



# **CAPABILITY POLICY**

This document applies to Community and Voluntary Controlled Schools and is advisory for Foundation and Voluntary Aided Schools

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## **INTRODUCTION**

A capability issue may arise when an employee is failing in a significant or persistent way, to carry out their responsibilities or duties in a satisfactory manner.

Where an employee may be under-performing the head teacher or other line manager will have identified this through the appraisal or induction process and on-going supervision. The employee should be supported to improve or resolve the situation as soon as it becomes apparent.

## **CAPABILITY OR CONDUCT**

The head teacher will need to decide if the matter is a capability one, where the employee is unable to carry out their duties, or one of conduct where the employee is capable of carrying out these duties but for some reason has chosen not to do so.

## **SERIOUS INCAPABILITY**

In exceptional cases where an employee's poor performance is believed to be the result of deliberate negligence, or where one performance error or defect has serious consequences (i.e. if it results in the serious jeopardy of the health and safety of pupils or other employees) this policy will not apply. Instead the issue should be managed in accordance with the Disciplinary Policy.

## **SUPPORT**

It is strongly advised that independent input is also provided through the use of an appropriate specialist. For teachers this should be an educational specialist such as the school's School Improvement Partner and/or appropriate consultant.

Head teachers and governors are strongly advised to seek advice and support from relevant professionals and should consult their HR provider regarding any procedural issues. In particularly contentious cases, the head teacher/manager may be accompanied by their HR provider or other person offering management support at formal meetings.

## **HEAD TEACHER CAPABILITY**

If it is the head teacher's competence, which is the cause of concern, the chair of governors will undertake the role defined for the head teacher in these procedures. However, this is not appropriate in all cases and in these circumstances governors are advised to consult their HR provider.

## **TRADE UNION OFFICIALS**

Where formal action is being considered against a trade union official the case will be discussed with a full-time trade union officer/official in accordance with the ACAS Code of Practice. It is recommended that you seek advice from your HR provider in such cases.

## **RECORDS**

The complete history of a capability case may be requested at an appeal hearing or at an Employment Tribunal. It is therefore essential that comprehensive records are made of any level of capability action. The note taker will be either the school's clerk to governors or an appropriate member of the administration team. These notes will not be verbatim and they should be shared with the individual concerned.

A copy of the discussion notes should be kept by the head teacher/manager and placed in the employee's supervision file. It should not be placed in the employee's personal file. Only letters relating to the formal procedure should be on the employee's personal file and should be removed when the cases are no longer live.

In order to minimise unnecessary formality and apprehension, the electronic, audio or video recording by any device of any of the meetings or hearings detailed in this policy will not be permitted.

Should an employee/minute taker think that there are exceptional circumstances where this should be allowed (for instance, due to a disability) this should be raised in advance with the person due to conduct the meeting. Due consideration will then be given to the request and the employee will be advised of the outcome of that consideration.

## **SICKNESS ABSENCE DURING THE PROCEDURE**

If long term sickness absence appears to have been triggered by the commencement of monitoring or a formal capability procedure, the case will be dealt with in accordance with the school's absence management policy.

## **INCREMENTAL PAY PROGRESSION**

Consideration should be given as to whether an employee should progress up the pay spine when their capability is in question.

- Teaching Staff  
Pay progression will be in accordance with the school's pay policy. Once the formal capability process commences the appraisal process will be paused. Pay progression is awarded following a successful appraisal review therefore there will be no opportunity for incremental pay progression whilst being monitored under the formal capability process.
- Support Staff (Green Book Employees)  
The conditions of service for support staff allow for the withholding of increments where service has been unsatisfactory. It is strongly advised, however that this is not considered until the second period of formal monitoring is set.

## **EMPLOYEE REPRESENTATION**

During each stage of the procedure an employee is entitled to be accompanied by a work colleague, recognised trade union representative, or a recognised trade union officer.

If an employee's representative is unavailable to attend the meeting at the time specified by the school but proposes an alternative time and date, then the head teacher/governors should consider postponing the meeting until the later date provided that the latter is within 5 working days of the original. If this is not practicable then the head teacher/governors should arrange a suitable alternative.

