearing**

The principles of the [formal record of the meeting/ hearing](#) will apply.

**Sharing of information**

The principles of [sharing of information](#) will apply.

**Alternative date**

The principles of [alternative date](#) will apply.

**Right of representation**

The principles of the formal stage [right of representation](#) will apply.

**Attending a formal stage 3 hearing**

The principles of [attending formal meetings/ hearing](#) will apply.

**Outcome of the formal stage 3 hearing**

The principles of [outcome of the formal meeting/ hearing](#) will apply.

**Appeal**

The principles of the [appeal stage](#) will apply.

## 8. Other Policy Requirements

Reference must be made to the How to Guide – Capability for further information relating to this section.

**Confidentiality** It is expected that all parties involved in the capability process will maintain confidentiality as appropriate. This is both within and outside of the Federation (including social media).

If any party does not maintain confidentiality action may be taken under the Disciplinary policy.

**Right of Representation** Employees are actively encouraged to contact their professional association/ trade union representative at the earliest opportunity to obtain advice and support at any point during this procedure..

The employee is not usually accompanied at any discussions within the informal stage of the policy. There may be circumstances when the employee asks to be accompanied and consideration should be given to any requests. This should be accommodated where it does not cause a delay to the process.

The employee has the right to be represented/ accompanied at a formal stage meeting/ hearing or appeal meeting. This can be by a professional association/ trade union representative or a work colleague.

It is the employee's responsibility to:

- arrange their own representative
- liaise with their representative to agree the formal meeting/ hearing or appeal meeting date and time
- advise management of the representative's details.

There is no right to legal representation at any stage of this policy.

**Referral to Occupational Health/ medical practitioner** It may be necessary to refer the employee to Occupational Health/ medical practitioner to obtain medical advice and information.

If an employee does not co-operate with the referral, any assessment or decision taken will be based on the information available.

**Redeployment** Redeployment can be considered at any stage in this policy and:

- must not be used as a sanction
- should result in satisfactory performance in the new role

- is subject to a suitable opportunity being available.

**Requirement for the School to pass on information about a teacher's capability to a new employer**

A Headteacher or teacher may apply for a job with an alternative employer. The employee may have been subject to the formal stages of the Capability policy within two years prior to starting a job with a new employer. In such cases, the Federation must notify the new employer.

**Safeguarding concern (relating to vulnerable adults, children and young people)**

The Federation may take action under the Capability policy for reasons that relate to a safeguarding concern. Such cases must be dealt with in accordance with Hampshire's Child Protection procedures. This ensures that a child, young person or vulnerable adult is not at risk or that a police or social care investigation is prejudiced.

Advice must be sought from Education Personnel Services.

**Referral to relevant bodies**

In the following circumstances it may be necessary to make a referral to the relevant body:

- if a dismissal takes place
- in circumstances where a formal process regarding a capability concern has not concluded and the potential outcome may have resulted in dismissal.

Where there is a requirement to make a referral to a relevant body, the employee must be notified in writing that a referral has taken place.

For further guidance please contact Education Personnel Services.

**Mutual agreement**

As an alternative to a formal stage meeting/ hearing, the Federation and the employee may discuss a mutual agreement. The contract of employment may be ended by mutual agreement between the employee and the Federation.

There is no right to appeal a mutual agreement as it is entered into with the consent of both parties.

**Fast track procedure**

In very serious cases, a final warning may be issued at a formal stage one meeting. In such cases, if the necessary improvement in performance is not achieved during the review period, the manager can proceed to a formal stage three hearing.

Further advice must be sought from Education Personnel Services.

**Formal action – professional association/ trade union representative**

Where there are concerns involving a professional association/ trade union representative, must notify and seek advice from Education Personnel Services before taking formal action.

## 9. Appendix One - Managing Capability for employees with less than two years service

Reference must be made to the How to Guide – Capability for further information relating to this section.

### Managing Capability

#### Policy stages

The possible stages are:

- informal stage
- formal stage – may result in dismissal
- appeal only against a dismissal.

As a general principle the manager will seek to use the informal stage prior to progressing to the formal stages.

In exceptional circumstances, it may be appropriate to start at the formal stage without using the informal stage. The manager must seek advice from Education Personnel Services in such cases.

The employee must be given a reasonable period of time to achieve the required improvement before moving to the next stage of the policy.

#### Informal stage

The principles of the [informal stage](#) will apply.

#### Formal stage

The principles of the [formal stage](#) will apply.

#### Appeal stage

The principles of the [appeal](#) section will apply. An employee only has the right of appeal against a dismissal decision. There is no right of appeal against a warning.

### Gross Incompetence

#### Gross incompetence

The principles of [gross incompetence](#) will apply.

## 10. Policy Governance

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## HOW TO GUIDE .... CAPABILITY

### 1. Purpose

This Federation expects excellent standards of performance and is committed to supporting employees to fulfil the requirements of their role. The Federation acknowledges that there may be circumstances when an employee does not perform to the required standards. This may happen because the employee does not have the necessary skills, knowledge and/ or experience. The employee may not demonstrate the appropriate behaviours that are required.

This policy defines how the Federation will manage an employee if they are unable to perform to the required standards.

Further guidance is available in the How to Guide and this must also be referred to. Please note that the section numbering in the Capability policy and the How to Guide – Capability are not aligned.

### 2. Scope

The policy and this how to guide apply to:	<ul style="list-style-type: none"><li>• Teachers including Leadership, Upper Pay Range, Main Pay Range and Unqualified Teachers</li><li>• Support Staff.</li></ul>
The policy and this how to guide do not apply to:	<ul style="list-style-type: none"><li>• Volunteers</li><li>• Contractors</li><li>• Agency workers.</li></ul>

This policy is non contractual and does not form part of any employee's terms and conditions.

Employees that have been subject to a TUPE into the Federation may be excluded from this policy. In such cases, the employee should refer to their own contractual policies and procedures.

Employees with less than two years service may be subject to a shortened procedure as detailed in [Appendix One](#).

Employees are actively encouraged to contact their professional association/ trade union representative at the earliest opportunity to obtain advice and support at any point during this procedure.

The Federation expects all parties to maintain confidentiality throughout the application of the policy.

### 3. How to use this document

#### Principles

This How to Guide provides information about the procedure to follow when applying the Capability policy. The document has been written in the second person to address the line manager, referred to throughout the document as

'you'.

Throughout this guide, the word 'must' is used as a 'requirement' of the policy and procedure. The word 'should' is used to indicate actions or processes that are considered to be best practice.

Please note that the section numbering in the policy and this how to guide are not aligned.

If there are concerns about a Headteacher's performance concerns, a relevant Governor must consult Education Personnel Services.

**How do I address my concern?**

<b>Type of concern</b>	<b>Refer to the...</b>
Conduct or behaviour which is considered to be wilful, negligent or a breach of the Code of Conduct	Disciplinary policy and how to guide
Performance concerns that relate to a possible underlying medical condition or disability	Education Personnel Services team for advice and Occupational Health/ medical practitioner.  It may be more appropriate to manage the concern using the Managing Sickness Absence policy.
Absence from work due to sickness	Managing Sickness Absence policy and how to guide
Annual performance review for employees	Performance Management policy
Sickness absence whilst action under the Capability policy has started	In some cases it may be appropriate for action under the Capability policy to continue during a period of sickness absence. In such cases consideration must be given to any medical advice from Occupational Health/ medical practitioner.
An employee's concern(s) about a decision or action taken when applying the policy	Education Personnel Services team for advice.  If matters are related - use the meetings and appeals process within the policy.  If matters are unrelated - run the policy and the Grievance policy concurrently.  Or, in certain cases action under the policy may pause to address the grievance.

