



Capability of Staff

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BIRMINGHAM CITY COUNCIL

PROCEDURE FOR CASES OF ALLEGED LACK OF CAPABILITY OF TEACHERS IN SCHOOLS (2023)

1. Purpose

- 1.1 In order to ensure that required professional standards of teaching are achieved and maintained and to comply with the requirements of the School Staffing Regulations for a capability procedure, the governing body of Raddlebarn Primary School has adopted the following capability procedure. This procedure is to be implemented only if a teacher fails, on a regular basis and despite appropriate additional support provided through the teacher appraisal process to address serious concerns previously notified to the teacher, to perform his or her duties to the required professional standards. This procedure will be implemented having regard to the most recent guidance issued by the local authority.

2. Introduction

- 2.1 In these procedures:-
- the 'Local Authority' or the 'Authority' means Birmingham City Council acting in its capacity as a Local Education Authority;
 - references to the Strategic Director include any other senior officer of the City Council designated by him/her;
 - 'teacher' means a teacher, including a head teacher, employed to work at the school.
- 2.2 As part of their acknowledged management responsibilities, and as part of the arrangements for the supervision, appraisal, support and training of teachers, head teachers or other staff designated by the head teacher may from time to time discuss aspects of capability with a teacher on a day to day basis. Such discussions should not be regarded as falling within the scope of the formal capability procedures but should ensure that teachers receive fair and honest feedback on their performance, a balanced assessment, and advice and support on how their performance may be improved.
- 2.3 For the purpose of these procedures, lack of capability is defined as a situation in which a teacher fails on a regular basis to perform his or her teaching and/or management duties to required professional standards.
- 2.4 The procedures are to be implemented with the intention of supporting the teacher in achieving the required standards. The teacher needs to be aware that failure to achieve the required standards may lead to termination of his or her employment in accordance with this procedure.

- 2.5 In order to facilitate the smooth implementation of these procedures the teacher should be advised to contact his/her Teacher Association for advice as soon as possible.
- 2.6 The procedure is distinct from the disciplinary procedure which is used in cases of misconduct or that for dealing with sickness and ill health and from the rights of teachers under the separate grievance procedure.
- 2.7 This procedure does not apply to newly qualified teachers whose appointment is subject to statutory induction.
- 2.8 Normal standards of capability and normal procedures should apply to employees who are school trade union representatives or local union officers, except that no action will be taken until the circumstances of the case have been discussed with a local or regional officer.
- 2.9 This procedure will be applied in accordance with the Instrument of Government of the School, any other statutory provisions which may apply from time to time, also the Advisory, Conciliation and Arbitration Service's Code of Practice.
- 2.10 The records of any case under this procedure will be confidential.
- 2.11 The Governing Body may decide, by formal resolution, to delegate to the head teacher or principal the hearing of cases under section 5 of this procedure, provided that the head teacher or principal has not been previously involved in managing the case.

3. Preliminary Consideration

- 3.1 This procedure is intended to highlight concerns in performance and provide an opportunity for a teacher to improve. **It is strongly recommended that this procedure is only implemented where the appraisal process and appropriate support provided have failed to improve the performance to the required standards. Only after sufficient, recorded evidence exists from triangulated sources should this capability procedure be implemented.**
- 3.2 As set out in the appraisal process examples of performance might be evidenced through pupil progress, observations, book scrutiny, impact of management, OFSTED assessments.
- 3.3 Being subject to a capability procedure should never be a surprise to a teacher. **Any concerns should have been raised with the teacher in advance as part of the appraisal process.** If it became apparent during or at the end of the appraisal period that the teacher's overall performance was below

acceptable standards the head teacher or a member of the leadership team should have met with the teacher to discuss the nature and level of the concerns, confirmed the content of the discussion in writing and given the teacher the opportunity to reflect on it before another meeting, arranged with adequate notice, is held to determine what increased support would be given to the teacher, the kind of improvement required, the period for improvement, how improvement would be assessed and when the situation would be reviewed. The head teacher, principal or other person in charge of the day to day running of the school should have explained to the teacher what would happen in the event of the teacher not meeting the required standards. During the appraisal process consideration should have been given to any known mitigating or personal circumstances (including a health condition) which might explain a dip in performance and similar consideration should continue to be given to such circumstances in relation to this procedure.

4 Capability meetings

- 4.1 The head teacher, principal or other person in charge of the day to day running of the school shall review the facts and information gathered to date, adding to it where appropriate, and then write to the teacher setting out the area(s) of concern and the evidence supporting the concerns and inviting the teacher to a formal capability meeting. At this stage onwards the teacher may be accompanied by a trade union representative or fellow-employee. It shall be explained to the teacher that the meeting is being held in accordance with the provisions of this procedure. Copies of any documentation to be used at the meeting shall be sent with the written notice within a reasonable timescale before the meeting to ensure that the teacher has enough time to prepare his or her response to the concern(s). A copy should be included for the teacher's representative.

