

Longdean School



Capability Procedure Policy

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Capability Procedure Policy

1 Introduction

The governing body is required to have a Capability Procedure to deal effectively with allegations of poor performance or unacceptable levels of skill or aptitude. This procedure has been negotiated with the trade unions and is recommended to governing bodies for adoption.

It is important that the governing body produce a clear minute, adopting a Capability Procedure.

This procedure incorporates DCSF Guidance in respect of teachers but **the principles and processes apply to all school based staff, although separate arrangements apply to staff employed on Local Government conditions of service during their probationary period.**

(See link

<http://connect.hertscc.gov.uk/connect/people/workforherts/yourtermsofemployment/probationaryservice/probpol?view=connect>)

The formal procedure is intended to be used for problems which are serious in themselves, or serious because they remain unresolved after informal steps have not achieved satisfactory solutions. Many problems and difficulties can and should be resolved informally. The Head should be able to demonstrate in writing that clear advice and help have been given to the employee and will have a record of any concerns, support given and informal warnings issued as part of the normal managerial functions (including performance management)

Trade unions and professional associations are ready, on request, to offer advice to employees who are members experiencing difficulties.

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 job performance. Schools should notify staff of this procedure and take account of relevant terms and conditions of employment.

This procedure applies to:

- all employees of the school, including the Headteacher, except NQTs (see below);
- staff who are centrally employed by the LA **and** who work solely at the school;
- staff in bases attached to schools.

The procedure does not apply to:

- newly qualified teachers
[alternative procedures are in place for newly qualified teachers during their period of induction, normally one year, where issues would be addressed through the induction review]

- peripatetic staff who are centrally employed by the LA;
- schools meals staff employed by Hertfordshire Catering or other external catering contractors;
- employees of external contractors and providers of services (e.g. contract cleaners).

All staff must have ready access to this procedure and are entitled to complete confidentiality in relation to personal, professional and medical information.

At every stage in the procedure, with the exception of the management stage, the employee will:

- be advised in writing of the nature of the complaints against him or her;
- have the right to be accompanied by their trade union representative, professional association representative or work colleague and by *no-one* else;
- have a right of appeal against any penalty imposed.

In some cases an employee's poor performance may be related to other factors and may require a different approach.

Ill Health

Where it is established that the employee's unsatisfactory performance is caused by ill health, the policies and procedures for dealing with ill health, adopted by the school, should be used accordingly.

Where poor performance is due to an employee having a disability, this policy should be adapted to meet the requirements of the Disability Discrimination Act 1995. For example, in addition to the support offered, reasonable adjustments to assist the employee reach the required standard must be considered.

Advice should be sought from the Schools' HR Advisory Team in conjunction with the Occupational Health Unit.

This Capability Procedure is concerned with allegations of an unacceptable level of skill and/or performance. Where an employee becomes sick, having entered Capability Procedures, it may be necessary to refer to the Occupational Health Consultant, (but this will not be automatic), through the Schools' HR Advisory Team, for advice on health and fitness for work.

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

Misconduct

Although most employees genuinely want to perform well, 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.

Professional Association/Trades Union Representatives

If the member of staff involved in the capability procedure is an accredited trade union or professional association representative (including elected as the school's representative), no action should be taken beyond the management stage until the employee's trade union or professional association official has been contacted.

3 Definition and Separation of Roles

It is important to be clear from the outset about the role to be played at various stages by: the Headteacher, the Chair of Governors, other Governors, the Schools' HR Advisory Team and Local Authority Advisers.

3.1 General

The assessment of performance, competence and capability is an essential part of the duties of an employee's manager and, ultimately, of the Headteacher. It follows that the process of identifying and rectifying problems and concerns falls to the management of the school and that the involvement of the governing body will be limited to the formal stages of this procedure and then in hearing appeals against the Headteacher's findings or at the dismissal stage.

3.2 Employees

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

3.3 The Headteacher

In all cases, except where the Headteacher is the subject of concerns, interviews at Stages 2 and 3 of the formal Capability Procedure will be arranged and conducted by the Headteacher. The Headteacher will consider the evidence, reach a conclusion and issue a warning as necessary. The Headteacher will specify the improvement required and support to be provided as part of the warning process.

In cases where the Headteacher is the subject of concerns, the Chair of Governors will carry out the functions allocated to the Headteacher in this procedure. The Chair of Governors will need to take advice from the Area School Improvement Partner Manager.

3.4 Chair of Governors

It is possible that as part of the normal working relationship between the Headteacher and Chair of Governors, the Chair of Governors has discussed details of concerns about the employee. If that is the case, the Chair of Governors can take no part in appeal hearings or in dismissal hearings.

The Chair of Governors has a specific role in relation to concerns about the performance and capability of the Headteacher. At every stage, bearing in mind the particular sensitivity in these circumstances, the Chair of Governors is advised to contact their Area School Improvement Partner Manager.