If you are unsure which policy to use please contact Education Personnel Services.

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## 4. Introduction

This Federation expects excellent standards of performance and is committed to supporting employees to fulfil the requirements of their role.

The Federation acknowledges that there may be circumstances when an employee does not perform to the required standards. If a performance concern is identified, this should be addressed early on to help the employee to improve. The Federation will work with an employee to support them to achieve the required standards of performance.

### **Policy aims**

The aims of the policy and this how to guide are to:

- improve and maintain performance
- manage capability positively
- provide a framework for managing capability
- ensure the employee is made aware of performance concerns in a timely manner
- support the employee to perform successfully in their role
- support a culture of high performance within the Federation to facilitate school improvement.

### **Key definitions** (shown in alphabetical order)

**Equality Act 2010** - a person has a disability for the purposes of the Equality Act 2010 if they have 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.

**Suspension or alternative arrangements** – are neutral and precautionary acts. They may be considered at any point during the Capability policy once an investigation has established that the circumstances may be gross incompetence.

**Timescales** - all references to 'days' in this how to guide refer to working days, regarded as Monday to Friday, excluding public holidays. Periods of notice that are specified indicate the number of clear days between (and exclusive of) the day the letter is issued and the day of the meeting/ hearing.

## 5. Performance management

### **Performance management**

The Federation will manage an employee's day to day performance with the Performance Management Policy.

The performance management cycle enables a manager to address any concerns promptly with the employee. It allows for appropriate support to be put into place to support an employee to improve their performance. Sometimes despite having supported the employee to improve, performance concerns can continue. In these circumstances, you should consider whether it is appropriate to commence the Capability policy.

**Annual review of performance** Every employee will have an annual review of their performance. The review process enables an employee's performance to be monitored and assessed.

**Pay progression** If an employee is unable to perform to the required standards of the role, this may have an impact on their annual pay progression.

For further advice, please contact Education Personnel Services.

## **6. Managing capability**

**Considerations** You must consider whether to start the capability process if an employee does not perform the duties of their role to the required standards. This may happen because the employee does not have the necessary skills, knowledge and/ or experience. The employee may not demonstrate the appropriate behaviours that are required.

There may be other reasons to explain why an employee is unable to perform to the required standards. This may happen due to a physical, cognitive, mental, sensory, emotional, or developmental disability, impairment, condition or illness which may be temporary or permanent.

There may be exceptional circumstances when you and/ or employee anticipate a long term capability concern. This may happen due to the employee's health or a disability. In these circumstances, it is anticipated it is unlikely that the employee can achieve the required level of performance. Consideration must be given to whether reasonable adjustments are appropriate. You must seek advice from Education Personnel Services in such cases.

If an employee's performance is causing concern, you must consider whether:

- appropriate training and support has been provided to the employee
- reasonable adjustments are necessary
- it is a [performance or conduct issue](#)
- the employee has an underlying medical condition and a [referral to Occupational Health/ medical practitioner](#) may be appropriate
- to hold an informal discussion under the [informal stage](#) of the Capability policy
- it is appropriate to hold a [formal meeting/ hearing](#)
- it is [a gross incompetence](#) matter.

**How to distinguish between performance and conduct**

You will need to consider whether it is appropriate to use the Capability policy. In some circumstances it may be more appropriate to apply the Disciplinary policy.

To help decide which policy to apply, you will need to consider the following:

- does the employee have the necessary skills?
- has the employee completed relevant training to develop the necessary skills?
- does the employee have the necessary knowledge for the role?

- has the employee previously been able to perform to the required standards?

In considering the above questions, this will help you to decide whether the employee has the necessary skills, knowledge and/ or experience. If the employee does not have the necessary skills, knowledge or experience, it would be appropriate to apply the Capability policy.

If you consider that an employee's behaviour or conduct is deemed to be wilful or negligent, it would be appropriate to apply the Disciplinary policy.

If you are unsure about which policy to apply, you must seek advice from Education Personnel Services.

**Identifying a capability concern**

Examples of unsatisfactory performance and gross incompetence are included in [Appendix Two](#) and [Appendix Three](#).

**Policy stages and principles**

The possible stages are:

- informal stage
- formal stage one
- formal stage two
- formal stage three – may result in dismissal
- appeal after each formal stage.

There is a shortened procedure for employees with less than two years service as detailed in [Appendix One](#).

As a general principle you will seek to use the informal stage prior to progressing to the formal stages.

In exceptional circumstances, it may be appropriate to start at the formal stage without using the informal stage. You must seek advice from Education Personnel Services in such cases.

The employee must be given a reasonable period of time to achieve the required improvement before moving to the next stage of the policy.

An employee may have a disability classified by the Equality Act 2010. You must refer to the Reasonable Adjustments guidance before progressing to the informal or formal stages of the policy.

**7. Informal stage**

**Informal stage**

As a manager, the Federation expects you to have open and transparent discussions with an employee to seek to address perceived performance concerns.

You must raise a perceived performance concern promptly with the employee.

You should speak to the employee by having an informal discussion known as a managerial support discussion. Depending on the circumstances, this could become a series of informal discussions.

It may be appropriate to develop an [action plan](#), as a supportive tool to help the employee.

It is important that you make it clear to the employee that the discussion is the informal stage of the Capability policy. The employee must be made aware that it is not a routine discussion.

Where there are performance concerns about the Headteacher, the HPMC will normally invite the School Improvement provider to give support at the informal managerial support discussion.

### **Right of representation**

The employee is not usually accompanied at any discussions within the informal stage of the policy. There may be circumstances when the employee asks to be accompanied and consideration should be given to any requests. This should be accommodated where it does not cause a delay to the process.

### **How to manage an informal managerial support discussion**

When undertaking the informal managerial support discussion, you must:

- provide clear, tangible examples of when and why performance has been unsatisfactory which must be based on facts
- ask the employee to respond, explaining any reasons they feel may be relevant
- try to establish whether the employee has taken action to address the concern(s)
- discuss with the employee whether there is any support, training or reasonable adjustments that may help them to improve their performance
- identify the standards of performance expected, with examples where appropriate
- ensure you explain to the employee what is expected of them
- decide on an outcome and agree this with the employee if possible.

### **Outcome of the informal stage**

The manager undertaking the managerial support discussion(s) must decide on the outcome.

The possible outcomes of the informal stage are:

- the employee provides an explanation and you determine that no further action is needed
- an agreement is reached with the employee about how to improve their performance
- an [Occupational Health/ medical practitioner referral](#) is made if appropriate
- reasonable adjustments are considered if appropriate
- any support/ development/ training needs are identified, agreed and put in place as needed which could include an action plan if appropriate
- a realistic timescale is set within which an improvement needs to take

- place and review meetings are scheduled
- a clear statement is made to the employee that if they are unable to improve their performance, further action under the formal stages of the Capability policy may be necessary.

A record must be made of each discussion. You can use the 'record of informal discussion' template to complete a record of the discussion. You should:

- seek to agree the record with the employee if possible
- share the record with the employee
- keep a copy on the employee's personnel file.