4.2 First Capability meeting

The purpose of the meeting shall be:-

- (a) define which of the required standards have not been met and the effect of this on pupils and the provision of education in the school;
- (b) to invite the teacher and/or the teacher's representative to comment and/or offer an explanation for the alleged shortfalls in performance;
- (c) for the head teacher, principal or other person in charge of the day to day running of the school to decide, having regard to (a) and (b) above, whether his or her concern(s) remain and if no concern remains, for the head teacher, principal or other person in charge of the day to day running of the school to confirm in writing that no further action will be taken.

- (d) if concerns remain, for the head teacher, principal or other person in charge of the day to day running of the school to inform the teacher of them and decide what reasonable targets are to be set, what programme of action, including a range of thorough, suitable support, is to be arranged, how long each part of that programme shall last, and how it shall be monitored and evaluated.
- (e) where (d) applies, to arrange for the programme of action to be reviewed in a second meeting, to be held 7-8 working weeks after the first meeting, and set the date and time for that meeting in discussion with the teacher and the teacher's representative.

4.3 Notes of the meeting, including the programme of action shall be sent to the teacher within two working days of the meeting together with a copy for the teacher's representative.

4.4 Second Capability meeting

At the second meeting progress will be reviewed against the targets, standards and programme of action. Copies of any evidence to be presented on the teacher's performance should be sent to the teacher in reasonable time beforehand, including a copy for the teacher's representative. The teacher and/or the teacher's representative will have the opportunity to comment upon his or her performance and make appropriate representations. At the conclusion of the meeting the head teacher, principal or other person in charge of the day to day running of the school will either

- (a) decide that the teacher now meets the required professional standards and that this procedure is terminated, which will be confirmed in writing; or
- (b) decide that the teacher's performance, or certain aspect(s) of it, remains a cause for concern, confirm the nature of that concern, note any improvements, decide whether to modify the targets, programme of action, support provided, and arrangements for monitoring and evaluation over a further period of 6-7 weeks. A third meeting will be arranged to review progress at the end of that period and the date for that meeting should be set in discussion with the teacher and the teacher's representative. The head teacher, principal or other person in charge of the day to day running of the school will explain to the teacher that if the improvement which is still required has not been achieved by the date of the third meeting the matter will be referred for a hearing before a committee of governors (or, depending on the governing body's delegations, before the head teacher or principal if the head teacher or principal has not been involved previously in the management of the teacher's performance) which may lead to the

termination of the teacher's employment in accordance with this procedure.

Notes of the meeting, including where applicable the programme of action, monitoring and evaluation and the explanation about the possibility of terminating the teacher's employment, shall be sent to the teacher within two working days of the meeting together with a copy for the teacher's representative.

4.5 Third Capability meeting

The third meeting will take place within the time set out in 4.4 (b) above. Progress will again be reviewed against the targets, standards and programme of action, subject to any modifications to these as a result of the second meeting. As with the previous meetings, copies of the evidence on the teacher's performance should be sent to the teacher in reasonable time beforehand, with a copy for the teacher's representative. The teacher may be accompanied by a trade union representative or fellow-employee and the teacher and/or the teacher's representative will have the opportunity to comment on his or her performance. At the conclusion of the meeting the head teacher, principal or other person in charge of the day to day running of the school will either

- (a) decide that the teacher now meets the required professional standards and that this procedure is terminated, which will be confirmed in writing; or
- (b) extend the programme of action and support for a further reasonable period if there is a prospect of the teacher meeting the required standards within a further reasonable period; or
- (c) refer the matter to a committee of the governing body (or, depending on the governing body's delegations, before the head teacher or principal if the head teacher or principal has not been involved previously in the management of the teacher's performance) with a recommendation that the teacher's employment be terminated.

4.6 The third meeting shall be recorded in writing and a copy sent to the teacher within two working days of the meeting together with a copy for the teacher's representative.

5 Hearing by a committee of the governing body (or by a head teacher or principal with formally delegated authority to hold the hearing)

- 5.1 When it has been decided to refer the teacher's capability to a committee of the governing body (or, depending on the governing body's delegations, before the head teacher or principal if the head teacher or principal has not been involved previously in the management of the teacher's performance) a hearing shall be arranged as set out below.
- 5.2 There may be cases in which an employee is simultaneously the subject of allegations being considered under one or more of the governing body's procedures for conduct, capability or redundancy. Advice should be taken from the Employee Relations Team.
- 5.3 The local authority (through the Employee Relations Team) must be informed immediately of any circumstances which, if they lead to a hearing, might lead the governing body of a community, community special, voluntary controlled or maintained nursery school to determine that a teacher should cease to work at the school.

The governing body of such a school recognises that, under the provisions of the School Staffing Regulations, the local authority is obliged to dismiss an employee in respect of whom such a determination has been made but is also entitled to be represented at all stages of the proceedings relating to the dismissal of any teacher. The local authority therefore has a right to be represented at any proceedings leading to such a determination.

The governing body of a voluntary aided or foundation school recognises that it must also inform the local authority (through the Employee Relations Team) if provision has been made under a relevant agreement and if it wishes to ensure that the authority will meet the costs of a claim by an employee arising from the application of the school's procedures. A service level agreement on the provision of personnel services between the authority and the governing body counts as a "relevant agreement" under the Regulations.

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

Names of any witnesses from both sides should be circulated in advance and all witnesses should be asked to provide a written statement for inclusion with the documents to be used at the hearing. A second set of papers should be enclosed for the teacher's representative.

