





## Capability Procedure for Schools

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This procedure has been negotiated with the Professional Associations/Trade Unions and is recommended for adoption.



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<b>Chair of Governors:</b>		<b>Date:</b>	14 <sup>th</sup> November 2016

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## 1. INTRODUCTION

This procedure applies only to Teachers, Headteachers and Support Staff employed by the school where there are serious concerns about performance that have not been resolved through the Appraisal process.

This policy and procedure does not form part of any employees' contract of employment.

Employees who are subject to the Capability Procedure are strongly advised to contact their Trade Union/Professional Association for support. A list of accredited County Professional Association and Trade Union representatives can be found on the Hertfordshire Grid for Learning.

## 2. PURPOSE, SCOPE AND PRINCIPLES

A Capability Procedure is necessary for promoting fairness and order in the treatment of individuals and is designed to help and encourage all employees to achieve and maintain high standards of performance at work. **For examples of areas which may give rise to concern, see Appendix 1.** All staff must have ready access to this procedure and are entitled to complete confidentiality in relation to personal, professional and medical information.

With the exception of where serious concerns arise, this procedure should only be followed when concerns have been identified over a reasonable period of time. It would not usually be appropriate to react to one observation that falls below expectations by invoking this procedure. In such cases detailed feedback and appropriate support should be given to ensure that the concerns are understood and can be acted upon. It is reasonable to follow up a weak observation by undertaking another to give an employee a chance to show it was a one-off. A reasonable period of time (at least a week) should be allowed for the individual to reflect on the observation and any support or advice given before a follow up observation is carried out.

Concerns raised as well as support and advice given at all stages should be well documented.

Relevant training should be considered, noting that training can take many forms and does not have to be external.

Reasonable consideration will be given to facilitating adjustments required in accordance with the Equality Act 2010, for example allowing an interpreter at a formal meeting.

This procedure applies to:

- all employees of the school, including the Headteacher, except NQTs and staff still in their probationary period (see below)

The procedure does not apply to:

- Newly Qualified Teachers (alternative procedures are in place for newly qualified teachers during their period of induction)
- Support Staff who are still in their probationary period (concerns should be dealt with under the Probationary Procedure)

At every formal stage in the procedure, the employee will:

- be advised in writing of the nature of the performance concerns
- have the right to be accompanied by their accredited Trade Union/Professional Association representative or work colleague and by no-one else
- have a right of appeal against any penalty imposed



### 3. EXTENUATING CIRCUMSTANCES

#### 3.1 Ill Health & Absence

Where it is established that the employee's unsatisfactory performance is caused by ill health, the School's Health and Attendance Procedure should be followed.

Where poor performance is due to an employee having a disability, this procedure should be adapted to meet the requirements of the Equality Act 2010. For example, in addition to the support offered, reasonable adjustments to assist the employee to reach the required standard must be considered.

Where an employee becomes sick, having entered Capability Procedures, it may be necessary to refer them to the Occupational Health Physician, **but this will not be automatic**. Headteachers are advised to contact the Schools' HR Advisory Team for further advice.

Short absences should not significantly delay any part of the Capability Procedure.

#### 3.2 Misconduct

In some circumstances performance may be unsatisfactory due to an employee's own negligence or wilful misconduct. In such cases the Disciplinary Procedure should be used rather than the Capability Procedure.

### 4. DEFINITION AND SEPARATION OF ROLES

#### 4.1 Employees

Every employee has a contractual responsibility to perform at an appropriate level. Employees are, therefore, expected to be committed to achieving appropriate levels of performance.

#### 4.2 Line Manager

The process will usually be undertaken by the Headteacher, but may be delegated to another senior colleague, such as a Deputy Head, Assistant Head or Business Managers (for non-teaching staff). In some circumstances Formal Capability Meetings may be arranged and conducted by an appropriate Line Manager with the Headteacher's agreement. The Headteacher or Line Manager will consider the evidence, reach a conclusion and issue a warning as necessary. The Headteacher or Line Manager will specify the improvement required and support to be provided as part of the warning process.

