

Capability Procedure for School Based Teachers and Centrally Employed Teachers

Version Control	Changes Made	Author
Version 1 – September 2023		HR/OD

Introduction

This document represents agreement between the Local Authority (LA) and the recognised trade unions, and was adopted by the Governing Body of this school on _____ and shall be regarded as a party to this agreement for all purposes. In reaching agreement on this procedure it is acknowledged that the employer is the LA except in the case of Voluntary Aided and Foundation schools where the Governing Body is the employer. Voluntary Aided/ Foundation Schools should refer to the supplementary provisions on page 9 of this document.

Scope

This document, which sets out the formal capability procedure, applies only to teachers (including the Headteacher) about whose performance there are serious concerns that the appraisal process has been unable to address. The capability process will not apply to newly qualified teachers, who have their performance managed through the induction process.

This procedure also applies to Centrally Employed Teachers.

Principles

The Capability Procedure will be used when employees require the support of their Headteacher/Manager in meeting and maintaining a satisfactory of performance due to skill, aptitude, physical or mental ability. The emphasis in dealing with capability issues should be open and honest communication backed up by a jointly agreed assisted programme of support. This is aimed to restore the employees' performance to the required standard.

The Education (School Teachers' Appraisal) (England) Regulations 2012 places responsibility on Governing Bodies of schools with delegated budgets for establishing capability procedures and taking appropriate steps to make them known to staff at the school.

While a school has a delegated budget, the Governing Body will have control of all matters of capability relating to staff employed at the school.

The references to Headteacher in this procedure assume they are not the employee concerned. Where the Headteacher is the employee concerned, references below to Headteacher should be regarded as referring to the Chair of Governors/ Vice Chair and references to employee should be regarded as referring to the Headteacher. In adopting this procedure, the Governing

Body gives delegated authority to the chair of Governors to act as stated, except where in their absence, the Vice Chair may act.

It is recognised that a Headteacher may have occasion, as part of the normal day-to-day management function, to draw the attention of an employee to under-performance without having recourse to the formal procedure set out below. Such action may include the use of advice or admonition without giving rise to doubts as to the employee's capability. Good management, clear expectations and appropriate support will go a long way towards addressing weaknesses in performance. Early identification of problems through performance review will help to avoid the need for formal capability procedures. In some cases improvement may be achieved informally with a minimum of support and attention. In others a more formal approach will be necessary.

The timescale adopted in each case will be reasonable and proportionate and determined by the School.

The Headteacher or another senior nominated manager should take the lead at each stage of the procedure, and reach the decisions as to whether it is appropriate to proceed to the next stage. However, it is good practice for informal review meetings and certain aspects of support to be delegated to other senior staff in the school. The responsibility and role of any staff involved in the process, at any particular stage, should be made clear by the Headteacher. LA General Advisers with education experience may advise the school, and where appropriate, provide support.

You are strongly advised to seek support and advice from your HR Provider/Diocese before using this procedure.

No formal capability action shall be taken against an employee who is a recognised trade union official (including safety and learning representatives) until the circumstances of the case have been discussed with a full-time paid employee of the trade union concerned.

An employee will be afforded the right to be accompanied by a trade union representative or work based colleague at any informal or formal review meeting, capability meeting or appeal. If the employee's chosen companion is not available at the time proposed for the interview, meeting or hearing, and the employee proposes an alternative that is reasonable and falls within five working days of the day proposed for the interview, and other participants are available, the school should rearrange the event to the time proposed by the employee.

Notice of at least ten working days must be given for all meetings and an exchange of any papers which may be referred to at such meetings should take place at least five working days before the meeting.

In the unlikely event of a fast track situation discussions need to be had with all parties to agree a suitable timescale for an exchange of any papers, commensurate with DoE regulations and ACAS codes of practice.