- 5.5 In order to ensure that the teacher has enough time to prepare his or her response at least ten working days' notice of the hearing should be given.

It is helpful to agree a date with the teacher's union/professional association before sending the formal notice to attend the hearing. The teacher may suggest an alternative time and date as long as it is reasonable and is not more than five working days after the original date. The committee or head teacher (as the case may be) may reject this suggestion but will do so only if it is unreasonable, when they may proceed to hear the case in the absence of the teacher or the teacher's representative and will take advice from the Employee Relations Team on what is reasonable.

- 5.6 The teacher may provide documentation in his or her defence and give the names of witnesses whom he or she is asking to appear on his or her behalf. This information should be provided at least five working days before the hearing. Where the hearing is before a committee of the governing body the clerk to the governing body is required to ensure that all parties to the hearing receive copies of all documents in good time before the hearing. Evidence submitted after the distribution of these documents may or may not be accepted as evidence; in such circumstances a decision will be made by the chair of the committee (or the head teacher or principal if he or she is conducting the hearing) in the hearing itself, and not before. There is no requirement on the teacher to submit any documentation, other than a statement from any witness who may be called by the teacher. However, if the teacher does not intend to submit any documentation there should be a positive statement from the teacher and/or the teacher's representative to this effect. Neither side will be able to use at the hearing any evidence not previously provided.
- 5.7 The head teacher, principal or other person in charge of the day to day running of the school should normally present the case to the committee, unless the head teacher is the subject of the hearing, in which event the chair of the committee should seek the advice of the local authority (through one of the School and Governor Support Managers) on an appropriate person to present the case.
- 5.8 The School Staffing Regulations provide that the head teacher (except where he/she is the person concerned) is entitled to attend for the purpose of giving advice, all proceedings of the governing body (this includes committees of the governing body) which may relate to a determination that a person employed

at the school should cease to work there or, in the case of a voluntary aided or foundation school, should be dismissed. The governing body must consider any such advice. The School Staffing Regulations do not apply to academies, but it is good practice for the principal of an academy to attend the hearing for the purpose of giving advice. The local authority has a right to be represented at any proceedings leading to a determination that a teacher should cease to work at the school. The local authority has a right to similar representation under its service-level agreement with voluntary aided and foundation schools as a condition of meeting the costs of a claim by an employee arising from the application of the school's procedures.

- 5.9 The hearing will follow the procedure set out in Appendix 1.
- 5.10 The committee (or the head teacher or principal if he or she is conducting the hearing) has the following options and shall decide on one of them:
- take no action in relation to the teacher
 - determine that a further defined period for improvement should be allowed
 - determine that the teacher should cease to work at the school (in the case of an employee in a community, community special, voluntary controlled or maintained nursery school) or may dismiss the employee from a voluntary aided or foundation school.
- 5.11 The committee shall announce its decision to the parties in person or subsequently in writing as the committee shall determine. An oral announcement shall be confirmed in writing subsequently, including the right of appeal. The head teacher or principal holding a hearing shall announce a decision in a similar way.
- 5.12 A notification of a determination to cease to work at a community, community special, voluntary controlled or maintained nursery school shall include a statement that the local authority will be advised of the determination to enable it to confirm dismissal as required by law. It shall also give details of the right of appeal (see below). A notice of dismissal from a voluntary aided or foundation school shall give details of the right of appeal.
- 5.13 The committee (or the head teacher or principal if he or she has conducted the hearing) will take advice from the Employee Relations Team on the duties to be undertaken by the teacher during the notice period.

6. Appeals

- 6.1 An employee has the right of appeal against the decision of the committee or head teacher or principal who has conducted the hearing. An appeal shall be to the appeal committee established by the governing body.

- 6.2 A teacher may appeal by giving written notice of the appeal and of all the grounds on which it is made to the clerk to the governing body within five working days of receiving written confirmation of the decision. The grounds for the appeal should be accompanied by any additional evidence to be presented in support of the appeal. There is no requirement to submit any documentation if the teacher does not wish to, other than a statement from any witness who may be called by the teacher. However, if the teacher does not intend to submit any documentation there should be a positive statement from the teacher and/or the teacher's representative to this effect and the teacher will not be able to use at the hearing any evidence not previously provided.
- 6.3 The clerk to the governing body will immediately notify the head teacher or the person representing the committee (whichever took the decision against which the teacher is appealing) of all the grounds of appeal and any additional evidence, with a request to submit any additional papers in response to the clerk within five working days.
- 6.4 The clerk to the governing body will then arrange an appeal committee hearing in reasonable time. The clerk shall give at least five working days' formal notice of the date, time and location of the appeal hearing to all the participants (see model letter). All documents relevant to an appeal hearing shall be enclosed with the letter. The employee may suggest an alternative time and date as long as it is reasonable and is not more than five working days after the original date. The committee may reject this suggestion if it is unreasonable and may proceed to hear the case in the absence of the teacher or the teacher's representative, but also has the discretion to defer the date of the hearing in order to reach mutual agreement on a convenient date.
- 6.5 The witnesses may include, as appropriate to the circumstances of the case, the head teacher or principal and/or a member of the committee which took the decision against which the employee is appealing, or the person who presented the case if that person was not the head teacher.
- 6.6 The normal order of proceedings for an appeal hearing is set out in Appendix 2. The appeal committee will have regard to any guidance issued from time to time by the local authority on conducting an appeal hearing.
- 6.7 The appeal committee may dismiss the appeal, uphold the appeal, amend the period defined for further improvement, or substitute a defined period for further improvement for a determination that an employee should cease to work at the school or a dismissal from the school.

