



## Capability Policy and Procedure

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## INTRODUCTION

This policy and procedure relates to the professional capability of all staff employed at any level within The Learning Alliance, including Head Teachers and Deputy Heads. It does not apply to newly qualified teachers or employees in their probationary period, where alternative procedures are in place.

For the purposes of this policy, capability is in relation to aptitude and the inability or limited ability of someone to perform their full job description to the required standard of performance. It may be due to poor standards of work, even with training and close supervision, or low output of work – where the person can produce work to the right standard but not in the right quantity. Capability due to ill health is dealt with under this policy and matters involving potential misconduct, gross misconduct or gross negligence/neglect of duty will be dealt with under the Trust's disciplinary procedure.

This policy does not form part of any employees' terms and conditions of employment with the Trust and is not intended to have contractual effect. It does however reflect the Trust's current practice, the requirements of current legislation and best practice and guidance. This policy may be amended by the Trust from time to time and any changes will be notified to employees within one month of the date on which the change is intended to take effect.

The aim of this procedure is to ensure that all employees understand the professional standards expected of them in terms of their duties and responsibilities and are helped to achieve these through open discussion, guidance, training and support. While the Trust recognises that the vast majority of employees achieve and maintain a high level of performance and professional capability, there are some circumstances where, for a variety of reasons, an employee is not capable, or becomes incapable of meeting an acceptable level of performance.

In such circumstances the nature and the severity of the problem will be clearly identified, and discussed as soon as reasonably practicable and an appropriate structure of support and monitoring will be put in place with the aim of assisting the individual to improve his or her performance to an acceptable standard within a reasonable period of time. Concerns raised about performance, as well as support and advice given at all stages, will be documented.

The employee will be informed without unreasonable delay that a decision has been taken to move to the formal stage of this procedure.

Problems of performance may be specific or of a broader nature; they may be of recent concern or span a longer period of time. These considerations, together with the seriousness of the difficulty, will have a direct bearing on what action the Trust considers and takes and the timetable for this. Capability issues (non-health related) will normally be resolved within a ten week period. For part time staff this will be pro-rata.

## **Equality**

The Board of Trustees should ensure that when implementing the capability policy, no employee will be disadvantaged on the basis of their gender, transgender, marital status or civil partnership, racial group, religion or belief, sexual orientation, age, disability, pregnancy or maternity, social or economic status or caring responsibility. This means that the policy may need to be adjusted to cater for the specific needs of an individual including the provision of information in alternative formats where necessary.

## **Monitoring**

Data relating to capability cases will be collated and monitored regularly to ensure that the policy is operating fairly, consistently and effectively. Issues that are identified from the data will be dealt with appropriately.

In formulating this policy account has been taken of other relevant legislation and policies including the Human Rights Act, the Equality Act 2010.

## **SPECIAL CASES**

### **Newly appointed staff**

Where concern about capability persists that has not been resolvable within a reasonable period of time or is not reasonably amenable to resolution under the NQT's own programme of induction and support, newly appointed teaching staff will be subject to the formal stage of the procedure.

### **Headteachers**

Where there is a question over the capability of a Headteacher, the provisions of the capability procedure will be initiated and progressed by the Chair of the Governing Body (or other governor nominated by the Governing Body). Insofar as this is feasible, the same process will be followed as for other teachers, but with the Chair of Governors, or nominated Governor, taking on the functions which would be undertaken by the Headteacher in all other cases.

### **Accredited teacher association representatives and union representatives**

Where the employee is also an accredited representative of a teachers' association or a trade union representative, the Trust will liaise with a senior representative from the association/union prior to entry into the formal stage of this procedure.

### **Absence**

Where application of the Procedures results in absence of the employee the advice of Occupational Health will be obtained immediately as to how long the absence could be expected to last for. The employee will be advised in writing that the performance issues which prompted the application of the Procedure will be addressed on their return to school and that the Procedure will be applied at the point reached when the absence began. The employee's absence will be managed under the Trust's Managing Attendance Policy.

## **CONFIDENTIALITY**

The Headteacher and Governors will ensure that any information relating to concerns about an employee's capability are disclosed only to those who have a direct involvement in dealing with these concerns and those parties themselves will be required to maintain confidentiality.

## **PRELIMINARY STEPS**

This procedure applies when the Trust has serious concerns about an employee's performance. In the first instance these concerns should be addressed via the appraisal process, where it is expected that any problems with an employee's performance should be identified and responded to at the earliest time. If poor performance continues beyond that process, it may be necessary to commence the formal capability procedure.