It is important that appropriate support and training are provided for all staff, particularly where new responsibilities or changed working practices are introduced. It is recognised that financial provision for training generally is limited. However, priority should be given in the allocation of

resources where concerns about capability are identified and where training is considered to be necessary. A record of training and support offered in this respect should be kept and the impact of training should be evaluated and reviewed. Those monitoring the performance should offer feedback and instruction to help the employee's performance. If training courses or assistance from colleagues would be helpful these should be arranged as soon as possible and therefore may effect timescales.

Within the monitoring and support programme the support mechanisms should be made clear, including how and when these will be implemented. It will be necessary to determine these depending on the circumstances. However, the following are possible areas for inclusion in the support plan, as appropriate:

- observations of best practice from other staff in the school;
- observations/visits to other schools;
- observation by an LA School Improvement Officer and with associated oral and written feedback, with the opportunity for the employee to respond;
- in-service training;
- work-sharing or team teaching;
- visit from appropriate specialist advisers, e.g. specialist teachers, etc.

General continuing professional development including:

- formal short courses on specified areas of concern;
- development time to improve knowledge in areas of concern;
- assigning a mentor not involved in the monitoring process;
- counselling;
- volunteering to temporarily relinquish additional responsibilities and associated payments;
- a modified workload or timetable for a specified period.
- directed self-managed study;

These are not exhaustive and should be determined following discussion with the employee and their representative, however should be specific to the areas of underperformance identified/addressed in the support plan.

Monitoring should include observations of a range of relevant duties and functions. An objective record of the monitoring should be kept and used to assist with the evaluation of performance.

A written note should be made of all stages with the employee, and any action taken following this. A copy will be given to the employee within 5 working days. If the employee disagrees with the content of the written records they may respond, where their concerns are not met a copy of their submission will be attached to the official record.

Staff who are absent through illness during the procedure

Absence which is triggered by the capability procedure, and which management reasonably believe is likely to be long term, should be referred immediately to the school's Occupational Health Adviser to assess whether participation in meetings would be detrimental to health or whether they are fit for continued employment and participation in meetings.

Short absences may delay the capability procedure.

The Headteacher may call upon advice from the school's Occupational Health Adviser at any stage where an employee is seeking a postponement of a meeting to consider their dismissal. In addition, the employee may also arrange for medical advice to be made available to the Headteacher from their doctor or other medical source.

If an employee is unable to attend a scheduled meeting due to sickness, Occupational Health advice should be sought to ascertain if the employee is fit to fully engage with the process. If a decision is made to convene a meeting and the employee does not attend there should have been at least one postponement allowed. The employee and their representative shall be given the appropriate notice in writing, together with all relevant papers 10 working days before the meeting.

Should there be any concern over sickness absence, reference should be made to the school's adopted absence procedure

Appeals

Appeals may be heard by a panel of three composed of the Headteacher and senior managers (if the Headteacher is not leading the capability process) or Governors (if the Headteacher is leading the capability process or is the subject of it). An employee is entitled to be accompanied at an appeal meeting by a trade union representative or work based colleague. The appeal decision should be confirmed in writing within five days of the appeal hearing and the employee told that there is no further appeal against the decision. Where an appeal is upheld the matter should be referred back to the Headteacher or appropriate senior manager to be reconsidered or for further appropriate action. Where monitoring would otherwise be continuing, it should not be halted while an appeal is pending.

Disputes about the procedure

Any disagreements or grievances about the interpretation of the Procedure, or the application of any related matters not covered in the Procedure, must not delay the various elements of the capability process or the overall timetable determined as appropriate for handling any particular case.

Disputes about the procedure should be addressed immediately.

Grievances

In certain circumstances an employee may raise a grievance during the course of a capability procedure. Where the grievance refers directly to the capability process, it may be appropriate to suspend the procedure until the grievance can be considered. Such a delay should only be considered where there is a strong indication that the employee has been mistreated and consideration should be given to bringing in another manager to deal with the capability case. Any records should be passed to the new manager and if appropriate the case should be continued within the same timetable.