- 6.8 The appellant may choose whether to hear the appeal committee's decision in person or receive it subsequently in writing, but this choice shall not prevent the committee from choosing to adjourn and reconvene before making a decision. An oral announcement shall be confirmed in writing by the clerk to the governing body within five working days of the appeal hearing. If an appeal against a determination to cease to work at a community, community special, voluntary controlled or maintained nursery school is upheld, the letter of notification will state that the local authority will be notified immediately so that it can withdraw the letter of dismissal and reinstate the appellant without a break in service. If an appeal against dismissal from a voluntary aided or foundation school is upheld, the letter of notification will include a withdrawal of the dismissal and reinstatement without a break in service.

7. Head Teachers

- 7.1 In the event of concerns arising about the capability of a head teacher (as defined in 2.3 above) the chair of the governing body will refer them to the Strategic Director for action in accordance with these procedures. Simultaneously the chair of the governing body will inform the head teacher that such action is being taken.
- 7.2 The Strategic Director will arrange for the concerns to be investigated and if the conclusion is that there are no concerns or concerns which are more appropriately addressed outside this procedure, the Strategic Director will notify the chair of the governing body and the head teacher in writing.
- 7.3 If the concerns are serious, the Strategic Director will also make a written report to the chair of the governing body and at the same time send a copy to the head teacher as required by the School Staffing Regulations. The chair of the governing body will then arrange for proceedings to take place under Sections 4 and 5 of these procedures as appropriate, with capability meetings under Section 4 being conducted by a representative of the Strategic Director at the request of the chair of the governing body.
- 7.4 Where the Strategic Director believes the education of children is likely to be seriously jeopardised then he/she may proceed under Section 8 of this procedure.
- 7.5 The Strategic Director will act in relation to the head teacher as the head teacher acts in relation to any other teacher.
- 7.6 The Strategic Director will report back to the governing body through the chair at each stage of the procedure, although there shall be no report on the detail of the concerns.

8. Exceptional Circumstances

- 8.1 In extreme cases the head teacher or principal shall write to the teacher explaining that he or she considers that this is an extreme case in which the education of pupils is seriously jeopardised, setting out the evidence supporting this allegation, and inviting the teacher to a meeting, at which the teacher may

be accompanied by a trade union representative or fellow-employee. It shall be explained to the teacher that the meeting is being held in accordance with the provisions of this Section of the procedure. Copies of any documentation to be used at the meeting shall be sent with the written notice. In order to ensure that the teacher has enough time to prepare his or her response to the concern(s) reasonable notice of the meeting should be given. This should be at least five working days. It is advisable to agree a date with the teacher's union/professional association before sending the formal instruction to attend the meeting.

8.2 The purpose of the meeting shall be:-

- (a) to define the aspects of capability which lead the head teacher or principal to allege that the education of pupils is jeopardised and why it is not appropriate to use or continue to use the procedure set out in Section 4;
- (b) to allow the teacher and/or the teacher's representative to comment and/or offer an explanation;
- (c) for the head teacher or principal to decide, having regard to (a) and (b), above whether to confirm or withdraw the allegation(s) of lack of capability which seriously jeopardises the education of the pupils;
- (d) for the head teacher or principal, in the light of (c) above, to take one of the following options
 - take no further action under this section of the procedure;
 - start capability meetings at the second meeting, thereby omitting the first meeting under Section 4. Under such circumstances the teacher must be informed of the reasons for taking such action.

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

8.3 A copy of the notes of the meeting shall be sent to the teacher within two working days of the meeting together with a copy for the teacher's representative.

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

9 Suspension

9.1 Under the School Staffing Regulations the governing body and the head teacher of a school with a delegated budget both have the power to suspend any person employed to work at the school where, in the opinion of the governing body, or, as the case may be, of the head teacher, the exclusion of that person from the school is required. It is not expected that the head teacher or governing body will exercise this power under the capability procedure, which is intended to support teachers in achieving the required standards and give them the opportunity to demonstrate the required improvement. Advice on suspension for any reason should be taken from the Employee Relations Team.