## **8. Formal stage**

**Formal stage** At each formal stage of the policy, the employee must be invited to attend a meeting/ hearing.

**Meeting/ hearing arrangements** The employee must receive in writing the invitation to the meeting/ hearing.  
The letter must give the employee **5 working days** notice of the meeting/ hearing. The timescales for the meeting/ hearing can be varied by mutual agreement.

Meeting/ hearing arrangements should ensure that:

- the date is set in consultation with the employee's representative and Education Personnel Services, where applicable
- a suitable venue is sourced
- consideration is given to access to refreshments (water)
- there are adequate break out rooms reserved for relevant parties
- reasonable adjustments are considered if applicable
- appropriate arrangements are made to enable a [formal record of the meeting/ hearing](#) to be made.

**Formal record of the meeting/ hearing** A formal record must be taken during the meeting/ hearing. This may be made by audio recording the meeting/ hearing or by a note taker. It is the Federation's responsibility to make the appropriate arrangements.

Copies of the notes or audio recordings will be provided on request. Audio recordings will not be transcribed.

If an audio recording takes place, a copy of the recording must be retained by the Federation. The Federation must comply with all relevant retention and storage requirements.

The notes/ audio recording and documents shared within the formal meeting/ hearing are confidential to those present in that meeting/ hearing.

In some cases, it may be necessary as is reasonable in the circumstances to circulate documents to other Federation employees, in connection with

the matter. Any information communicated to other Federation employees in connection with the matter must be treated as confidential.

For governor hearings in maintained schools, there remains a legal requirement to have a written record of the meeting of the Governor Committee.

### **Alternative date**

The Federation expects that the employee and their representative will make all reasonable efforts to attend the first scheduled meeting/ hearing date and time.

If it is not possible, the employee may propose an alternative date and/ or time. This should be within **5 working days** of the original meeting/ hearing.

The meeting/ hearing will be rescheduled.

If the employee is unable to attend or does not attend the re-arranged meeting/ hearing, the chair must decide whether to proceed in their absence. Further advice should be sought from Education Personnel Services.

### **Sharing of information**

The manager and employee are required to exchange all relevant papers and supporting evidence in advance of the meeting/ hearing.

Management documents will be supplied with the invitation letter. This will include any appeal information from the previous formal stage.

A simple record about the situation with details of any informal discussion(s) may be all that is required during the early stages of the process.

A template management report is available to help you compile relevant information in more complex cases and at formal stage three.

The employee will be provided with two copies of all documents that will be provided to the chair/ panel in advance of the meeting/ hearing. One copy is for their reference and the other is for their representative.

You can arrange for a copy of the management documents to be sent directly to the representative, if consent is given by the employee.

The employee or their representative must submit all relevant papers and supporting evidence to arrive with the chair at least **3 working days** before a meeting/ hearing.

In exceptional circumstances, additional information may need to be submitted to the chair/ panel outside of the above timescales. If this happens, the information should be shared with all parties as soon as possible.

If additional documents are submitted on the day of the meeting/ hearing, time must be given to allow all parties to read the documentation.

**Right of representation**

The employee has the right to be represented/ accompanied at a formal stage meeting/ hearing or appeal meeting. This can be by a professional association/ trade union representative or a work colleague.

It is the employee's responsibility to:

- arrange their own representative
- liaise with their representative to agree the formal meeting/ hearing or appeal meeting date and time
- advise management of the representative's details.

There is no right to legal representation at any stage of this policy.

**Who chairs the formal meeting/ hearing****For Teachers and Support Staff**

Stage	Chair/ Panel	HR Adviser	<a href="#">Right to be represented/ accompanied</a>
Stage one	Line manager	If required	Yes
Stage two	Line manager or other manager	HR Adviser	Yes
Stage three/ less than two years service	Headteacher (where they have delegated powers of dismissal) OR a Governors' Committee	HR Adviser	Yes

**Who chairs the formal meeting/ hearing****For a Headteacher**

Stage	Chair/ Panel	HR Adviser	<a href="#">Right to be represented/ accompanied</a>
Stage one	Headteacher Performance Management Committee (HPMC)	If required	Yes
Stage two	Headteacher Performance Management Committee (HPMC)	HR Adviser	Yes
Stage three/ less than two years service	Governors' Committee	HR Adviser	Yes

The chair of the HPMC will commission an advocate from the School Improvement Service and an HR Adviser from Education Personnel Services to present the management case. The chair of the HPMC will usually be called as a witness.

If required, an additional professional adviser from the School Improvement

Service will be present, at any stage to provide the Governors with professional advice.

**Other meeting/  
hearing  
conditions**

The chair/ panel should not have had previous involvement in the case.

If the Headteacher has heard an appeal at formal stage one and/ or formal stage two, they must not be part of the formal stage three hearing panel.

The chair/ panel must declare any conflict of interest or involvement in the matters prior to the meeting/ hearing so that an alternative chair/ panel can be found.

The HR Adviser to the chair does not perform a decision making role. Their function is to provide advice on legal issues, correct application of the policy and how to guide and procedural matters.

**Other meeting/  
hearing  
attendees**

Other meeting/ hearing attendees may include:

- the manager/ alternative manager with an HR Adviser if required to present the case/ respond to the appeal
- the chair of a meeting/ hearing (at an appeal hearing only)
- a professional association/ trade union representative or work colleague
- witnesses (which may include the line manager or chair of the previous meeting/ hearing)
- a note taker
- an observer for training purposes with the consent of all parties.

**Witnesses**

Witnesses are not normally required to be involved or attend a meeting/ hearing in performance cases.

The manager and the employee can request witnesses to attend the meeting/ hearing. It is the responsibility of either party to arrange their own witnesses. The chair of the meeting/ hearing must be notified in advance of the meeting/ hearing of the witnesses who will be called.

Witnesses should only be called if they can provide significant information regarding the case. Witnesses must be given due notice to attend the meeting/ hearing by the person who wishes to call them.

If a witness is unable or refuses to attend the meeting/ hearing then the chair can use the witness's statement contained within the management report.

A witness may find it difficult or distressing to attend a meeting/ hearing. You can provide information about support that is available to the witness during the process. If the professional association/ trade union representative requests a witness it is their responsibility to provide the witness with support.

**Attending  
formal**

If the employee is not well enough to attend the meeting/ hearing, it may be deferred until they are able to attend. Every effort should be made to make it possible for the employee to attend if they wish to do so. A meeting/

## meetings/ hearings

hearing will not be deferred indefinitely because the employee is unable to attend.

If the employee does not attend, the chair will need to decide whether to defer the meeting/ hearing or to continue in the employee's absence.

If the employee is unable to attend, their professional association/ trade union representative may attend the meeting/ hearing. The professional association/ trade union representative would represent the employee. Alternatively the employee can submit a written statement.

## How to manage a formal meeting/ hearing

During the formal meeting/ hearing, the chair must:

- outline the purpose of the meeting/ hearing, introduce attendees and confirm housekeeping arrangements (for example toilets, fire alarm)
- explain the possible outcomes of the meeting/ hearing
- decide whether to accept any new evidence presented on the day of the meeting/ hearing by either party
- ensure that the employee is given an explanation about why their performance is causing a concern and discuss the measures put in place during any previous stage(s) of the policy, referring to any documents or examples - or ask the manager to do so
- provide the employee with an opportunity to respond, referring to any documents or examples, or the representative can do this on their behalf
- call any witnesses who can be questioned by all parties
- invite all parties to ask questions at the appropriate point
- invite both parties to summarise their case, you will summarise first (new evidence must not be introduced at this point)
- adjourn the meeting/ hearing, if necessary, to consider the evidence and decide on the outcome
- reconvene the meeting/ hearing in the case of an adjournment
- notify the employee of the outcome and the reason(s) for the decision
- keep a written record during the meeting/ hearing to refer to when reaching a decision and to help with producing the outcome letter.