If an employee raises a grievance, in writing, about the way in which a manager handled a capability case or conducted the investigation/monitoring before the appeal stage of the capability procedure it will be discussed and the outcome recorded at the appeal hearing.

If an employee raises a grievance relating to the capability process after the process has been completed and after any appeal arising from it has been heard, it will not be allowed, as the appeal will have served to consider whether management action and other circumstances have been properly handled by the School.

Process

This process applies only to teachers or Headteachers about whose performance there are serious concerns that the appraisal process has been unable to address.

The purpose of the capability process is to raise the performance of the employee to a point where they can achieve a sustained level of performance consistent with recognised professional standards and the reasonable operational requirements of the school. Where there are concerns regarding an employee as to their capability to carry out to the work he or she is engaged to perform to a satisfactory standard, it is important that this is drawn to their attention as soon as is reasonably possible. The Headteacher or other nominated senior manager, having reviewed and determined the perceived problem, and having consulted, where appropriate, with staff who have a line management responsibility for the employee concerned, shall raise the matter with the employee. Whilst in less serious cases this might be via normal appraisal arrangements, it is important to allow the employee as much time as reasonably possible to improve performance, and so notification of significant concern should not be delayed to a future appraisal meeting.

At least ten working days' written notice will be given of the formal capability meeting. The notification will contain sufficient information about the concerns about performance and their possible consequences to enable the teacher to prepare to answer the case at a formal capability meeting. It will also contain copies of any written evidence; the details of the time and place of the meeting; and will advise the teacher of their right to be accompanied by a companion who may be a colleague, a trade union official, or a trade union representative who has been certified by their union as being competent.

Formal Capability meeting

This meeting is intended to establish the facts. It will be conducted by the Chair of Governors for Headteacher capability meetings) or Headteacher/ line manager (for other teachers/ centrally employed teachers). The meeting allows the teacher, accompanied by a companion if they wish, to respond to concerns about their performance and to make any relevant representations. This may provide new information or a different context to the information/evidence already collected.

The person conducting the meeting may conclude that there are insufficient grounds for pursuing the capability issue and that it would be more appropriate to continue to address the remaining concerns through the appraisal process. In such cases, the capability procedure will come to an end. The person conducting the meeting may also adjourn the meeting for example if they decide that exploration of the alleged unsatisfactory performance is needed, or that more time is needed in which to consider any additional information.

In other cases, the meeting will continue. During the meeting, or any other meeting which could lead to a formal warning being issued, the person conducting the meeting will:

- identify the professional shortcomings, for example which of the standards expected of
- Teachers are not being met;
- give clear guidance on the improved standard of performance needed to ensure that the
 - teacher can be removed from formal capability procedures (this may include the setting of new objectives focused on the specific weaknesses that need to be addressed, any success criteria that might be appropriate and the evidence that will be used to assess whether or not the necessary improvement has been made);
- explain the support that will be available to help the teacher improve their performance;
- set out the timetable for improvement and explain how performance will be monitored and reviewed. The timescale, which will depend on the circumstances of the individual case but will be reasonable and proportionate, will provide sufficient opportunity for improvement to take place. The length of time required will depend on the concerns raised with the employee, the nature of any support and training required, and allow sufficient time to establish whether performance has improved. And all stages to be followed for all cases. The timetable will depend on the circumstances of the individual case but in straightforward cases must not be less than 6 consecutive working weeks.

and

- warn the teacher formally that failure to improve within the set period could lead to dismissal.
- In very serious cases, this warning could be a final written warning. A final written warning will remain “live” for a period of 24 months from the date of issue, after which time it will be expunged from the employee’s records.

Notes will be taken of formal meetings and a copy sent to the member of staff within 5 working days. Where a warning is issued; the teacher will be informed in writing of the matters covered in the bullet points above and given information about the timing and handling of the review stage and the procedure and time limits for appealing against the warning.

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, unless they were issued with a final written warning, in which case they will be invited to a decision meeting (see below).