Meetings or appeal hearings will not normally be held during periods of school closure.

## **ROLE OF GOVERNORS**

Governors should not normally be involved with the capability procedure before an appeal hearing following the dismissal of an individual. Where it is the head teacher's capability that is in question the chair of governors or other appropriate governor will assume the role of the manager.

Governing bodies need to ensure that they have a properly established capability appeal committee, the members of which are untainted by earlier proceedings. It is advised that the committee would not include staff governors. The chair of governors should be kept informed of the progress of any case but not be given the details in case he/she is involved later at the appeal stage.

Where dismissal is being considered the decision will normally be taken by the head teacher unless certain circumstances apply. See Appendix 4.

## **ROLE OF THE LOCAL AUTHORITY**

The local authority has advisory rights as regards all proceedings of a governing body of all community, voluntary controlled, community special and maintained nursery schools where potentially a dismissal may take place. This will normally be done through the school's HR provider in consultation with the People Management Service of the Council.

This also applies to foundation, voluntary aided, and foundation special schools where the governing body have accorded the authority those rights of attendance and giving advice.

The dismissal of an employee could be the subject of an appeal to an Employment Tribunal, which may involve costs being awarded against the school and the Authority who will have been named as co-respondents. Costs will not normally be met from a school's budget share unless the Authority has good reason to deduct the costs or part of those costs. The potentially unfair or unlawful dismissal of an employee however, may be such a reason.

# MANAGING THE PROCESS

## 1. Informal Capability Processes

- **Teacher / Individual Experiencing Difficulty – Appraisal Policy**

Initial identification of an employee's apparent poor performance should be raised at normal regular supervision or performance management meetings in accordance with the School's Appraisal and Performance Procedure. The individual's progress will be monitored as part of the appraisal process and a reasonable time given for the individual's performance to improve.

- **NQT Induction**

The initial process is slightly different for an NQT as the appraisal process, including teacher experiencing difficulty, is not applicable. If it becomes apparent that an NQT is not making satisfactory progress the head teacher must ensure that additional monitoring and support measures are put in place immediately. Action must not be delayed until a formal assessment meeting has taken place. It is important that the NQT is made aware of where they need to improve their practice, and given every opportunity to raise their performance.

Where there are still concerns about the NQT's progress they will be invited to a transition meeting to determine whether formal capability proceedings need to commence.

- **Transition Meeting**

It is expected that the majority of performance related issues will be resolved promptly and informally. However, if the outcome of the teacher/individual experiencing difficulty or the additional support during the NQT induction is that unsatisfactory improvement has been made then the employee will be invited to a transition meeting to determine whether formal capability proceedings need to be commenced. At the meeting they may be assisted by a trade union representative or work colleague and will have at least 5 working days' notice of the meeting.

## 2. Formal Capability Meeting

The first step in the formal process is a formal capability meeting. The employee should be written to inviting them to a formal capability meeting giving at least 5 working days' notice (template letter 1), a copy of the capability policy should be included with this letter.

The employee may be accompanied by a work colleague, recognised trade union representative, or a recognised trade union officer. The head teacher/manager may also be accompanied by their HR provider or other person offering management support.

The discussion at the meeting should include the following:

- the head teacher/manager will present the evidence of the performance issue(s) to the employee and express their concerns being sensitive to the fact that unless otherwise identified, issues of performance are not disciplinary in nature, and that the correct approach is therefore one of constructive support, guidance, coaching and encouragement.

- the employee will be given a full opportunity to respond and explain any factors affecting their current performance levels. If any underlying medical issues are suggested, it may be appropriate to refer the employee to Occupational Health
- the head teacher/manager will give thorough consideration to all the responses made by the employee
- the head teacher/manager should make the employee aware of the confidential Employee Support and Counselling Service.
- confirm with the employee that their work performance will be monitored under the first formal stage of the capability policy and ensure they have a copy of this document.
- develop a performance improvement plan (template at appendix 1) with the employee, with specific targets and dates and how they will assist the employee to meet the required levels of improvement.
- a date will be set for review allowing at least 4 working weeks monitoring period.

The outcome of the meeting will be confirmed in writing by the head teacher/manager (template letter 2).