## Outcome of a formal stage meeting/ hearing

The chair of the formal stage meeting/ hearing must fully consider all evidence presented and decide on an outcome.

Any outcome given will apply from the date of the meeting/ hearing.

If the employee is issued with a warning, the chair must make a clear statement to the employee about the importance of improving their performance. The employee should understand that if they are unable to improve their performance, further action under the formal stages of the Capability policy may be necessary. If sufficient improvement is not made within the review period or if an improvement is not sustained as follows:

- **at stage one** - for a 12 month period following the formal stage meeting, the employee may be required to attend a formal stage two meeting

- **at stage two** – for at least 12 – 24 months following the formal stage meeting, the employee may be required to attend a formal stage three hearing.

Stage	Possible outcomes
At any stage (including employees with less than two years service)	<ul style="list-style-type: none"> <li>• no further action</li> <li>• to manage the concern on an informal basis</li> <li>• reaching an agreement with the employee about how to improve their performance</li> <li>• an <a href="#">action plan</a> is issued and a review period agreed</li> <li>• any additional support, action plan or development/ training required to help the employee</li> <li>• setting a realistic timescale within which an improvement needs to take place and review meetings are scheduled</li> <li>• whether a <a href="#">referral to Occupational Health/ medical practitioner</a> is appropriate</li> <li>• whether reasonable adjustments need to be considered and/ or implemented where appropriate to do so</li> <li>• whether <a href="#">redeployment</a> opportunities will be explored</li> </ul>
Formal stage one	<ul style="list-style-type: none"> <li>• a first written warning of 12 months</li> <li>• no formal action is required, the concern(s) will be addressed through the Performance Management cycle and the Capability policy will not apply</li> <li>• to refer the concern to a higher stage of the policy (this would take place as a formal stage two or stage three meeting/ hearing)</li> <li>• in serious cases, a final warning is issued</li> <li>• in exceptional cases, the matter is deemed to be potential gross incompetence. This will be managed under the <a href="#">Gross Incompetence</a> stage of the Capability policy.</li> </ul>
Formal stage two	<ul style="list-style-type: none"> <li>• the Stage 1 first written warning remains in force for a further specified period</li> <li>• a first written warning of 12 months</li> <li>• a final written warning of between 12 - 24 months</li> <li>• to progress to a formal stage 3 hearing of which a potential outcome could be dismissal</li> </ul>
Formal stage three	<ul style="list-style-type: none"> <li>• a first written warning of 12 months</li> <li>• a final written warning of between 12 – 24 months</li> <li>• to refer the employee back to a formal stage</li> </ul>

	<p>2 meeting with a final written warning and a further review period</p> <ul style="list-style-type: none"> <li>• to explore the possibility of <a href="#">redeployment</a></li> <li>• to dismiss on the grounds of performance capability with contractual notice.</li> </ul>
Formal stage for an employee with less than two years service	<ul style="list-style-type: none"> <li>• a final written warning is issued (with an action plan and review meetings) and is valid for between 12 – 24 months</li> <li>• to dismiss on the grounds of performance capability with contractual notice.</li> </ul>

The length of the warning depends on:

- the nature of the unsatisfactory performance
- whether there is a belief that the unsatisfactory performance may reoccur
- whether a warning at the same stage has previously been issued.

If a dismissal takes place the Federation must make arrangements to complete the necessary leaver actions including:

- cancelling the employee's IT account
- obtaining the employee's identity card
- completing the other leaver requirements.

If the outcome is dismissal, any sums owing to the Federation from the employee will normally be deducted from their final pay.

The chair of the meeting/ hearing must also explain to the employee that:

- a copy of the letter detailing the outcome will be placed on their personnel file
- they have the right of appeal.

### **Previous warnings**

A performance concern may arise whilst a warning is still live. The chair will take the previous warning into account at a formal stage meeting/ hearing. This may lead to a higher sanction being imposed.

Expired warnings may be taken into consideration. This would be in circumstances where the employee has a history or pattern of the same or similar performance concern(s) over a prolonged period of time which continues to give cause for concern.

The chair must seek advice from Education Personnel Services.

### **Confirming the outcome**

The chair will normally advise the employee verbally of the outcome at the meeting/ hearing, unless agreed otherwise with the employee.

The chair must confirm the outcome in writing within **5 working days** of the meeting/ hearing. The outcome letter will include details of any warning and/ or sanction issued. A template letter is available to ensure all of the necessary information is included.

A copy of the outcome letter and any warning must be placed on the

employee's personnel file.

### **How to develop an action plan**

An action plan is a tool for you and the employee to use to assist with improving performance. The aim of an action plan is to identify and record any activity that will enable the employee to demonstrate their ability to meet and maintain the expected standards of performance.

The action plan can be used to record key outcomes from a formal meeting/hearing including any associated timescales.

The action plan should include:

- the expected standard(s) of performance and timescale in which this should be achieved
- the action/ support that will be put in place
- the associated action(s) to be taken
- who is responsible for arranging or providing any relevant support, training or guidance as appropriate
- dates of review meetings.

You should develop an action plan jointly with the employee. Working with the employee, you should seek to agree the action plan if possible. You must ensure that the employee has the tools/ support that they need to improve their performance.

You must share the action plan with the employee and keep a copy for your records.

### **Review meetings**

Following a formal stage meeting/ hearing, you must hold scheduled review meetings with the employee. These must be followed by a final review meeting before the end of a warning period.

You should agree a series of dates and times to meet with the employee throughout the duration of the length of the warning issued.

The Federation recommends that review meetings should be held every 4 weeks. Once the employee is sustaining an improvement in performance, together you can agree to decrease the frequency of the meetings.

The purpose of the meetings are to provide an opportunity to:

- review the employee's performance
- review any action plan as appropriate
- discuss any other support that may be relevant
- establish whether there is a need to progress to the formal stages of the policy.

A record must be made of each discussion. You should:

- seek to agree the record with the employee if possible
- share the record with the employee
- keep a copy on the employee's personnel file.

## **Progression through the formal stages**

The principles of the right of representation will apply.

The employee must be given a reasonable period of time to achieve the required standard of performance at each of the formal stages.

If you have any concerns about the employee's performance, you should discuss these as soon as possible. There is no need to wait until a scheduled review meeting.

The formal stage of the policy can begin if the employee:

- has been unable to sustain an initial improvement
- does not achieve the required improvement
- does not meet or only partially meets any targets you have set
- has been unable to sustain an improvement for a 12 month period following the managerial support discussion.

There may be circumstances in which you feel the employee's performance is sufficiently serious to progress straight to the formal stages without a managerial support discussion taking place. In such cases, you must contact Education Personnel Services for advice before taking further action.

Progression through the formal stages normally occurs where performance continues to be a concern whilst a written warning remains active. If there are concerns, you should speak to the employee at the earliest opportunity. You do not have to wait until a scheduled review meeting, the end of the review period or warning.

There may be circumstances when an employee has a history and pattern of performance concerns over a prolonged period of time which causes concern, despite there not being an active warning. A history of performance concerns may be identified by a record of previous written warnings and/ or where there are examples to show that the employee has been unable to sustain the required standard of performance.