Formal review meeting

As with formal capability meetings, at least 10 working days’ written notice will be given and the notification will give details of the time and place of the meeting and will advise the teacher of their right to be accompanied by a companion who may be a colleague, a trade union official, or a trade union representative who has been certified by their union as being competent.

If the person conducting the meeting is satisfied that the teacher has made sufficient improvement, the capability procedure will cease and the appraisal process will re-start. In other cases:

- If some progress has been made and there is confidence that more is likely, it may be
- appropriate to extend the monitoring and review period;

- If no, or insufficient improvement has been made during the monitoring and review period, the teacher will receive a final written warning.

As before, notes will be taken of formal meetings and a copy sent to the member of staff. The final written warning will mirror any previous warnings that have been issued. Where a final warning is issued, the member of staff will be informed in writing that failure to achieve an acceptable standard of performance (within the set timescale), may result in dismissal and given information about the handling of the further monitoring and review period and the procedure and time limits for appealing against the final warning. The teacher will be invited to a decision meeting.

Decision meeting

As with formal capability meetings and formal review meetings, at least 10 working days' written notice will be given and the notification will give details of the time and place of the meeting and will advise the teacher of their right to be accompanied by a companion who may be a colleague, a trade union official, or a trade union representative who has been certified by their union as being competent.

If an acceptable standard of performance has been achieved during the further monitoring and review period, the capability procedure will end and the appraisal process will re-start. If performance remains unsatisfactory, a decision, or recommendation to the Governing Body, will be made that the teacher should be dismissed or required to cease working at the school.

Dismissal

The employee shall be called to a meeting with the Staff Dismissal Committee of the Governing Body of the school (unless the power to dismiss has been delegated to the Headteacher).

The employee shall be given not less than ten working days' notice in writing of the date, time and place of the hearing, the nature of the complaint and informed that he or she has the right to be accompanied at the hearing by a representative of their trade union or colleague. At the hearing the complaint against the employee shall be formally presented and the employee and their representative shall be given the opportunity to ask questions relative to the complaint, to state his or her case and to call witnesses.

A representative of the LA shall have the right to be present, for the purpose of giving advice, at all stages when a dismissal is being considered. The Staff Dismissal Committee of the Governing Body shall consider such advice before coming to a decision on the matter and consider the appropriateness of any other actions short of dismissal

The outcome of the hearing must be confirmed in writing to the employee concerned within three working days, stating the reasons for the decision and in the case of dismissal, the right to lodge an appeal within ten working days.

Where the decision is to dismiss, once the Governing Body has decided that the teacher should no longer work at the school, it will notify the Local Authority of its decision and the reasons for it.

Appeal

If a teacher feels a decision to dismiss them or other action taken against them is wrong or unjust, they may appeal. The appeal shall be made by the employee or their trade union representative or colleague, in writing, to the clerk to the Governors or other nominated officer of the School within 10 working days of receipt of the written confirmation of the warning/dismissal, stating the grounds of appeal. The appeal shall be heard as soon as possible thereafter, and neither the Headteacher or other manager issuing the original sanction (in the case of another employee) nor the chair of Governors (in the case of the Headteacher) shall take part in the appeal other than to present the case or act as a witness.

The Appeal Committee of the Governing Body shall be constituted from those Governors who are not otherwise disqualified from hearing the appeal, by virtue of their membership of the Dismissals Panel of the Staff Dismissal Committee of the Governors, or their involvement in the case as a witness, or in any material sense. The Appeals Panel should be the same size or larger than the Dismissals Panel. At any meeting of the Appeal Panel which is to hear an appeal against dismissal, a representative of the LA shall have the right to be present throughout the appeal hearing for the purpose of giving advice. The Appeal Panel shall consider such advice before coming to a decision on the matter.

The employee shall be given not less than 10 working days' notice in writing by the clerk to the Governors or other nominated officer of the School, of the date, time and place of the appeal meeting and informed of his or her right to be accompanied by a trade union representative or work based colleague. The procedure to be adopted at the hearing is set out in Appendix 2 of this document. The decision on the appeal shall be confirmed to the employee (and the LA in writing in cases of appeal against dismissal by the clerk to the Governors or other nominated officer of the School.