### **3. First Formal Capability Review Meeting**

Following the first monitoring period the employee will be reminded of the review date with at least 5 working days' notice (template letter 3).

The employee should be provided with a copy of their performance improvement plan and any notes of the previous meeting.

Any documentation that the employee/representative wishes to submit should be provided no later than 3 working days before the meeting. This will avoid delays at the meeting.

Again both parties may be accompanied as appropriate.

Where previous meetings have been held by a manager, it is important that the head teacher attends this meeting if it is felt that satisfactory improvement has not been made and that a further monitoring period is a likely outcome.

The discussion should include the following:

- a review of the monitoring period and support provided
- review progress against performance improvement plan

At the review there are three possible outcomes:

- i. Satisfactory review and no further action required
  - Where the decision is that satisfactory improvement has been made, the decision will remain live for 12 months and therefore if satisfactory improvement proves only to be of a temporary nature then the head teacher has the option of returning immediately to this point in the procedure.
- ii. Significant improvement made but extension of review period required

- The performance improvement plan should be revised to cover the targets for the extended review period.
- iii. Unsatisfactory review and a second monitoring period set.
- The performance improvement plan should be revised to cover the targets for the second monitoring period.
  - Any further training and support that is required and can be provided.
  - Consideration of any extenuating circumstances that may be affecting the employee's performance.
  - Consideration of withholding an increment until level of performance has reached the required standards.
  - The employee should be forewarned that if the level of performance is not improved and maintained by the end of the review period it may result in a formal capability hearing, which could lead to dismissal on the grounds of capability.
  - Consideration of alternative employment - where a suitable vacancy exists the normal recruitment and selection process will apply.

An outcome letter should be sent to the employee following the meeting (template letters 4a/b/c). Where the head teacher decides to progress to a second monitoring period they will inform the chair of governors before issuing the outcome letter to the individual confirming the decision. In very serious cases the head teacher/manager may consider progressing immediately to the capability hearing.

#### **4. Second Formal Review Meeting**

Following the second monitoring period the employee will be reminded of the review date with at least 5 school days' notice (template letter 5). Both parties may be accompanied as appropriate.

There are three possible outcomes:

- i. Satisfactory review and no further action required
  - Where the decision is that satisfactory improvement has been made, the decision will remain live for 12 months and therefore if satisfactory improvement proves only to be of a temporary nature then the head teacher has the option of returning immediately to this point in the procedure.
- ii. Significant improvement made but extension of review period required
  - The performance improvement plan should be revised to cover the targets for the extended review period.
- iii. A capability hearing is convened

An outcome letter should be sent to the employee following the meeting (template letters 6a/b/c).

#### **5. Capability Hearing**

*The head teacher will normally be expected to lead in determining staff dismissals including those where the reason is capability. If alternative arrangements have been made please refer to appendix 4.*



If the decision is to proceed to a capability hearing the employee will be written to giving at least 10 working days' notice of the hearing (template letter 7).

Any documentation from the employee that they wish to refer to at the hearing should be submitted 5 working days prior to the hearing. Witnesses may be called to support the information provided at the hearing.

If the employee wishes to attend the hearing but is absent due to sickness or some other reason or their representative is unable to attend, the meeting may be postponed and will be rearranged within 5 working days or as soon as is practicable. The employee should be notified of the date in writing and informed that if they are not able to attend on the revised date the hearing will proceed on this occasion in their absence. If the employee cannot attend personally they will be invited to put their case whether through their representative or if that person is not available, an alternative representative, or submit their case in writing in advance by no later than 3 working days in advance of the reconvened hearing.

The purpose of the hearing is for the head teacher to present a summary of the capability process to date. The employee/representative will provide any mitigation as to why the required progress has not been made and any further information they wish the head teacher to consider.

The head teacher will give full consideration of all the information presented, the level of progress made and the support given.

There are 2 possible outcomes:

- i. Significant improvement made but extension of previous monitoring period required. Should the employee not have made satisfactory progress at the end of this period, the capability hearing will be reconvened (template letter 8a).
- ii. Dismissal with contractual notice.