You can progress to the next formal stage and re-enter at the appropriate point if:

- the employee does not achieve the required improvement
- there are further performance concerns which may be for a different reason
- if an improvement is not sustained for a 12 month period following a formal stage one meeting
- if an improvement is not sustained for a 12 - 24 month period following a formal stage two meeting
- the employee has not been successfully redeployed and/ or has refused a reasonable offer of alternative employment.

You must contact Education Personnel Services for advice prior to commencing any formal stage.

## How to manage anticipated long term performance concerns

In exceptional circumstances the employee's personal situation or health may change. This may mean they are no longer able to perform the duties of their role. In these circumstances it is anticipated that this will become a long term or permanent performance concern.

You must consider whether there is any support and/ or reasonable adjustments that could be put into place to help the employee.

In these circumstances, the employee is unable to perform to the required standards. The following options may apply:

- to complete an [Occupational Health/ medical practitioner referral](#)
- to consider reasonable adjustments
- to explore medical redeployment
- to explore ill health retirement
- to initiate the Managing Sickness Absence policy.

Please contact Education Personnel Services for further advice and to discuss the above options before progressing.

## 9. Appeal

**Appeal stage** The employee has the right to appeal against the outcome of a formal meeting/ hearing.

**Right of appeal** The employee must submit their appeal in writing within **10 working days** following receipt of the written outcome of the formal meeting/ hearing. This must include the full reasons for the appeal.

The employee must send their appeal letter as follows:

<b>Stage of the original meeting/ hearing</b>	<b>Appeal letter sent to</b>
Formal stage 1	Chair of the original meeting
Formal stage 2	Chair of the original meeting
Formal stage 3	Clerk to Governors

The appeal is not a repeat of the original meeting/ hearing. It seeks to address the specific issues raised by the employee in their appeal letter.

The grounds for appeal are (this is not an exhaustive list):

- finding/ outcome was unreasonable
- emergence of new evidence which could have a material effect on the outcome
- terms of a warning are unreasonable (duration or conditions imposed with the warning)
- unfair/ incorrect application/ breach of the policy which could have had a material effect on the outcome.

A complete re-hearing is only permitted in exceptional circumstances where the chair determines that the submitted grounds of appeal identify:

- there was a defect in the procedure

- new evidence has to come to light since the meeting/ hearing which may have an impact on the decision
- there is a dispute about evidence given by one or more witnesses at the original meeting/ hearing. In these cases it may be necessary to rehear the witness's evidence at the appeal.

Following an appeal of a formal stage three hearing, there is no further right of internal appeal.

**Appeal meeting**

The employee must be invited to attend a meeting.

**Meeting arrangements**

The employee must receive in writing the invitation to the meeting.

The letter must give the employee **7 working days** notice of the meeting. The timescales for the meeting can be varied by mutual agreement.

Meeting arrangements should ensure that:

- the date is set in consultation with the employee's representative and Education Personnel Services, where applicable
- a suitable venue is sourced
- consideration is given to access to refreshments (water)
- there are adequate break out rooms reserved for relevant parties
- reasonable adjustments are considered if applicable  
appropriate arrangements are made to enable a [formal record of the meeting](#) to be made.

**Formal record of the meeting**

The principles of a [formal record of the meeting/ hearing](#) will apply.

**Alternative date**

The principles of an [alternative date](#) will apply.

**Sharing of information**

You and the employee are required to exchange details of any additional papers and supporting evidence in advance of the appeal meeting. The original papers will normally be sent with the invitation letter. Education Personnel Services will advise you on the collation and distribution of papers.

The principles of [sharing of information](#) will apply.

**Right of representation**

The principles of the formal stage [right of representation](#) will apply.

**Who chairs the appeal meeting** **For Teachers and Support Staff**

Stage	Chair/ panel members	HR Adviser	<a href="#">Right to be represented/ accompanied</a>
Appeal against a formal warning	Headteacher/ Governors' Committee	If required	Yes
Appeal against dismissal	Governors' Committee	HR Adviser	Yes

**For a Headteacher**

Stage	Chair/ panel members	HR Adviser	<a href="#">Right to be represented/ accompanied</a>
Appeal against a formal warning	Governors' Committee	If required	Yes
Appeal against dismissal	Governors' Committee	HR Adviser	Yes

**Other appeal meeting conditions**

If a first or final written warning has been issued by a senior manager during the formal stages, the appeal may be heard by the Headteacher. If the Headteacher issued a first or final written warning, the appeal will be heard by a Governors' Committee.

The principles of [other meeting/ hearing conditions](#) will apply.

**Other appeal meeting attendees**

The principles of [other meeting/ hearing attendees](#) will apply.

**Witnesses**

The principles of [witnesses](#) will apply.

**How to manage an appeal meeting**

During the appeal meeting, the chair must:

- introduce attendees and confirm housekeeping arrangements (for example toilets, fire alarm)
- outline the purpose of the appeal meeting and confirm the reasons for the appeal (as outlined in the employee's appeal letter and/ or invite letter to the appeal meeting)
- decide whether to accept any new evidence presented on the day of the meeting by either party
- ask the employee or their representative to present their appeal, referring to any documents or examples
- call any witnesses if applicable
- provide the Federation with an opportunity to respond to the appeal and present the grounds upon which previous decisions have been made, referring to any documents or examples and call any witnesses (for example the chair of the previous meeting/

hearing)

- invite all parties to ask questions at the appropriate point
- adjourn the meeting, if necessary, to consider the appeal and decide on the outcome
- reconvene the appeal meeting in the case of an adjournment to notify the employee of the outcome
- keep a written record during the appeal meeting to refer to when reaching a decision and to help with producing the outcome letter
- notify the employee of the outcome and the reason(s) for the decision.

### **Outcome of the appeal meeting**

The chair must fully consider all evidence presented and decide on an outcome.

The possible outcomes are:

- the appeal is not upheld and the previous decision remains. The chair must be able to justify that there is insufficient evidence to overturn the decision of the original formal stage meeting/ hearing
- the appeal is upheld. This is likely to occur when:
  - new evidence has been presented
  - a review of the process has uncovered flaws in how the Capability policy was applied
  - there are flaws in how the formal stage meeting/ hearing was conducted
  - if mitigating circumstances have been uncovered which were not previously taken into account
- to impose a different outcome in place of the original decision
- to reinstate the employee. The employee's service remains continuous and any loss of pay between dismissal and reinstatement will be paid. The Federation is responsible for contacting their payroll provider to make the arrangements to ensure the employee receives their pay. The Federation must also make the necessary arrangements for the employee to have their IT account reinstated.

The outcome cannot impose a higher sanction than issued at the formal meeting/ hearing although a lower sanction can be applied.

There is no further internal right of appeal.

### **Confirming the outcome**

The chair will normally advise the employee verbally of the outcome at the meeting, unless agreed otherwise with the employee.

The chair must confirm the outcome in writing within **5 working days** of the meeting. A template letter is available to ensure all of the necessary information is included.

A copy of the outcome letter must be placed on the employee's personnel file.