#### 4.3 Chair of Governors

It is possible that as part of the normal working relationship between the Headteacher and Chair of Governors, they will have discussed details of concerns about the employee. If that is the case, the Chair of Governors can take no part in any hearing.

In cases where the Headteacher is the subject of concerns, the Chair of Governors will carry out the functions normally allocated to the Headteacher in this procedure. The Chair of Governors will need to take advice from the Area HR Manager. The Chair of Governors will be responsible for organising hearings or appeals at any stage.

#### 4.4 Other Governors

The Governing Body has quite specific tasks to perform under this procedure in relation to appeal and dismissal hearings, when they will be expected to form a Panel of 3 Governors. Governors who are employees of the school should not form part of the Panel. It is inappropriate for Governors to be



involved in detailed discussion or consideration of performance concerns at any other time. It is also inappropriate for details of any capability cases to be discussed at a full meeting of the Governing Body.

In some exceptional circumstances there may not be enough 'clean' Governors to form a Panel at a hearing; the Governance team can assist in finding Governors, from other schools, in such instances.

#### **4.5 Expert Advice**

The Headteacher or Chair of Governors may need to seek expert advice at the outset of the process or at any of the formal meetings. For schools that subscribe to the Schools' HR Advisory Team, advice from an HR Adviser is always available.

#### **4.6 Advisory Staff**

It will often be appropriate for the school to seek specialist or outside advice in dealing with sustained and/or serious poor performance or lack of capability. A member of the Achievement Team may be involved in giving initial advice to the Headteacher as part of the general support role, in giving or arranging advice and support for individual employees and in providing evidence for formal meetings.

### **5. RIGHT TO BE ACCOMPANIED**

An employee has the right to be accompanied and supported, at each formal stage of the procedure where action may be taken (including appeal), by a school employee or an accredited Professional Association/Trade Union representative and no-one else.

The role of the Professional Association/Trade Union representative or work colleague is to:

- familiarise him/herself with the case
- assist the employee in preparing any case they wish to present
- confer with the employee before and after the meeting or hearing
- present and sum up the employee's case, as appropriate and as agreed with the employee
- address the meeting or hearing and ask appropriate questions, as agreed with the employee
- respond on the employee's behalf to any view expressed at a meeting or hearing and
- ask for adjournment if necessary

The Professional Association/Trade Union representative or work colleague is not permitted to:

- (i) answer questions on behalf of the employee
- (ii) address the meeting or hearing if the employee indicates that he/she does not wish the Professional Association/Trade Union representative or work colleague to do so
- (iii) prevent the school from explaining the case
- (iv) prevent any other person at a meeting or hearing from making his/her contribution

Internal school Professional Association/Trade Union representatives are entitled to take a reasonable amount of time during normal working time to fulfil this responsibility. The Professional Association/Trade Union representative should agree the amount of time required and when this can be taken with the Headteacher.

The employee should give advance notice if he/she is to be accompanied, and by whom. If the Professional Association/Trade Union representative or work colleague is unavailable at the time of the meeting or hearing, the employee should contact the individual who convened the meeting to postpone the hearing (once) to a time that is mutually convenient to all parties. Any postponement should be within a reasonable timescale and should not normally extend beyond 5 working days.



An employee will not be subjected to a detriment by the school by reason of having acted as a companion in any Capability Proceedings.

## 6. MANAGEMENT PERIOD

**Before** embarking on the Capability Procedure, management should ensure that through normal performance appraisal and supervision:

- the employee has been alerted to concerns
- the employee has an agreed job description, which is fully understood and that there is a clear agreed expectation of standards of performance
- a programme of support has been arranged for the employee in line with Appendix D (for Teaching staff) and Part B (for Support Staff) of the school's appraisal procedures (e.g. regular meetings, monitoring, objectives set, training and mentoring), and has been well documented and provided in written form and
- a reasonable timescale for improvement has been set, usually 6 weeks and the employee has been informed in writing of the programme of support which will be offered and the consequences of failing to perform at the required standard. If performance is considered extremely poor, or a risk under health and safety, a 4 week period may be appropriate