If the decision is one of dismissal it will be communicated to the employee orally immediately after it has been reached and will then be confirmed in writing. The letter confirming the dismissal decision will inform the employee that they can appeal against the decision to a committee of the governors.

Any dismissal must give the appropriate period of notice required by the employee's terms and conditions of employment. However, there are alternatives to placing the employee back into their place of work to serve out their period of notice and these should be explored with the assistance of the School's HR provider.

For community, voluntary controlled, community special and maintained nursery schools, following any initial dismissal determination, notification of the decision must be sent to the Authority who will within 14 days issue a termination of employment letter. If a subsequent appeal reverses the dismissal decision the termination notice will be rescinded (template letter 8b).

For foundation, voluntary aided and foundation special schools, following any initial dismissal determination, notification of the termination of the contract will be issued by the school. If a subsequent appeal reverses the dismissal decision the termination notice will be rescinded (template letter 8c).

## **6. Capability Appeal Meeting**

The employee will be given ten working days from the announcement of the decision to lodge an appeal with the clerk to the governors.

The employee will be given a least one working weeks' notice of the date of and appeal hearing.

The capability appeal committee must be a properly constituted committee of governors. Members of the committee will be untainted by earlier proceedings. The committee will normally be made up of three governors, one of whom will be nominated as Chair.

The committee will be advised by a HR provider on matters of procedure. The HR provider will also be able to participate in the meeting but the decision regarding the action to be taken will be made by the committee members only although the HR provider will be present throughout their deliberations in an advisory capacity.

See Appendix 2 for the Capability Appeal Committee Meeting Procedure.

The committee will have the option of two courses of action:

1. to uphold the decision of the head teacher  
  
or
2. to refer the matter back to the head teacher for further action and may include specific recommendations made by the committee. Notice from the Local Authority or school will be rescinded.

## APPENDIX 1: TEMPLATE PERFORMANCE IMPROVEMENT PLAN

Identified Areas of Performance Concerns	Targets for Performance (SMART)	Support/Training required	Timescale for tasks to be achieved	Progress against Targets