In determining the possible reasons for poor performance, the Headteacher or the senior member of staff investigating the concerns must decide whether it is appropriate to address these through the capability procedure or whether the principal issue may be one of misconduct/gross misconduct/gross negligence or gross neglect of duty, which needs to be dealt with under alternative procedures.

Where the concerns fall under the scope of this policy and procedure, consideration will be given to the employee's basic professional duties as set out in the employee's job description, the custom and practice of the role in its day to day operation together with previous formal and informal reviews, appraisals and discussions relating to the employee's performance and through informal confidential discussions with the employee's relevant managers.

The person conducting the meetings described below may be advised/supported by an HR Adviser.

## **INFORMAL MANAGEMENT ACTION**

Before embarking on the capability procedure, management should ensure that through normal performance appraisal and management supervision:

- the employee has been alerted to concerns;
- the employee has an agreed job description, which is fully understood and there is a clear agreed expectation of standards of performance;
- that concerns about performance have been raised within the school/trust monitoring procedures including the appraisal process where appropriate and support and reviews undertaken;
- an improvement support plan (IPS) has been set with support and a timescale for review (usually between four to six weeks dependent upon the severity of the underperformance);
- a copy of this procedure has been given to the employee.

## **FORMAL CAPABILITY ACTION**

The following Formal capability action may be decided upon following a formal capability / disciplinary hearing.

1. Formal written warning
2. Final written warning
3. Capability transfer
4. Demotion
5. Dismissal

## **FORMAL (DISCIPLINARY) STAGE- STAGE 1**

### **Instituting formal action**

The Headteacher/Manager will notify the employee of the Trust's decision to initiate the formal capability procedure in writing confirming:

- a) the nature of the performance concerns, the evidential basis for those performance concerns and the intention to initiate formal procedures;
- b) the time and date of the hearing giving reasonable notice and location;
- c) schedule of the enclosed copy documentation to be used as evidence;
- d) the purpose of the hearing and who will be determining the outcome;
- e) the likely range of disciplinary sanctions that may be applied if the performance concerns are upheld further to the hearing;
- f) the employee's right to request to be accompanied by a union representative or appropriate work colleague for whom no conflict of interest arises;
- g) whether the Trust intends to call relevant witnesses on its own account to the capability hearing; if so the names of those witnesses. This will usually only be in exceptional circumstances. More commonly the Trust will rely on written witness evidence in the form of investigation interview notes confirmation of the same;
- h) the employee's right to request to ask questions of any witnesses identified by the Trust, to identify any additional potential witnesses or to submit any additional relevant documentation or written statement in support of his or her case;
- i) details of enclosed copies of any documents to be used as evidence;
- j) the attendance of any other party at the Trust's arrangement;
- k) the date by which the employee's confirmation of attendance and details of requested companion should be notified to the Trust.

### **Capability Hearing**

At the hearing, the Headteacher/Manager will explain the purpose and nature of the procedure, detail the areas of concern, the basis for those concerns and specify how the employee's performance appears to have fallen short of what would reasonably be expected. The employee will be afforded a full and fair opportunity to answer the allegations against them and to put forward his or her version of events.

No decisions will be made at the hearing itself. The hearing will be adjourned to allow the Headteacher/Manager to consider all the relevant evidence together with the representations the employee has made during the hearing.

Without unreasonable delay after the hearing the Headteacher/Manager will decide whether on the balance of probabilities the specific performance concerns complained of should be upheld or not and, where upheld, the appropriate level of disciplinary sanction: a written warning, a final written warning or in exceptional circumstances dismissal with notice. The Trust will not consider dismissal as a first formal disciplinary sanction save in serious cases falling short of conduct warranting summary dismissal and where the employee has been given a fair and reasonable opportunity to improve.

Any performance concern that the Trust considers so serious as to constitute gross misconduct/gross neglect of duty/gross negligence warranting summary dismissal, will as above be dealt with under the Trust's disciplinary policy and procedure rather than under this procedure.

### **Outcome to the Capability Hearing**

If the specific performance concerns are not upheld, the Headteacher/Manager will write to the employee without unreasonable delay to confirm this and to confirm that no further action will be taken.