A copy of this procedure shall be given to the employee

## 7. THE CAPABILITY PROCEDURE

**See Appendix 2 for a procedural flowchart.**

Where performance concerns have been unsuccessfully addressed and managed using the normal appraisal management channels (see section 6), the employee should be invited in writing to attend a Formal Capability Meeting with their Professional Association/Trade Union representative or work colleague and no-one else. At least 5 but no more than 10 working days' notice will be given. The letter will inform the employee that the appraisal process is suspended and will no longer apply whilst the employee's performance is being managed under the Capability procedure. The letter will contain sufficient information about the performance concerns and possible consequences, e.g. a first written or final written warning could be issued, to enable the employee to prepare their case for the Formal Capability Meeting. Any copies of written evidence will be enclosed with the letter together with a copy of the Capability Procedure.

Where it is known that an individual is a member of a Professional Association or Trade Union and the name and contact details of their representative are available it is advised that the representative in question be consulted when arranging any formal meetings in order to minimise the possibility of delays.

### 7.1 Formal Capability Meeting

**7.1.1** The meeting is intended to establish the facts. At this meeting the Headteacher or Line Manager (with the Headteacher's knowledge and agreement) will:

- i. identify the performance concerns, the support already given as part of the appraisal policy, the standards required and where the shortfall in their performance has occurred



- ii. provide written evidence of the concerns identified (e.g. from job descriptions, supervision notes, classroom observations, examples of pieces of work that do not meet the required standards)
- iii. consider and discuss any causes and reasons for the shortfall. The employee should be given the opportunity to discuss any contributory factors they feel may have affected their performance and/or refute the evidence presented if appropriate
- iv. After reviewing the evidence before them and taking into account any contributing factors the employee has put forward, the Headteacher or Line Manager will decide whether
  - a) to move into a further period of monitoring without issuing a warning
  - b) to issue a first written warning\*
  - c) to issue a final written warning\* (serious cases only)

If, following response from the employee, it is accepted that it is not appropriate to proceed with the formal capability process; the matter could be addressed via performance appraisal or relevant management support.

- v. reach agreement to the future standard of performance with agreed objectives set out showing clearly how these will be achieved and measured
- vi. Identify the support to be provided to assist the employee in reaching the required standard (e.g. additional supervision, coaching, observing exemplar lessons), together with clear timescales and a review date, the employee should also be invited to suggest what support that they feel they may benefit from
- vii. Set out the timetable for improvement and explain how performance will be monitored and reviewed. The timetable will depend on the circumstances of the individual case but should usually be 6 weeks or half a term. It is for the school to determine the set period. It should be reasonable and proportionate, but not excessively long, and should provide sufficient opportunity for significant improvement to take place
- viii. Notes must be taken of the meeting and a copy given to the employee

\*A warning may be given at this stage where the concerns over performance, raised as part of the management stage (see section 6) are severe enough as to question the employee's overall satisfactory execution of his/her duties. If a written warning is given, this will be confirmed in writing within 3 working days of the meeting, giving the employee the opportunity to appeal the decision and clear information about possible outcomes and the next stage.

## **7.2 Monitoring and review period following a Formal Capability Meeting**

A performance monitoring and review period will follow the Formal Capability Meeting. Formal monitoring, evaluation, guidance and support will continue during this period. The member of staff will be invited to a Formal Review Meeting, (date to be agreed at the first meeting and confirmed in the outcome letter of the Formal Capability Meeting under section 7.1.1). If there is no improvement and depending on the stage of the process a first written or final written warning may be issued. A further review period should be put in place followed by a Formal Review Meeting. Once a final warning is given and the decision of the Formal Review Meeting is that there has been insufficient improvement following a further period of 4/6 weeks then a dismissal hearing will be convened (8).



### **7.3 Formal Review Meeting**

#### **7.3.1 Arranging a Formal Review Meeting**

The Formal Review Meeting allows the employee to respond to concerns about performance and present his/her case with the support of their Professional Association/Trade Union representative or work colleague.