Signed: \_\_\_\_\_  
**Employee**

Date: \_\_\_\_\_

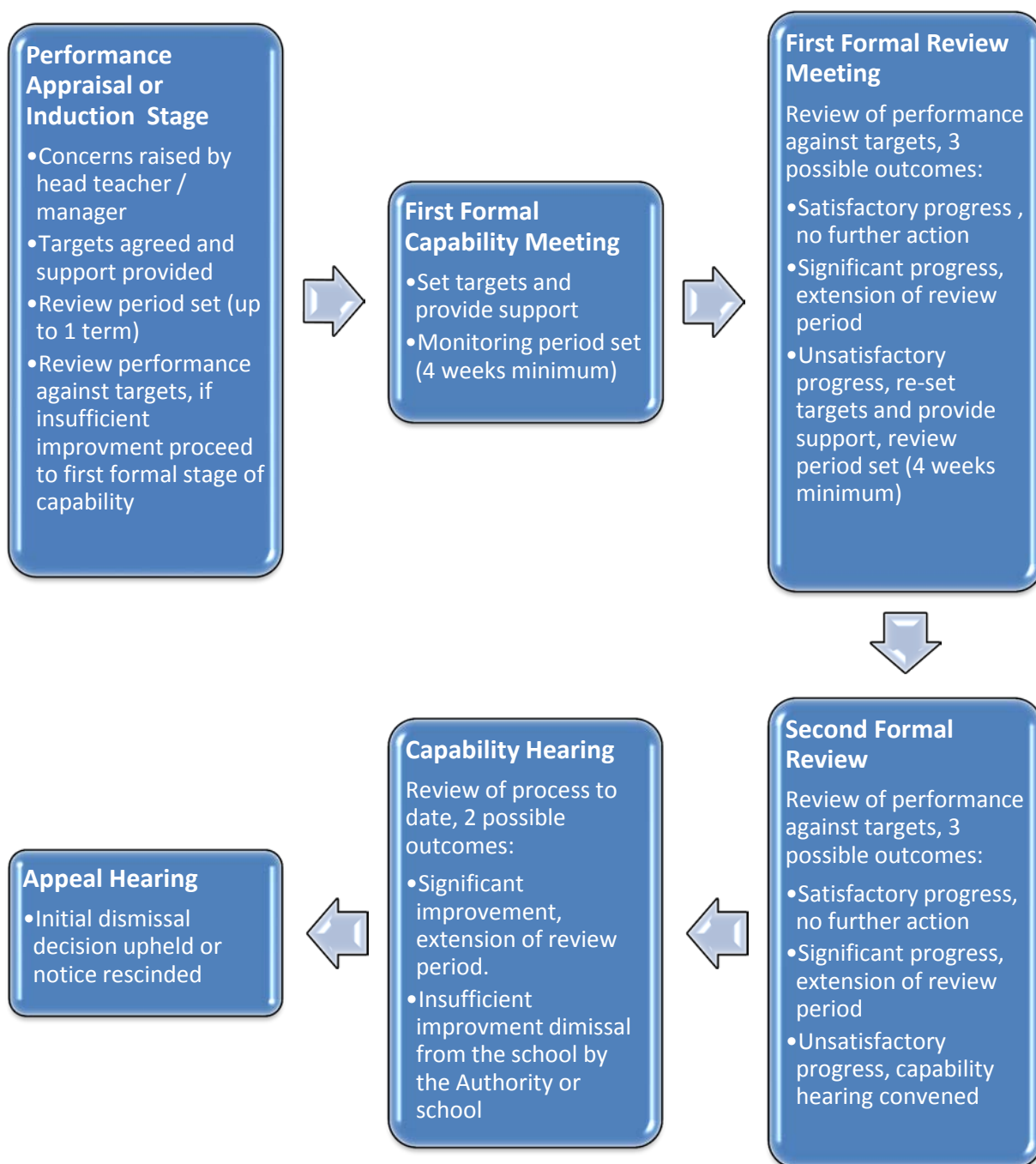
Signed: \_\_\_\_\_  
**Manager**

Date: \_\_\_\_\_

## **APPENDIX 2: CAPABILITY APPEAL COMMITTEE MEETING PROCEDURE**

1. Head teacher (or representative), employee and representative enter together.
2. Chairman of the committee describes the procedure. Any procedural questions are resolved at this point.
3. Employee or representative makes statement.
4. Head teacher questions employee/representative on statement(s).
5. Members of the committee and HR adviser question employee and/or representative on statement(s).
6. Head teacher makes statement in respect of the concerns about the employee's capability and the procedure that has been followed.
7. Employee and representative question head teacher on statement(s).
8. Members of the committee and HR adviser question head teacher on statement(s).
9. Employee or representative summarises and concludes.
10. Head teacher summarises and concludes.
11. Head teacher, employee and representative withdraw whilst the committee, advised by the HR adviser considers the appeal.
12. Head teacher, employee and representative return and decision of the committee is announced.

## APPENDIX 3: CAPABILITY PROCEDURE FLOW CHART



## **APPENDIX 4: CAPABILITY PROCEDURE - ALTERNATIVE ARRANGEMENTS**

The head teacher will normally be expected to lead in determining staff dismissals including those where the reason is capability.

The capability procedure therefore delegates this responsibility to the head teacher although in certain circumstances in accordance with the provisions of the Education Act 2003 the governing body should apply alternative arrangements if the process reaches the potential dismissal stage.

These arrangements may include decisions being taken by an individual governor or a group of governors with or without the head teacher. Regardless of the approach adopted the head teacher has the right to attend to offer advice.

The circumstances are as follows:

- A head teacher who is unwilling to perform these functions and whose previous history of service at the school did not include any such responsibilities.
- A head teacher subject to suspension, disciplinary procedures (including capability), or disciplinary action.
- Where the Local Authority has made representations to the chair of the governing body on grounds of serious concerns about the performance of the head teacher.
- Where the head teacher has failed to abide by financial limits agreed by the governing body for any school purpose.
- Where the governing body of a faith school has agreed staffing policies, which provide for governor involvement in the interests of preserving the school's religious character.

Where any of the above circumstances apply schools are strongly advised to consult your HR provider.