If some or all of the specific performance concerns are upheld, the Headteacher/Manager will write to the employee without unreasonable delay to:

- a) Confirm which areas of concern were upheld and the rationale for that decision in respect of each area in question;
- b) Confirm the disciplinary sanction to be applied. Any disciplinary warnings will be confirmed in writing clearly stating the period during which they will remain active on the employee's file (usually no less than 6 and no more than 12 months depending on the circumstances);
- c) Set clear targets for improvement to be achieved within a reasonable and identified period of time. The timetable will depend on the circumstances of the individual case but in straightforward cases could be between four and ten weeks;
- d) Confirm how progress will be monitored and reviewed during this time;
- e) Identify and consider any additional training, mentoring or support that will be offered during this period of time;
- f) Set the date and time for the progress review meeting to be convened at the end of the identified review period;
- g) Confirm the likely consequences of failing to achieve the required improvements within the period identified and the likely consequences of additional performance concerns arising during the active period of the warning imposed;
- h) Confirm the employee's right to appeal the decision to the Governing Body, when that appeal must be made by, how and to whom it should be addressed in the first instance.

### **Employee's right to appeal**

If an employee wishes to appeal the outcome of the capability hearing, the employee should set out their specific grounds of appeal together and the evidential basis for the same, submitting any relevant additional documentation they wish to be considered addressing this in the first instance to the Director of Human Resources who will liaise with the Board of Governors to convene an appeal hearing with three nominated Governors.

A nominated member of the Appeal Panel will write to the employee without unreasonable delay on receipt of the appeal, giving the employee reasonable notice of the intended appeal hearing, confirming the employee's right to request to be accompanied by a trade union representative or appropriate work colleague for whom no conflict of interest arises.

During the Appeal Hearing the employee will be given a full and fair opportunity to put forward his or her grounds of appeal together with any supporting evidence for the Panel's

consideration. No decisions will be made at the appeal hearing itself. The hearing will be adjourned to allow the Panel to consider all the relevant evidence together with the representations the employee has made during the hearing.

Without unreasonable delay after the Appeal hearing the Panel will decide whether, on the balance of probabilities, the specific grounds of the employee's Appeal are upheld or not, setting out the basis for its decision in respect of each individual ground. The Appeal Panel's decision is final.

### **On-going assessment and review further to capability hearing**

After the capability hearing and during the period of review, support and monitoring leading up to the progress review, a written record of any meeting held to discuss progress, or of observation of the employee's classroom performance, will be taken and copies provided to the employee.

At the end of the review period, and having discussed progress with the member of staff who has had responsibility for managing ongoing review, the Headteacher/Manager will convene a review meeting.

If the employee has satisfactorily achieved the required improvements and no further incidences of alleged poor performance have occurred during the review period, this meeting will be an informal meeting to review progress, confirm attainment of targets and discuss ongoing support, maintaining the required standard and areas for ongoing informal development.

## **FORMAL DISCIPLINARY STAGE 2**

### **Initiating Stage 2**

If the Headteacher/Manager believes from ongoing review that the employee may not have achieved the required improvements or further incidences of alleged poor performance have occurred during the review period, the Headteacher/Manager will recommend that the Board of Governors convene a further formal capability hearing in accordance with the provisions set out in 4 above.

Where dismissal is a potential outcome to that hearing, the Trust may liaise with the Director of Education or his representative who may exercise the statutory right to be present at the hearing. The Trust has a statutory obligation to consider but not necessarily follow that advice and the Trust may also invite its independent employment advisers to be present at the hearing to advise and assist the panel if it so chooses.

Notice of the hearing will be in accordance with the provisions set out under 4 above and the hearing will be held and conducted by a panel of three Governors for whom no conflict of interest arises, without unreasonable delay in accordance with the provisions of that section. No decisions will be made by the panel at the hearing itself. The hearing will be adjourned to allow the Panel to consider all the relevant evidence together with the representations the employee has made during the hearing.



Without unreasonable delay after the hearing the Panel will decide whether on the balance of probabilities the specific performance concerns complained of should be upheld or not, and where upheld the appropriate level of disciplinary sanction to be applied. These may include but are not limited to: a further final written warning relating to a final specified period of assessment and monitoring, dismissal, changing the employee's responsibilities with a consequent loss of responsibility points awarded on the common pay spine.

### **Outcome to Stage 2 Capability Hearing**

If the specific performance concerns are not upheld, the Panel will write to the employee without unreasonable delay to confirm this and to confirm that no further action will be taken.