## **10. Gross Incompetence**

<b>Definition</b>	<p><b>Gross incompetence</b> - occurs where an investigation identifies that an employee has failed, either by a single error or series of errors, to perform the duties of their role to such an extent that this causes or has caused serious harm or puts others (colleagues, general public or service users) or the Federation's reputation and performance at serious risk.</p> <p>Gross incompetence only applies in exceptional circumstances. You must seek advice from Education Personnel Services in such cases.</p>
<b>Policy stages</b>	<p>The possible stages are:</p> <ul style="list-style-type: none"><li>• formal stage three hearing - may result in dismissal</li><li>• appeal.</li></ul>
<b>Suspension or alternative arrangements</b>	<p>Before making a decision about suspension or alternative arrangements, the appropriate manager must seek advice from Education Personnel Services.</p> <p>Suspension or alternative arrangements are neutral and precautionary acts. They may be considered at any point during the Capability policy once an investigation has established that the circumstances may be gross incompetence.</p> <p>If the potential gross incompetence establishes that the employee entering the workplace places them, or the Federation, at risk, alternative arrangements must be put in place to reduce or remove that risk. This must be a considered response to the specific issues/ risks in the investigation.</p> <p>Issues/ risks may be identified at the start of an investigation, or new evidence may mean that alternative arrangements become appropriate part way through the case.</p> <p>The risks may arise from:</p> <ul style="list-style-type: none"><li>• the seriousness of the potential issues, in that they could amount to gross incompetence</li><li>• interference with the investigation which may impact on the fairness of the investigation</li><li>• a health and safety risk to the employee or others in the work place.</li></ul> <p>The alternative arrangements that could be made include:</p> <ul style="list-style-type: none"><li>• temporary placement into another role, or</li><li>• amended duties in the employee's current role, or</li><li>• temporary placement in an alternative location</li><li>• another action identified which would reduce or remove the risk</li><li>• suspension.</li></ul> <p>Alternative arrangements to suspension are only appropriate where the new duties or role are not linked in any way to the alleged gross incompetence.</p> <p>The appropriate manager must refer the case to the Headteacher or the</p>

Chair of the Governing Body. A decision will be made as to whether alternative arrangements or suspension are applicable. The Governing Body should be informed as soon as possible of any cases of suspension. The information must be limited so as not to prevent the governors from involvement in a formal stage hearing, if this is necessary.

The decision regarding whether alternative arrangements or suspension is necessary and the rationale must be recorded in writing. The appropriate manager must also seek advice from Education Personnel Services before communicating the outcome to the employee.

If a Headteacher is to be suspended, Education Personnel Services will support the Chair of the Governing Body in making the necessary arrangements. For maintained schools this will involve the School Improvement Manager or County Education Manager as necessary.

**Suspension** – this requires the employee to stay away from the workplace whilst on full contractual pay. Suspension is a neutral act and does not imply guilt or innocence. Advice must be sought from Education Personnel Services when considering whether suspension is necessary. Suspension must be a last resort after other alternatives have been considered.

#### **Documenting and reviewing alternative arrangements/ suspension**

The reason for any alternative arrangements must be documented. In the case of suspension, the reason why other alternatives were not appropriate must be documented.

Arrangements must be regularly reviewed to determine whether they are still appropriate. This will be undertaken by the Headteacher. If the Headteacher has been suspended, then the arrangements must be regularly reviewed by the Governing Body (who may delegate the responsibility to a Committee or identified member). In reviewing the suspension arrangements, a decision may be made that suspension is no longer required and the employee can return to work.

Academies can determine who has the authority to decide whether suspension arrangements are no longer required.

If the arrangements are to continue, or change, the reason for this must be documented and communicated to the employee.

#### **Communicating alternative arrangements/ suspension**

Once confirmation that suspension or alternative arrangements are approved, the Headteacher or Chair of the Governing Body must meet face to face (where possible) with the employee immediately to inform them of the decision.

The employee has no statutory right to be accompanied. However this will normally be accommodated where it does not cause any unnecessary delay. This meeting should be handled sensitively and acknowledge this is likely to be a difficult time for the employee.

The alternative arrangements/ suspension must be confirmed to the employee in writing.

There is no right of appeal against the decision to implement alternative arrangements or suspension.

### **Support during suspension**

The terms of the suspension often involve the employee being instructed not to contact colleagues during the suspension. Colleagues can still remain friends but the employee must refrain from discussing the investigation with colleagues.

It is important to identify one or more people they are able to communicate with, in order to ensure that contact can be maintained. Ideally this should be agreed with the employee and their representative.

The contact person should usually be a member of staff from the Federation. It must not be a member of the Federation's Governing Body. It is essential that the contact shall have no part whatsoever to play in any subsequent investigation, nor any other connection with, or vested interest in, the outcome of the case.

The nomination of a contact will need to be dealt with sensitively as it is not intended to replace the role of the employee's representative or line manager but rather to reinforce the support/ contact available for the employee concerned.

The employee can also seek support from their professional association/ trade union representative.

The principles of support for the employee will apply.

**For cases of suspension only** - during suspension the employee must:

- remain away from the workplace for a period of time with the purpose of enabling the investigation to take place and protecting both the Federation and the employee
- continue to receive full pay and all allowances applicable to their role unless they become sick in which case their pay will be in accordance with the sick pay scheme
- fulfil the requirements of their suspension. If the employee fails to maintain contact, their whereabouts are unknown, or they breach the terms and conditions of the suspension, their pay and any allowances may be suspended
- be available for hearings
- be provided with the details of the contact that will be assigned to them during the suspension or alternative arrangements
- follow normal reporting procedures such as sickness absence and annual leave. Sickness absence and annual leave must be requested and recorded in line with required protocols.

The Headteacher or Chair of Governors must decide how to inform other colleagues to explain the situation. It is important that all parties maintain

confidentiality. It is important for the Headteacher or Chair of Governors to carefully consider how workplace messages will be managed during any period of suspension or alternative duties.

**Formal stage three hearing** The employee must be invited to attend a formal stage hearing.

**Formal stage three hearing arrangements** The principles of [meeting/ hearing arrangements](#) will apply.

**Formal record of the hearing** The principles of a [formal record of the meeting/ hearing](#) will apply.

**Alternative date** The principles of an [alternative date](#) will apply.

**Sharing of information** The principles of [sharing of information](#) will apply.

**Right of representation** The principles of [right of representation](#) will apply.

**Who chairs the formal stage three hearing** **For Teachers and Support Staff**

Stage	Chair	HR Adviser	<a href="#">Right to be represented/ accompanied</a>
Stage three	Headteacher (where they have delegated powers of dismissal) OR Governors' Committee	HR Adviser	Yes

**For a Headteacher**

Stage	Chair	HR Adviser	<a href="#">Right to be represented/ accompanied</a>
Stage three	Governors' Committee	HR Adviser	Yes

**Other hearing conditions** The principles of [other meeting/ hearing conditions](#) will apply.

**Other hearing attendees** The principles of [other meeting/ hearing attendees](#) will apply.

**Witnesses** The principles of [witnesses](#) will apply.

**Attending the formal stage** The principles of [attending formal meetings/ hearings](#) will apply.

## three hearing

### How to manage a formal stage three hearing

The principles of [how to manage a formal meeting/ hearing](#) will apply.

### Outcome of a formal stage three hearing

The chair of the formal stage hearing must fully consider all evidence presented and decide on an outcome.

Any outcome given will apply from the date of the hearing.