The employee must receive written notice of the meeting, **at least 5 but no more than 10 working days in advance by recorded delivery or delivery by hand of:**

- The purpose, time and place of the meeting
- Specific concerns, confirming that this is a formal meeting under the Capability Procedure
- A copy of this procedure (although one should have been provided previously)
- The right to be accompanied by a work colleague or his/her Professional Association/Trade Union representative (and no one else)
- Details of who will be attending the meeting (e.g. Head, employee, expert witness/es)
- Relevant documentation (e.g. copies of objectives, the support provided, and capability/review meeting minutes)

If an employee is unable to attend a formal meeting he/she may choose to give written authority to his/her representative to act for his/her. He/she may also choose to provide a written response.

Alternatively, if he/she cannot attend for a genuine reason, and is not willing for his/her representative to act on their behalf, it may be reasonable to re-arrange the meeting. However, if the employee fails to attend for a second time, management can make a decision based on the facts and evidence gathered during the review period in the employee's absence.

#### **7.3.2 Conducting a Formal Review Meeting**

Follow the guidelines set out in section 7.1

#### **7.3.3 Outcome of Formal Review Meeting**

There are 4 possible outcomes to the Formal Review Meeting:

- Outcome 1

Sufficient improvement, in which case the capability procedure will cease and appraisal process will resume.

- Outcome 2

There has been some improvement, and there is confidence that more is likely, but further support or monitoring is required and the monitoring and review period will be extended.

- Outcome 3

If no, or insufficient improvement has been made, the employee will receive either a first written warning if one wasn't issued at the commencement of the Formal Capability Meeting or a final written warning.

- Outcome 4

If the employee has previously received a final written warning either at the Formal Capability Meeting or following a subsequent Formal Review Meeting and there has still not been sufficient improvement then a performance capability hearing will be arranged to consider if dismissal is an appropriate outcome (see 8).





### 7.3.4 Duration of Warnings

In circumstances where a written or final written warning is issued it will be placed on the employee's personal file normally for a period of 12 months, unless the employee is notified to the contrary.

### 7.3.5 Appeal against a Warning

An employee may appeal against a warning or dismissal at any stage (within 7 calendar days) (see section 9 for appeals process).

## 8. THE DISMISSAL STAGE

**8.1** A Panel of 3 Governors will normally hear the case at this stage unless it is felt appropriate for the Headteacher to do so. If the case concerns the Headteacher a Panel of Governors would hear the case.

The employee will be given at least 10 working days' notice in writing of the hearing.

The letter will contain:

- The purpose, time and place of the hearing
- The right to be accompanied by a work colleague or his/her Professional Association/Trade Union representative and no one else
- Details of who will be attending the meeting (e.g. Headteacher, employee, expert witness/es)
- The requirement for the employee to provide to the school, at least 4 working days before the hearing, 6 hard copies of all documents that he/she intends to present at the hearing and enough copies for all those, except witnesses who will be present at the hearing
- All relevant documentation that will be used as evidence at the hearing (e.g. copies of objectives, the support provided, and review meeting minutes)

Copies of all relevant documents will be sent by the school to the Panel members not earlier than 3 working days before the hearing.

**8.2** At any hearing where dismissal is to be considered, the following provisions apply:

- a) At any Community or Voluntary Controlled school the local authority must be invited to send an adviser. The school must send all of the papers for the hearing to the HR Adviser no later than the date on which the papers are sent to the employee
- b) At any Voluntary Aided, Foundation school or Academy the school is encouraged to invite an HR Adviser. If an HR Adviser is to be in attendance the school must send all of the papers for the hearing to the HR Adviser no later than the date on which the papers are sent to the employee

Where the outcome is dismissal in a Community or Voluntary Controlled school (whose staff are employed by the County Council), a copy of the outcome letter will be sent to the Director of Children's Services once the time period for appeal has elapsed. The Director of Children's Services will then formally confirm dismissal by letter to the employee.

Dismissal on the grounds of capability shall be with notice.