With regard to an earlier decision to dismiss an employee, if the decision of the Appeals Panel is that the employee concerned should not cease to work at the school, the school or its HR provider will issue a letter rescinding the earlier letter of dismissal to the employee.

The teacher will be informed in writing of the results of the appeal hearing as soon as possible.

Supplementary Provisions

This procedure shall apply to those staff specified in the introduction to this policy save that in the case of Voluntary Aided/ Foundation School where the Governing Body is the employer of Teachers at the school: -

- i) the Governing Body may, by formal resolution, agree with the LA to accord advisory rights to the Director of Children's Services and a representative of the Diocesan Education Service in the case of RC schools, or, the Diocesan Board of Education in the case of CE Schools, in relation to the dismissal of staff at the school, in which case the advisory provisions of this procedure shall apply;
- ii) the Governing Body shall, on dismissing an employee employed by them, notify the LA in writing of the reasons for the dismissal.

Should the outcome of a capability enquiry/investigation/hearing adjudge that an employee was not blameworthy or should any capability-related action be rescinded and effectively withdrawn

following appeal, all records relating to the allegation shall be removed from the employee's record and the employee notified accordingly. In such circumstances, where the employee had been dismissed, any monies to which he or she would have been entitled but for the dismissal shall be repaid.

It is most strongly advised that copies of all relevant documents relating to the capability case must be kept securely for at least six years, in case they are required at a later stage, or a complaint to Employment Tribunal is lodged. Records must be kept on the individual's personal file detailing the nature of the incapability, the employee's response or mitigation, the action taken and the reasons for it, whether an appeal was lodged, its outcome and any subsequent developments. Records held by the school (not on the employee's personal file) will include warnings that have expired and related documents as well as instances where the employee has been exonerated at either the initial hearing or any subsequent appeal. These records are to be kept confidential and retained in accordance with this procedure and the General Data Protection Regulations (GDPR).

Where there is evidence following an OFSTED inspection, that deficiencies in a school that is judged to be in need of special measures or significant improvement, rest with the Headteacher, the position of the Headteacher may be so undermined, and the confidence of the Governing Body or the LA so eroded that steps may need to be taken to consider whether or not the Headteacher should continue to work at the school.

To meet this situation, it is necessary to have a strategy in place that: -

- a) observes the requirements of employment protection legislation and principles of natural justice;
- b) ensures that actions taken are justified, fair and reasonable in all the circumstances and
- c) is consistent with Education statutory requirements, where appropriate, and Education (School Government) Regulations.

Clearly the above procedure for Headteachers is not appropriate in such particular circumstances because of its potential lead-in period and the contradictory need for very rapid turnaround in the case of schools causing concern. There is also the matter of parental (and perhaps staff) confidence and a possible danger of withdrawal of pupils from a school causing concern if some immediate steps are not taken.

In such circumstances advice should be sought from the Local Authority.

Under no circumstances shall any warning issued in accordance with this Capability Procedure be recorded in the School Log Book.

This procedure shall not apply to:

- a) termination of temporary employment for which the employee has been specifically engaged;
- b) cases of redundancy or alleged misconduct;
- c) the efficiency of an employee whose dismissal arises from unsuitability for confirmation of appointment.

All dismissal proceedings under this document shall be confidential until the decision of the Governors has been made and thereafter any publication shall be restricted to the operative decision.

In cases of incompetence where an employer has ceased to use the services of a Teacher consideration should be given to reporting the circumstances in future references to prospective employers in line with the advice of the Secretary of State for Education contained in published guidance on teachers' performance.

Should further clarification be required in relation to the consultation and / or implementation process please contact your Directorate HR Team/School HR provider/Diocesan Officer.

For Schools:

Name of School:	
Date by which School have adopted procedure:	
Signature of Chair of Governors	

Date: September 2023