BIRMINGHAM CITY COUNCIL

GUIDANCE TO ACCOMPANY PROCEDURE FOR CASES OF ALLEGED LACK OF CAPABILITY OF TEACHERS IN SCHOOLS (2012)

1. This guidance has been produced in support of the model capability procedure for teachers recommended to schools in 2012. It may be revised from time to time. Governing bodies adopting the model procedure commit themselves to having regard to the authority's most recent guidance. Advice on particular cases should be obtained from the Employee Relations Team.
2. Governing bodies should check that, if they have not adopted the authority's model appraisal process, the process which they have adopted provides for evidence collected during the appraisal process to come from a variety of relevant sources, so that the criteria for using this capability procedure are met.
3. The Government's Appraisal Regulations require teachers' performance to be assessed against national standards. Teachers are expected to meet the Teachers' Standards and any other Government standards applicable to them. This is to be achieved by a thorough and supportive application of the appraisal process, in accordance with the Appraisal Regulations. The teacher capability procedure should only be used where, despite appropriate support provided during a properly managed appraisal process, it is shown, through sufficient, recorded evidence from a variety of relevant sources gathered during the appraisal process, that the teacher fails on a regular basis to perform his or her role and responsibilities to the required standards. The model appraisal process provides for discussions with a teacher if it appears that the teacher's overall performance does not meet the required standards.
4. When adopting this procedure the governing body should decide whether, in cases in which the head teacher has not been involved in the management of that teacher's appraisal and capability, it wishes to delegate the power of dismissal to the head teacher of the school. Such delegation might be appropriate when a head teacher is in charge of more than one school and the management of teacher appraisal and capability in each school is the responsibility of another senior teacher in charge of the day to day running of that school. In these cases the management of the capability meetings in section 4 of the procedure would fall to the other senior teacher. However, under section 8 of the procedure it is expected that decisions about exceptional circumstances would be taken by the head teacher or principal.
5. There is a special section in the procedure referring to head teachers, because the responsibility for managing the procedure in the case of alleged lack of capability on the part of a head teacher rests with governors nominated by the

governing body, with appropriate professional support. Apart from this, head teachers are subject to the capability procedure in the same way as all other teachers.

6. To help with the effective management of this procedure schools should maintain good communications with the teacher and the teacher's representative. In particular, they should seek to agree dates for meetings with them in advance in order to ensure that the teacher's representative is available and avoid delays in the procedure. If a date for the second meeting is agreed at the first meeting and a date for the third meeting is agreed at the second meeting, then a letter reminding the teacher of the date of the next meeting should be sent with the evidence to be considered at that meeting.
7. As part of the appraisal process the standards required of the teacher and the ways in which these are assessed should have been clearly explained. Nonetheless, this explanation should be repeated at the beginning of the capability procedure, as the context for the implementation of this procedure.
8. If the capability procedure is terminated because the teacher meets the required standards the teacher's future performance will be managed through the appraisal process as before. Should the appraisal process lead to the teacher again being referred to the capability procedure then, depending on the circumstances of the case, including the length of time which has elapsed since the previous capability proceedings, the matter may be considered under the 'exceptional circumstances' of section 8 of the procedure. Advice should be taken from the Employee Relations Team.
9. Although academies are not subject to the Appraisal Regulations or the School Staffing Regulations this capability procedure is commended to them because their teachers are expected to work to the same standards as teachers in maintained schools. In addition, teachers transferring to academies transfer with their existing contracts, which will include the School Teachers' Pay and Conditions Document, which in turn refers to the Appraisal Regulations and the teachers' standards.

BIRMINGHAM CITY COUNCIL

PROCEDURE FOR CASES OF ALLEGED LACK OF CAPABILITY OF SUPPORT STAFF IN SCHOOLS

Contents

1. Purpose	3
2. Scope	3
3. Introduction	3-4
4. Informal meetings under appraisal process	5
5. Formal capability meetings	5-6
6. First capability meeting	6
7. Second capability meeting	6-7
8. Third capability meeting	7-8
9. Hearing by committee	8-10
10. Appeals	10-11
11. Exceptional circumstances	11-12
Diagram to illustrate capability procedure	13

1.0 Purpose

- 1.1 The governing body and the head teacher have a responsibility to help and encourage all staff to maximise their performance, to ensure the highest level of education provision for children.
- 1.2 This procedure is therefore designed to provide a fair and consistent method of achieving this requirement and dealing with poor performance.

2.0 Scope

- 2.1 This procedure applies to all support staff in schools and academies with the exception of:
 - Support staff during their probationary period; and
 - Agency workers.
- 2.2 This procedure is to be implemented only if an employee fails on a regular basis (i.e. more than once), and despite appropriate additional support provided through the annual appraisal process to address serious concerns previously notified to the employee.
- 2.3 Where the employee is incapable of performing their duties as a result of sickness, injury or disability, the appropriate Managing Attendance procedure shall be used.

3.0 Introduction

- 3.1 In these procedures:-
 - the 'Local Authority' or the 'Authority' means Birmingham City Council acting in its capacity as a Local Education Authority;
 - Any reference to a 'school', also includes an 'academy';
 - 'employee' means a non-teaching employee who is employed to work at the school as a member of support staff;
 - reference to a 'head teacher' includes a 'principal' in an academy as appropriate; and
 - reference to a committee of the governing body includes an 'academy trust'