The chair/ panel must decide whether:

- there is no further action
- to manage the concern on an informal basis
- to reach an agreement with the employee about how to improve their performance
- an action plan is issued and a review period agreed including scheduling review meetings
- any additional support, action plan or development/ training required to help the employee
- setting a realistic timescale within which an improvement needs to take place and review meetings are scheduled
- a referral to Occupational Health/ medical practitioner is appropriate
- reasonable adjustments need to be considered and/ or implemented where appropriate to do so
- redeployment opportunities will be explored
- a first written warning is issued (if the panel consider that there has been unsatisfactory performance and not gross incompetence) and is valid for 12 months
- a final written warning is issued (if the panel consider that there has been unsatisfactory performance and not gross incompetence) and is valid for between 12 - 24 months
- to dismiss on the grounds of performance capability with immediate effect.

If the outcome is not dismissal, the chair must make it clear to the employee that if they are unable to make and maintain an improvement, further formal action under the Capability policy may be taken.

The length of the warning depends on:

- the nature of the unsatisfactory performance
- whether there is a belief that the unsatisfactory performance may reoccur
- whether a warning at the same stage has previously been issued.

If a dismissal takes place the Federation must make arrangements to complete the necessary leaver actions including:

- cancelling the employee's IT account
- obtaining the employee's identity card
- completing the other leaver requirements.

Any sums owing to the Federation from the employee will normally be deducted from their final pay.

The chair of the hearing must also explain to the employee:

- the outcome
- the reasons for the decision
- that a copy of the letter detailing the outcome will be placed on their personnel file
- that they have the right of appeal.

**Confirming the outcome** The principles of [confirming the outcome](#) will apply.

**Right of appeal** The principles of the [appeal stage](#) will apply.

## **11. Other policy requirements**

**Confidentiality** It is expected that all parties involved in the capability process will maintain confidentiality as appropriate. This is both within and outside of the Federation (including social media). If any party does not maintain confidentiality action may be taken under the Disciplinary policy.

**Right of representation** Employees are actively encouraged to contact their professional association/ trade union representative at the earliest opportunity to obtain advice and support at any point during this procedure.

The employee is not usually accompanied at any discussions within the informal stage of the policy. There may be circumstances when the employee asks to be accompanied and consideration should be given to any requests. This should be accommodated where it does not cause a delay to the process.

The employee has the right to be represented/ accompanied at a formal stage meeting/ hearing or appeal meeting. This can be by a professional association/ trade union representative or a work colleague.

It is the employee's responsibility to:

- arrange their own representative
- liaise with their representative to agree the formal meeting/ hearing or appeal meeting date and time
- advise management of the representative's details.

There is no right to legal representation at any stage of this policy.

**Referral to Occupational Health/ medical practitioner** It may be necessary to refer the employee to Occupational Health/ medical practitioner to obtain medical advice and information. This will help you to understand:

- the health issues
- the possible impact on the employee's performance
- whether any reasonable adjustments are required.

You should meet with the employee to discuss the reasons for the referral and the process. You can use the template letter to confirm the arrangements for making a referral if appropriate.

The Federation expect the employee to attend any medical appointments and to co-operate with the referral.

You must explain to the employee that:

- it is important for them to attend the medical appointment(s) so relevant information relating to their health can be shared with you and any needs at work can be supported
- they must tell you as soon as possible if there is any reason that prevents them from attending an appointment, so you can discuss ways to resolve any issues
- they must contact Occupational Health/ medical practitioner immediately if they wish to rearrange an appointment for an alternative date/ time
- they must inform you of a change of date/ time.

You should contact the employee 2 days before any medical appointment to remind them about the appointment.

If an employee does not co-operate with the referral, any assessment or decision taken will be based on the information available.

If the employee provides consent, you can attend at the end of the medical appointment. The purpose would be to enable you to be part of the discussions about possible outcomes and next steps.

Once you are in receipt of the referral advice from Occupational Health/ medical practitioner, you must make arrangements to discuss this with the employee.

Depending on the circumstances, it may be appropriate to write to the employee advising them that the information has been received. You should invite them to discuss the referral advice with you. You can use the template letter to ensure all of the relevant information is included.

Once you have discussed the referral advice with the employee, you should confirm the outcome of your discussions in writing.

- Redeployment** Redeployment can be considered at any stage in the policy and:
- must not be used as a sanction
  - should result in satisfactory performance in the new role
  - is subject to a suitable opportunity being available
  - the Redeployment Policy will apply.

Any discussion regarding redeployment may involve a Local Authority Officer. For an Aided School, this may also involve an officer of the Diocese.

**Requirement for the School to pass on information about a teacher's capability to a new employer**

A Headteacher or teacher may apply for a job with an alternative employer. The employee may have been subject to the formal stages of the Capability policy within two years prior to starting a job with a new employer. In such cases, the Federation must notify the new employer.

An employee may have been invited to a formal stage one meeting. The outcome may be that no formal action is required. In such cases, as the performance concern(s) will be managed through the Performance Management cycle, the Capability policy does not apply.

As the employee has not been issued with a formal warning, this does not have to be passed onto a new employer.

**Safeguarding concern (relating to vulnerable adults, children and young people)**

The Federation may take action under the Capability policy for reasons that relate to a safeguarding concern. Such cases must be dealt with in accordance with Hampshire's Child Protection procedures. This ensures that a child, young person or vulnerable adult is not at risk or that a police or social care investigation is prejudiced.

The Capability policy and this how to guide must not be used in cases of safeguarding allegations. In such cases, it is only appropriate to use the Capability policy once there is written confirmation from the Local Authority Designated Officer (LADO), or their representative that the Federation may proceed with an internal investigation.

Advice must be sought from Education Personnel Services.

**Referral to relevant bodies**

Some professions are required to be registered with a professional body in order to practice. During, or upon completion of the Capability process, in the following circumstances it may be necessary to make a referral to the relevant body:

- if a dismissal takes place
- where there are concerns about the employee's fitness or competence to practice
- in circumstances where a formal process regarding a capability concern has not concluded and the potential outcome may have resulted in dismissal.

If a referral is necessary, the Federation is responsible for initiating and completing it. The Federation must work in conjunction with Education Personnel Services and the Local Authority Designated Officer (LADO)/ Adult Services safeguarding team where appropriate.

If the capability concern(s) relate to a safeguarding matter, the employer is required to make a referral to the Disclosure and Barring Service (DBS). Further guidance is available on the [Disclosure and Barring Service](#) website. The DBS may take action under their statutory powers. Alternatively the DBS may refer the case to the Teaching Regulation Agency (TRA) for consideration where the matter concerns a teacher.

If the capability concerns relate to a teacher, the employer may make a

referral to the Teaching Regulation Agency (TRA). The TRA may take action under their statutory powers.

Where there is a requirement to make a referral to a relevant body, the employee must be notified in writing that a referral has taken place.

Further guidance is available on the relevant professional body websites.

For further advice please contact Education Personnel Services.

### **Mutual agreement**

As an alternative to a formal stage meeting/ hearing, the Federation and the employee may discuss a mutual agreement. The contract of employment may be ended by mutual agreement between the employee and the Federation.

The Federation must respect the employee's decision as it has to be agreed by both parties. If the employee does not wish to enter into a mutual agreement, then it is likely a formal stage meeting/ hearing will be arranged.

A mutual agreement is an alternative approach for the employee rather than attending a formal stage meeting/ hearing. This can help the employee to avoid the stress and pressure of a formal meeting/ hearing. This can be particularly helpful if the employee is unable to achieve the required standards of performance.

A mutual agreement is neither a dismissal nor a resignation. It is a letter setting out an agreed end date of employment, and other related arrangements. It is signed by both parties.

There is no right to appeal a mutual agreement as it is entered into with the consent of both parties.