The outcome will be confirmed in writing to the employee within 3 working days.



## 9. APPEALS

An employee may appeal against any warning or dismissal. Appeals should be made within 7 calendar days of the receipt of the outcome letter. Appeals must be made to the Chair of Governors, who will arrange a Panel of 3 Governors who have not previously been involved in the case to hear the appeal as soon as is reasonably practical. Where a Line Manager issued a warning, appeals may be heard by the Headteacher.

If an appeal is not made within 7 calendar days the school will assume the employee accepts the decision.

At least 4 working days before the hearing, the employee shall provide all documents that he/she intends to present at the hearing. The documents must be presented in hard copy and with sufficient copies for those, except witnesses, who will attend the hearing. Copies of all the papers to be presented will be sent to Panel members 3 working days before the hearing.

Panel members must not discuss any aspect of the case or the contents of the case papers with anyone, including other Panel members, before the hearing.

The decision of an appeal Panel at each stage will be final and will be reported to the Governing Body. The outcome of the appeal will be confirmed in writing to the employee within 3 working days.

The following general points are important:

- An appeal at the formal meeting and review stages will not interrupt the procedure (unless the appeal is upheld)
- An appeal will normally involve a review of earlier evidence but the request for an appeal should specify the grounds for the appeal and, in particular, whether these refer to the reasonableness of the decision or to procedural matters
- If either side intends to produce new evidence, all relevant documentation should be circulated in advance within the agreed timescales

## 10. DISPUTES ABOUT THE PROCEDURE

There will be no access to the Grievance or Harrassment and Bullying policies and procedures on matters related to the application of the Capability procedure where there is evidence of poor performance.

Where issues arise, for example identified support has not been provided; they should be raised during the support programme and at any subsequent formal meeting/hearing and appeal process.

If the complaint concerns matters that are unrelated to the capability process, it can be raised under the Grievance Procedure.

## 11. EXPIRY OF WARNINGS AND REFERENCES

If an employee is subject to the capability procedure, or has a warning in place at the time of the reference request, this must be referred to in any employment reference.

While potential action outlined in a formal warning will expire at the end of the specified period, a copy of the 'spent' warning will be retained on the employee's personal file for reference but will usually be disregarded for future capability purposes.



There may, however be occasions when the warning cannot be disregarded, such as where the performance is satisfactory throughout the period the warning is in force, only to lapse very soon thereafter. Where such a pattern emerges an employee's record of previous warnings will be borne in mind in deciding how long any new warning will last or whether it is appropriate to undertake disciplinary action instead, on the basis that the employee has been able to previously demonstrate that capability is not in question.

The period during which a sanction is "live" may be extended if the employee is absent from work for a lengthy period. The duration of a sanction is to allow the employee to demonstrate his/her performance is of the required standard, a task which can only be achieved if the employee is at work.

Records will be kept securely and only be made available to employees whose duties require access to this information.



## **APPENDIX 1**

### **PERFORMANCE CONCERNS THAT MAY BE ADDRESSED VIA THE CAPABILITY PROCEDURE**

The following list gives examples of areas in which deficiency in performance may give rise to concern and, in due course, lead to formal action. **This list is neither exclusive nor exhaustive:**

#### All Staff

- a) Discharge of specific responsibilities that form part of the job description which may include leading, managing or supervising responsibilities
- b) Compliance with further specific requirements as detailed by the Headteacher or other senior manager and the Governing Body, which are consistent with the relevant job description or conditions of service of employees in operation at the time
- c) Consistent failure to perform work to a reasonable and acceptable standard
- d) Failure to maintain appropriate standards of accounts or other school records
- e) Failure to maintain a secure and safe environment

#### Teaching staff only

- a) Failure to consistently meet statutory Teaching Standards over a period of time
- b) Failure to reach career stage expectations

Some of these areas may be more appropriately considered as matters of conduct, rather than capability and advice should be sought from the Schools' HR Advisory Team before embarking on this process.



**APPENDIX 2**

**CAPABILITY PROCEDURE FLOWCHART**