- 3.2 As part of their acknowledged management responsibilities, and as part of the arrangements for the supervision, appraisal, support and training of employees, head teachers or other staff designated by the head teacher may from time to time discuss aspects of capability with an employee on a day to day basis. Such discussions should not be regarded as falling within the scope of the formal capability procedure but should ensure that employees receive fair and honest feedback on their performance, a balanced assessment, and advice and support on how their performance may be improved.
- 3.3 For the purpose of this procedure, lack of capability is defined as a situation in which an employee fails on a regular basis (i.e. more than once) to perform the duties of their post.
- 3.4 The procedure is to be implemented with the intention of supporting the employee to improve and to meet the requirements of their job. The employee needs to be aware that failure to make the necessary improvements within the timescales set out in this procedure may lead to termination of their employment. Timescales appear in the flow chart appended to this procedure.
- 3.5 In order to facilitate the smooth implementation of this procedure the employee should be advised to contact his/her trade union for advice as soon as possible.
- 3.6 The procedure is distinct from the disciplinary procedure which should be used in cases of misconduct.
- 3.7 Normal standards of capability and normal procedures should apply to employees who are school trade union representatives or local union officers, except that no action will be taken until the circumstances of the case have been discussed with a local or regional officer.
- 3.8 This procedure will be applied in accordance with the Instrument of Government of the school, any other statutory provisions which may apply from time to time and/or the Advisory, Conciliation and Arbitration Service's Code of Practice.
- 3.9 The records of any case under this procedure will be confidential.
- 3.10 The governing body may decide, by formal resolution, to delegate to the head teacher the hearing of cases under section 9 of this procedure, provided that they have not been previously involved in managing the case.

4.0 Informal meetings under appraisal process

- 4.1 This procedure is intended to highlight concerns in performance and provide an opportunity for an employee to improve. **It is strongly recommended that this procedure is only implemented where the appraisal process and appropriate support provided have failed to improve the performance to the required standards. This procedure should only be implemented if the head teacher or other appropriate manager has sufficient recorded evidence from a variety of sources.**
- 4.2 Being subject to a capability procedure should never be a surprise to an employee. **Any concerns should have been raised with the employee in advance as part of the appraisal process.** If it became apparent during or at the end of the appraisal period that the employee's overall performance was below acceptable standards the head teacher or other designated manager should have:
- met with the employee to discuss the nature and level of the concerns,
 - recorded the concerns as part of the Appraisal Scheme; and
 - given the employee the opportunity to reflect on it before arranging another meeting to determine what increased support would be given, the kind of improvement required, the period for improvement, how improvement would be assessed and when the situation would be reviewed. The head teacher or other designated manager should have explained to the employee what would happen if they did not meet the required standards within the specified timescales.
- 4.3 During the appraisal process and throughout this procedure, consideration should be given to any mitigating or personal circumstances (including a disability or other health condition) which might explain a dip in the employee's performance. Reasonable adjustments may be considered if an employee has specific needs relating to a disability. A referral to Occupational Health may also be appropriate.

5.0 Capability meetings

- 5.1 The head teacher or appropriate manager shall review the facts and information gathered to date, adding to it where appropriate, and then write to the employee setting out the area(s) of concern and the evidence supporting those concerns and inviting the employee to a formal capability meeting. From this stage onwards the employee may be accompanied by a trade union representative or work place

colleague. In addition, a school can request that an appropriate HR Manager attends to provide technical advice.

- 5.2 The invite letter shall explain to the employee that the meeting is being held in accordance with the provisions of this procedure. Copies of any documentation to be used at the meeting shall be sent with the written invite letter within a reasonable timescale before the meeting to ensure that the employee has enough time to prepare his or her response to the concern(s). A copy should be included for the employee's representative.

6.0 First capability meeting

- 6.1 The purpose of the meeting shall be:-
- (a) to define which areas of the employee's role are not being met in line with the requirements of the role and the effect this is having on pupils; staff and the provision of education or service in the school;
 - (b) to invite the employee and/or the employee's representative to comment and/or offer an explanation for the alleged shortfalls in performance;
 - (e) for the head teacher or designated manager to decide, having regard to (a) and (b) above, whether his or her concern(s) remain and if no concern remains, for the head teacher to confirm in writing that no further action will be taken.
 - (f) if concerns remain, for the head teacher or other designated manager to inform the employee of those concerns and decide what reasonable targets are to be set, (via an employee support plan, including a range of thorough, suitable support). This should include clarification of how long each part of the support plan shall last, and how it shall be monitored and evaluated.
 - (e) where (d) applies, to arrange for the employee support plan to be reviewed in a second capability meeting, to be held 7-8 working weeks after the first capability meeting, and set the date and time for that meeting in discussion with the employee and the employee's representative.
- 6.2 Notes of the meeting, including the employee support plan shall be sent to the employee within two working days of the meeting together with a copy for his or her representative.

7.0 Second capability meeting

- 7.1 At the second capability meeting progress will be reviewed against the targets, standards and employee support plan. Copies of any evidence to be presented on the employee's performance should be sent to him or her in reasonable time beforehand, including a copy for their union representative. The employee and/or the employee's representative will have the opportunity to comment upon his or her performance and make appropriate representations. At the conclusion of the meeting the head teacher or other designated manager will either:
- (a) decide that the employee now meets the requirements of the role and that this procedure is terminated, which will be confirmed in writing; or
 - (b) decide that the employee's performance, or certain aspect(s) of it, remains a cause for concern. In this case, they will confirm the nature of those concern(s), note any improvements, decide whether to modify the targets, employee support plan, support provided, and arrangements for monitoring and evaluation over a further period of 6-7 weeks. A third capability meeting will be arranged to review progress at the end of that period and the date for that meeting should be set in discussion with the employee and his or her trade union representative. The head teacher, or other designated manager will explain to the employee that if the improvement has not been achieved by the date of the third capability meeting the matter will be referred for a hearing before a committee of governors (or, depending on the governing body's delegations, before the head teacher if the head teacher or other designated manager has not been involved previously in the management of the employee's performance) which may lead to the termination of the employee's employment in accordance with this procedure.
- 7.2 Notes of the meeting, including where applicable the employee support plan, monitoring and evaluation and the explanation about the possibility of terminating the employee's employment, shall be sent to the employee within two working days of the meeting together with a copy for the employee's representative.