The employee is encouraged to seek advice from their professional association/ trade union representative before entering into any discussions.

You must contact Education Personnel Services for further advice.

### **Fast track procedure**

In very serious cases, a final warning may be issued at a formal stage one meeting. In such cases, if the necessary improvement in performance is not achieved during the review period, you can proceed to a formal stage three hearing.

Further advice must be sought from Education Personnel Services.

### **Formal action concerning a professional association/ trade union representative**

Where there are concerns involving a professional association/ trade union representative, must notify and seek advice from Education Personnel Services before taking formal action.

The professional association/ trade union representative is encouraged to seek advice from their professional association or trade union branch.

## **12. Support**

**Support for the employee** Employees:  
A professional association or trade union representative can offer information and workplace support as well as signposting to useful support organisations. Support is also available from Employee Support on 0800 030 5182.

**Support for the manager** Any queries can be directed to Education Personnel Services on 02380 383500 or [eps.consultants@hants.gov.uk](mailto:eps.consultants@hants.gov.uk).

For schools which subscribe to Hampshire County Council's Occupational Health service, the manager can access the Managers' Advice Line by telephoning 023 8062 6600 (8am – 4pm weekdays). The Managers' Advice Line can support with any health related query prior to making a referral or during management of a case.

## **13. Toolkit**

Informal discussion form template, action plan template, invite and outcome letter templates, template management report.

## **14. Related documents**

To help with the application of this document it may be useful to read the following:

- Managing Sickness Absence policy and how to guide
- Performance Management policy
- Redeployment policy.

## **15. How to Guide governance**

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## Roles and responsibilities

Everybody	<ul style="list-style-type: none"> <li>• adopting a pro-active approach to induction, general development and continuing professional development</li> <li>• applying and complying with the Performance Management cycle and policy</li> <li>•</li> <li>• apply the Capability policy accurately</li> <li>• maintaining confidentiality.</li> </ul>
The Headteacher/ manager	<ul style="list-style-type: none"> <li>• setting clear and achievable standards that the employee can work to within their role</li> <li>• identifying concerns and deciding on appropriate action within a timely manner</li> <li>• tracking and progressing cases through case management</li> <li>• informing Education Personnel Services of all performance concerns that are moving to be managed under the formal stage if there has not been previous involvement in the case</li> <li>• seeking advice from Education Personnel Services about gross incompetence concerns</li> <li>• considering adjustments and deciding whether to implement them where reasonable to do so</li> <li>• arranging meeting/ hearings as necessary</li> <li>• drafting and issuing of letters, reports and documentation with Education Personnel Services support as necessary</li> <li>• ensuring the Federation completes the e-leaver form and completing the other leaver requirements if a dismissal takes place or the employee resigns during the process.</li> </ul>
All employees	<ul style="list-style-type: none"> <li>• seeking to improve their performance</li> <li>• identifying support that is helpful to their particular development needs</li> <li>• engaging and co-operating with the Occupational Health/ medical practitioner referral process, including attending all medical appointments</li> <li>• arranging their own professional association/ trade union representative or work colleague if desired and advising management of this.</li> </ul>
The Education Personnel Services caseworker	<ul style="list-style-type: none"> <li>• advising on policy application and best practice</li> <li>• supporting with case management</li> <li>• advising on the completion of letters, reports and relevant documentation</li> <li>• attending meetings where appropriate in an advisory capacity.</li> </ul> <p>The Education Personnel Services HR Adviser does not perform a decision making role.</p>
Occupational Health/ medical practitioner	<ul style="list-style-type: none"> <li>• receiving referrals from management and reviewing employees as appropriate</li> <li>• requesting medical information</li> <li>• making recommendations in line with the needs of the School.</li> </ul>
The professional association,	<ul style="list-style-type: none"> <li>• advising/ supporting their member/ colleague/ manager</li> <li>• attending arranged meetings/ hearings and/ or appeal meetings. If this is not possible, then arrangements should be made so that</li> </ul>

trade union representative or Hampshire County Council work colleague	meetings/ hearings and/ or appeal meetings are covered by an alternative representative and are not delayed <ul style="list-style-type: none"><li>• making representations, advocating and mitigating on behalf of the employee, submitting papers if appropriate, asking questions and addressing a meeting/ hearing on behalf of the employee.</li></ul> They may not answer questions on behalf of the employee.
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## **Appendix One – Managing capability for employees with less than two years service**

This procedure will be used for managing capability if the employee has less than 2 years' continuous service.

### **Managing capability**

- Policy stages**      The possible stages are:
- informal stage
  - formal stage – may result in dismissal
  - appeal only against a dismissal.

As a general principle the manager will seek to use the informal stage prior to progressing to the formal stages.

In exceptional circumstances, it may be appropriate to start at the formal stage without using the informal stage. The manager must seek advice from Education Personnel Services in such cases.

The employee must be given a reasonable period of time to achieve the required improvement before moving to the next stage of the policy.

**Informal stage**      The principles of the [informal stage](#) will apply.

**Formal stage**      The principles of the [formal stage](#) will apply.

**Appeal stage**      The principles of the [appeal stage](#) will apply. An employee only has the right of appeal against a dismissal decision. There is no right of appeal against a warning.

### **Gross Incompetence**

**Gross incompetence**      The principles of the [gross incompetence](#) stage will apply.

**Appeal**      The principles of the [appeal stage](#) will apply. An employee only has the right of appeal against a dismissal decision. There is no right of appeal against a warning.

## **Appendix Two – Managing capability**

### **Examples**

The following list provides some examples of when it may be appropriate for you to start the managing capability process. This list is not exhaustive and other examples can be managed under the Capability policy.

The employee has been unable to demonstrate:

- applying training to the workplace
- using workplace systems (electronic and paper) effectively
- applying professional or Federation policies or procedures accurately
- meeting professional standards (for example teacher standards, Headteacher standards or requirements of the role profile)
- using equipment in the correct way
- producing an acceptable standard of work
- understanding job duties, priorities or goals
- understanding the aims and objectives of the Federation / department in which the employee works
- following reasonable instructions
- managing tasks effectively or flagging issues to you as their line manager
- meeting reasonable targets or deadlines
- having professional working relationships with colleagues
- appropriately representing the Federation in the execution of the role
- contributing to team and department objectives
- adapting to alternative ways of working.

## **Appendix Three - Gross incompetence**

### **Definition**

**Gross incompetence** - occurs where an investigation identifies that an employee has failed, either by a single error or series of errors, to perform the duties of their role to such an extent that this causes or has caused serious harm or puts others (colleagues, general public or service users) or the Federation's reputation and performance at serious risk.

Gross incompetence only applies in exceptional circumstances. You must seek advice from Education Personnel Services in such cases.

### **Examples**

The following list provides some examples of when a performance concern may need to be managed under the gross incompetence section of the Capability policy. This list is not exhaustive and other examples can be managed under the Capability policy. Some examples on the list may also be more appropriately dealt with under the Disciplinary Policy, depending on the circumstances.

The employee has:

- been using equipment in a dangerous or unsafe manner
- a complete lack of knowledge and professional expertise
- a complete lack of understanding of the health and safety aspects relevant to the role
- a complete lack of understanding of the professional standards required within the role
- a complete lack of knowledge of Federation policies or procedures
- been unable to perform in all of their role, therefore making the improvement required too great
- failed to obtain a qualification that is an essential criteria of their role
- misadvised in a professional capacity which may have a direct implication on the Federation's reputation.