If some or all of the specific performance concerns are upheld, the Panel will write to the employee without unreasonable delay to:

- a) confirm which areas of concern were upheld and the rationale for that decision in respect of each area in question;
- b) confirm the disciplinary sanction to be applied. Any disciplinary warnings will be confirmed in writing clearly stating the period during which they will remain active on the employee's file (usually no less than 6 and no more than 12 months depending on the circumstances);
- c) In cases other than dismissal, set clear targets for improvement to be achieved within a reasonable and identified period of time, confirm how progress will be monitored and reviewed during this time, identify and consider any additional training, mentoring or support that will be offered during this period of time, set the date and time for the progress review meeting to be convened at the end of the identified review period, confirm the likely consequences of failing to achieve the required improvements within the period identified and the likely consequences of additional performance concerns arising during the active period of the warning imposed;
- d) In cases of dismissal, confirm the effective date of termination, and arrangements for the employee's notice period (the authority to dismiss staff in the Trust has been delegated to the Headteacher);
- e) Confirm in any case, the employee's right to appeal the decision to the Governing Body, when that appeal must be made by, how and to whom it should be addressed in the first instance.

### **Employee's Appeal to Stage 2 Capability Hearing**

If an employee wishes to appeal the outcome of the capability hearing heard by the Panel, the employee should set out their specific grounds of appeal together and the evidential basis for the same, submitting any relevant additional documentation they wish to be considered addressing this in the first instance to the Director of Human Resources who will liaise with the Board of Governors to convene an appeal hearing with three nominated Governors for whom no conflict of interest arises.

A nominated member of the Appeal Panel will write to the employee without unreasonable delay on receipt of the appeal giving the employee reasonable notice of the intended appeal hearing confirming the employee's right to request to be accompanied by a trade union representative or appropriate work colleague for whom no conflict of interest arises.

During the Appeal Hearing the employee will be given a full and fair opportunity to put forward his or her grounds of appeal together with any supporting evidence for the Panel's consideration. No decisions will be made at the appeal hearing itself. The hearing will be adjourned to allow the Panel to consider all the relevant evidence together with the representations the employee has made during the hearing.

Without unreasonable delay after the Appeal hearing the Panel will decide whether on the balance of probabilities the specific grounds of the employee's Appeal are upheld or not setting out the basis for its decision in respect of each individual ground. The Appeal Panel's decision is final.

Where the formal capability procedure is applied, action over both Stages should be taken over no more than two terms or their equivalent. Where application of the Procedures results in absence of the employee the advice of Occupational Health will be obtained immediately as to how long the absence could be expected to last for. The employee will be advised in writing that the performance issues which prompted the application of the Procedure will be addressed on their return to school and that the Procedure will be applied at the point reached when the absence began. The employee's absence will be managed under the school's Managing Attendance Procedure.

An employee who has been advised at a review meeting that their performance is to be managed under the Capability Procedure may not raise concerns under the Grievance Procedure except where these are about matters unrelated to their performance or its management. Any concerns/grievances an employee has about the application or progress of the Capability Procedure should be raised within that procedure. Consideration may be given to the suspension of proceedings while these are addressed but it is generally expected that these will be dealt with as part of or in parallel to the performance monitoring and review process and not lead to an extension of the timescale for improvement. If an employee has a grievance about an unrelated matter, this may be pursued simultaneously but arrangements under this procedure will take precedence over those relating to that grievance.

### **Referral to the Secretary of State**

By law, where an employer -

- (a) has ceased to use a teacher's services on grounds relating to his professional incompetence; or
- (b) might have ceased to use a registered teacher's services on such a ground had the registered teacher not ceased to provide those services,

the employer may report the facts of the case to the Secretary of State and provide him/her with certain information in relation to the teacher.

Therefore, where a teacher is dismissed for incompetence, the Trust will refer the case to the Secretary of State. A teacher may also be referred to the Secretary of State if s/he leaves his/her job (even under the terms of a Compromise Agreement) while within formal procedures. A teacher may not be referred to the Secretary of State if s/he leaves his/her job

while within formal procedures but improving, and it was considered improbable that dismissal would have been the outcome.

### **Transition back to Appraisal**

Where, following a formal review period it has been decided that a staff member's performance has improved to the required level against all the appropriate standards, and that formal capability procedures should cease, the member of staff will return to performance monitoring through the applicable formal appraisal process.

If at any time during that twelve month period the staff member's performance deteriorates to a level which causes concern about their overall performance against the required standards, the Appraisal process will cease and they will move back into the formal capability procedure at an appropriate point up to and including (but, other than in very serious cases affecting children's safety / education, not exceeding) the stage at which they were previously at in the formal capability procedure.

### **Expiry of Warnings and References**

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

There may be occasions when an expired 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 employee will need to be at work throughout the relevant warning period. If they should be absent from work for any reason, for example sickness, this period will not count for the purposes of the warning period.