8.0 Third capability meeting

- 8.1 The third capability meeting will take place 6-7 weeks after the second capability meeting. The employee will normally be given a minimum of 5 working days' notice of the meeting. Progress will again be reviewed against the agreed targets, role requirements and employee support plan, subject to any modifications to these as a result of the second

meeting. As with the previous meetings, copies of the evidence on the employee's performance should be sent to the employee in a reasonable time beforehand, with a copy for the employee's representative. The employee will have the opportunity to comment on his or her performance during the last monitoring period. At the conclusion of the meeting the head teacher or other designated manager will either:

- (a) decide that the employee now meets the requirements of the role and that this procedure is terminated, which will be confirmed in writing; or
- (d) extend the employee support plan for a further reasonable period if there is a prospect of the employee meeting the requirements of the role within this time; or
- (e) refer the matter to a committee of the governing body (or, depending on the governing body's delegations, before the head teacher provided they have not been involved previously in the management of the employee's performance) with a recommendation that the employee's employment be terminated on the grounds of professional capability.

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

9.0 Hearing by a committee of the governing body (or by a head teacher with formally delegated authority to hold the hearing)

9.1 When it has been decided to refer the employee's capability concerns to a committee of the governing body (or, depending on the governing body's delegations, before the head teacher if they have not been involved previously in the management of the employee's performance) a hearing shall be arranged as set out below.

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

9.3 A formal notice to an employee to attend a hearing should be issued in writing, with an explanation of the hearing's purpose and its place in the procedure. The letter should not only state the reasons for the hearing but should also attach copies of any documents to be used at the hearing. The letter must remind the employee of the right to be

accompanied or represented. The employee should be asked to confirm that he/she will be attending the hearing, who will be accompanying or representing him or her (that person must be either a trade union/professional association representative or work-place colleague), and a list of any witnesses attending. The employee/ trade union should also be reminded to provide this information along with any documentation on which he or she wishes to rely at least five working days before the hearing.

- 9.4 Names of any witnesses from both sides should be circulated in advance and all witnesses should be asked to provide a written statement for inclusion with the documents to be used at the hearing. A second set of papers should be enclosed for the employee's representative.
- 9.5 In order to ensure that the employee has enough time to prepare his or her response at least ten working days' notice of the hearing should be given. It is helpful to agree a date with the employee's union/professional association before sending the formal notice to attend the hearing. The employee may suggest an alternative time and date as long as it is reasonable and is not more than five working days after the original date. The committee or head teacher (as the case may be) may reject this suggestion but will do so only if it is unreasonable, when they may proceed to hear the case in the absence of the employee or the employee's representative. Advice should be taken from the Employee Relations team or appropriate HR Manager on what is reasonable.
- 9.6 The employee may provide documentation in his or her defence and give the names of witnesses whom he or she is asking to appear on his or her behalf. It is recommended that witnesses attend formal hearings in support of their written statements. This information should be provided at least five working days before the hearing. Where the hearing is before a committee of the governing body the clerk to the governing body is required to ensure that all parties to the hearing receive copies of all documents in good time before the hearing (at least five working days before). Evidence submitted after the distribution of these documents may or may not be accepted as evidence; in such circumstances a decision will be made by the chair of the committee (or the head teacher or principal if he or she is conducting the hearing) in the hearing itself, and not before. There is no requirement on the employee to submit any documentation, other than a statement from any witness who may be called by the employee. However, if the employee does not intend to submit any documentation there should be a positive statement from the employee and/or the employee's

- representative to this effect. Neither side will be able to use at the hearing any evidence not previously provided.
- 9.7 The head teacher or designated manager should normally present the case to the committee, unless the head teacher is the subject of the hearing, in which case the chair of the committee should seek the advice of the local authority (through one of the School and Governor Support Managers or other appropriate advisors) on an appropriate person to present the case.
- 9.8 The School Staffing Regulations provide that the head teacher is entitled to attend all governing body meetings to give advice if the meeting may relate to a determination that a person employed at the school should cease to work there (or be dismissed in the case of a voluntary aided or foundation school). The governing body must consider such advice. Whilst the School Staffing Regulations do not apply to academies, it is good practice for the Principal to attend any final hearings or formal meetings for the purposes of giving advice.
- 9.9 The hearing will follow the procedure recommended by the local authority.
- 9.10 After considering the relevant evidence, the committee (or the head teacher or principal if he or she is conducting the hearing) has the following options and shall decide on one of them:
- take no action against the employee
 - determine that a further defined period for improvement should be allowed
 - determine that the employees should cease to work at the school (in the case of an employee in a community, community special, voluntary controlled or maintained nursery school) or may dismiss the employee from a voluntary aided or foundation school on the grounds of professional capability.
- 9.11 The committee (or Head Teacher where appropriate) shall announce its decision to the parties in person or subsequently in writing as the committee shall determine. An oral announcement shall be confirmed in writing within 2 working days of the meeting, including the right of appeal.
- 9.12 A notification of a determination to cease to work at a community, community special, voluntary controlled or maintained nursery school shall include a statement that the local authority will be advised of the determination to enable it to confirm dismissal as required by law. It shall also give details of the right of appeal (see below). A notice of

dismissal from a voluntary aided or foundation school shall give details of the right of appeal.

