



Disclosing Capability Information NEU guidance for members in England only

The purpose of this document is to explain the circumstances in which schools may disclose capability information to prospective employers.

Which schools have a right to receive capability information?

The School Staffing (England) Regulations 2009 expressly provide that only maintained schools or academies may receive capability information upon request. Independent schools and colleges are likely, in practice, to request the same or similar information by way of references or questionnaires, but there is no statutory duty on a school to provide the information prescribed by the regulations to such schools/colleges. There would be a duty on a school only to provide fair, honest and accurate references upon request.

What sort of information will maintained schools and academies be entitled to see upon request?

Maintained schools and academies will be entitled to be advised in writing if a teacher has been the subject of capability proceedings in the past two years and, if so:

- the concerns which gave rise to the capability proceedings
- the duration of the proceedings, and
- the outcome.

Is my school obliged to disclose capability information when asked to do so?

Your school is obliged to disclose capability information if it is a maintained school (ie a community, voluntary controlled, community special, maintained nursery, foundation, voluntary aided or foundation special school) and if the disclosure request has been made by another maintained school or academy. Even if your school is not strictly bound by the statutory duty to disclose, it may continue to disclose matters relating to a teacher's capability in references.

What if schools and colleges without a duty to disclose do so in any event?

Schools and colleges disclosing prescribed information in the absence of a statutory duty to do so must ensure that they do not breach confidentiality (eg the terms of a settlement agreement) and/or the data protection principles. If they do, they will not be able to rely on the regulations to justify their actions.

What if allegations of incapability remain unresolved?

The duty to disclose is not dependent on whether capability proceedings have resolved the allegations of incapability, although in circumstances where allegations have not been fully resolved (eg because the teacher resigns or enters into a settlement agreement) the school will be unable to provide details of the outcome of capability proceedings. It is anticipated that, in these circumstances, head teachers and/or prospective employers may ask the existing head teacher to speculate on what the outcome might have been but for resignation etc. Head teachers are discouraged from doing so where the response could be prejudicial to a teacher's job prospects.



When should a school at which I have applied to teach ask for capability information?

All schools (including academies) and colleges should seek capability information relating only to the successful applicant and not to every teacher who applies for a job. NEU divisions, associations and branches have been asked to seek to ensure that references and capability information are not sought by prospective employers early in the recruitment process (ie at the application stage).

Will information relating to informal support be subject to disclosure?

The NEU does not believe the government wanted support stages to fall within the scope of the regulations. If that had been its intention, the regulations would not have been supplemented by a model appraisal and capability policy for schools that does not require support stages to be reported unless they are subsequently followed by formal capability proceedings.

Furthermore, the current practice of giving references does not encourage disclosure of informal support. For example, if a staff member's performance improves after counselling and without the need to move to formal procedures, this would not normally be a matter for disclosure. Anyone who gives a reference has a duty to give a fair and honest account, and that duty is owed to the person it is written about as well as to the recipient.

Are schools obliged to disclose details relating to medical capability?

Section 60 of the Equality Act 2010 prevents a school to which an application for work is made from asking about the health of the applicant before offering the applicant work on a conditional or unconditional basis. If disclosing information would disclose the applicant's state of health (whether past or present), then schools that receive requests for capability information are not obliged to respond before the applicant has been offered work.

In the NEU's view a school or college which, in the early stages of the recruitment process, requests and receives details relating to medical capability will be making itself vulnerable to claims of disability discrimination if the affected applicant is not shortlisted, interviewed or appointed. All schools (including academies) and colleges should be encouraged to seek only capability information relating to the successful applicant and not to every person who applies for a job.

Should my capability information be disclosed if I am a former, rather than existing, member of staff?

The duty to disclose applies where a member of staff at a maintained school applies for a teaching post at another maintained school or an academy. Therefore, it may be argued that the duty is not triggered if the applicant for the job is no longer a member of the teaching staff at the time they apply (ie if they are a supply teacher whose assignment has ended). The NEU's advice to head teacher members is that they should not disclose prescribed information in such cases, but should seek to comment in the usual way if asked to provide a reference.



Must maintained schools disclose documents relating to capability procedures, eg observation notes etc?

The regulations require schools to 'provide written details' on request, not documents. The union takes the view that, if the government wanted schools to disclose documents, it would have made that clear in the regulations. The union believes any school disclosing confidential and/or highly sensitive capability-related documents, without a teacher's explicit consent, will be doing so without statutory authority and in breach of data protection principles.

What will be the effect of the regulations on agreed references forming part of a settlement agreement?

Agreed references will need to address the issues which maintained schools will be required by law to disclose on request. In advance of a prospective employer's request, therefore, the parties to the settlement agreement should seek to reach consensus on:

- the concerns which gave rise to the capability proceedings
- the duration of the proceedings, and
- the outcome (where appropriate).

Should I be permitted to view the content of capability information before it is disclosed?

Although nothing disclosed should be unexpected, it is good practice to share the details to be disclosed with the subject of the disclosure beforehand. This is particularly important where the school or employer's records are not as clear as they ought to be. For more information about access to references, refer to our guidance on references.

Should my capability information be disclosed if I have won a related unfair dismissal claim?

The duty to disclose will still apply in such circumstances. However, a governing body in this situation should explain that it lost an unfair dismissal claim or else risk claims that it provided a misleading and possibly malicious reference to a prospective employer.

What should I do next?

If further advice is needed, contact your NEU workplace rep in the first instance. If there is no NEU rep in your workplace, or the peripatetic nature of your employment makes contact with a workplace rep difficult, contact the NEU Adviceline in England on 0345 811 8111 or NEU Cymru in Wales on 029 2046 5000. Further contact details may be found at: neu.org.uk/contact-us

Further resources

NEU guidance available at: neu.org.uk

- References
- Capability