- 9.13 The committee (or the head teacher or principal if he or she has conducted the hearing) will take advice from Employee Relations or another appropriate HR Manager on the duties to be undertaken by the employee during the notice period.

10.0 Appeals

- 10.1 An employee has the right of appeal against the decision of the committee or head teacher who has conducted the hearing. An appeal shall be to the appeal committee established by the governing body.
- 10.2 An employee may appeal by giving written notice of the appeal and of all the grounds on which it is being made to the clerk to the governing body within five working days of receiving written confirmation of the decision. The grounds for the appeal should be accompanied by any additional evidence to be presented in support of the appeal. There is no requirement to submit any documentation if the employee does not wish to, other than a statement from any witness who may be called by the employee. However, if the employee does not intend to submit any documentation there should be a positive statement from the employee and/or their representative to this effect and the employee will not be able to use at the hearing any evidence not previously circulated to the parties in advance.
- 10.3 The clerk to the governing body will immediately notify the head teacher or the person representing the committee (whichever took the decision against which the employee is appealing) of all the grounds of appeal and any additional evidence, with a request to submit any additional papers in response to the clerk within five working days.
- 10.4 The clerk to the governing body will then arrange an appeal hearing in reasonable time. The clerk shall give at least five working days' formal notice of the date, time and location of the appeal hearing to all participants. All documents relevant to an appeal hearing shall be enclosed with the letter. The employee/trade union rep may suggest an alternative time and date as long as it is reasonable and is not more than five working days after the original date. The committee may reject this suggestion if it is unreasonable and may proceed to hear the case in the absence of the employee or their representative, it also has the discretion to defer the date of the hearing in order to reach mutual agreement on a convenient date.
- 10.5 The witnesses may include, as appropriate to the circumstances of the case, the head teacher and/or a member of the committee who took the

- decision against which the employee is appealing, or the person who presented the case if that person was not the head teacher.
- 10.6 The order of proceedings for an appeal hearing will follow the procedure recommended by the local authority. The appeal committee will have regard to any guidance issued from time to time by the local authority on conducting an appeal hearing.
- 10.7 The appeal committee may dismiss the appeal, uphold the appeal, amend the period defined for further improvement, or substitute a defined period for further improvement for a determination that an employee should cease to work at the school or a dismissal from the school.
- 10.8 The appellant may choose whether to hear the appeal committee's decision in person or receive it subsequently in writing, but this choice shall not prevent the committee from choosing to adjourn and reconvene before making a decision. An oral announcement shall be confirmed in writing by the clerk to the governing body within five working days of the appeal hearing. If an appeal against a determination to cease to work at a community, community special, voluntary controlled or maintained nursery school is upheld, the letter of notification will state that the local authority will be notified immediately so that it can withdraw the letter of dismissal and reinstate the appellant without a break in service. If an appeal against dismissal from a voluntary aided or foundation school is upheld, the letter of notification will include a withdrawal of the dismissal and reinstatement without a break in service.

11. Exceptional circumstances

- 11.1 In extreme cases the head teacher may need to fast track this procedure and start at the second capability meeting stage. If so the head teacher shall write to the employee explaining that he or she considers that this is an extreme case in which the education of pupils is seriously jeopardised, setting out the evidence supporting this allegation, and inviting the employee to a meeting, at which the employee may be accompanied by a trade union representative or work place colleague. It shall be explained to the employee that the meeting is being held in accordance with the provisions of this section of the procedure. Copies of any documentation to be used at the meeting shall be sent with the written notice. To ensure that the employee has enough time to prepare his or her response to the concern(s), reasonable notice of the meeting should be given. This should be at least five working days. It is advisable to agree a date with the employee's union/professional association before sending the formal invite letter.

11.2 The purpose of the meeting shall be:-

- (a) to define the aspects of capability which lead the head teacher to allege that the education of pupils is jeopardised and why it is not appropriate to use or continue to use the other sections of this procedure;
- (d) to allow the employee and/or their representative to comment and/or offer an explanation;
- (e) for the head teacher to decide, having regard to (a) and (b), above whether to confirm or withdraw the allegation(s) of lack of capability which seriously jeopardise the education of the pupils;
- (d) for the head teacher, in the light of (c) above, to take one of the following options
 - take no further action under this section of the procedure;
 - start capability meetings at the second formal capability meeting, thereby omitting the first meeting under section 6. Under such circumstances, the employee must be informed of the reasons for taking such action.

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

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

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