The Chair of Governors will be responsible for organising a hearing to consider an appeal against the findings of the Headteacher.

3.5 **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 three Governors. Governors who are employees of the school cannot form part of the panel. It is inappropriate for Governors to be involved in detailed discussion or consideration of allegations 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 exceptional circumstances - for example, where a school has several vacancies for governors other than employees - there may be not enough "definitive" governors to form a panel. The statutory regulations concerning collaboration between governing bodies allow the governing bodies of 2 or more schools to collaborate for a single purpose. Such a purpose would be the "loan" of a governor to take part in a capability hearing. Where this proves to be necessary, a formal agreement is required between the governing bodies. Such an agreement may be reached in writing by the chairs of the governing bodies, who may take urgent action on behalf of each of the governing bodies. The CSF Governance Team can assist in identifying a suitable partner governing body.

3.6 **Expert Advice**

The Headteacher or Chair of Governors may need to seek expert advice at the outset or at any of the formal interviews. For schools that subscribe to the Personnel Advice Service, advice from an HR Officer is always available.

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 Area HR Manager no later than the date on which the papers are sent to the employee. This provision applies whether or not the school subscribes to the Personnel Advice service.
- b) At any voluntary aided or foundation school where the governing body has formally granted advisory rights over dismissals to the Authority, the local authority must be invited to send an adviser. The school must send all of the papers for the hearing to the Area HR Manager no later than the date on which

the papers are sent to the employee. This provision applies whether or not the school subscribes to the Personnel Advice service.

- c) At any voluntary aided or foundation school where the governing body has **not** granted advisory rights to the Authority, the school may invite the Authority to send an adviser. If the school subscribes to the Personnel Advice service, then an adviser will attend the hearing. [It is likely that the school will, in any case, have already been advised by the Area HR Manager]

3.7 **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. The school's School Improvement Partner 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 interviews. The school will need to be clear, through the School Improvement Partner, about the amount of adviser time needed and the cost of any additional support, over and above the normal arrangements.

4 **When does the Capability Procedure apply?**

4.1 **Suspension of Performance Management**

Performance management will be suspended when an employee enters Stage 2 of the capability procedure. Confirmation of this must always be given in writing.

Movement up the pay spine may be delayed, subject to statutory and contractual terms of employment.

- 4.2 The responsibility for satisfactory performance falls jointly on the employee and on management. The employee is responsible for performing the duties of the post to the best of his/her ability and in accordance with any specified regulations or performance standards. Lack of capability occurs when an employee fails consistently to perform his or her duties to an acceptable standard. The governing body and Headteacher are responsible for ensuring the provision of training (including proper induction) and adequate feedback on performance. The duties and responsibilities of the post must be defined as clearly as possible in the job description so that there is no area of ambiguity that might cloud the assessment of performance

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:**

- a) Failure to discharge specific responsibilities associated with a particular appointment which may include leading, managing or supervising responsibilities.

- b) Lack of 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) Lack of organisation of the teaching or work area and management of suitable materials and equipment, including adequate course preparation;
- e) Inability to teach and/or supervise students;
- f) Maintenance of an adequate level of class discipline and control;
- g) Setting and appropriate marking of students' work;
- h) Failure to keep suitable records of students' work, progress and attainment;
- i) Failure to maintain appropriate standards of accounts or other school records;
- j) Failure to maintain a secure and safe environment.

5 Stages in the Capability Procedure

Fast Track Procedure

In exceptional circumstances a procedure of up to 4 working weeks may be invoked. This would be appropriate in cases of particular serious concerns. A final written warning, invoking a review period, not exceeding 4 working weeks, will be justified. Examples of this might be where a teacher's classroom control is so poor that no order can be established to enable teaching to take place, or where most of the children under a teacher's care fail to progress in that teacher's lessons.

Stage 1 – Management Stage

Before embarking on the following Capability Procedure (Stage 2):

- Management must be able to demonstrate that through normal management/supervision they have attempted to resolve the concerns;
- The employee will have an agreed job description, which is fully understood and that there is a clear agreed expectation of standards of performance;
- The employee will have been alerted to concerns;
- Timescales, whilst fair and appropriate for the improvement of targets set, will not be too lengthy

Stage 2 – Informal Stage

Where performance concerns have been unsuccessfully addressed and managed using the normal management channels, the employee should be invited to attend a meeting with their professional association/union representative or work colleague and no-one else.

At this meeting the Headteacher will:

- outline the performance concerns, the standards required and where the shortfall in their performance has occurred;
- provide evidence of the concerns identified (e.g. from job descriptions, supervision notes, evidence of complaints, examples of pieces of work that do not meet the required standards);
- 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;
- reach agreement to the future standard of performance with agreed targets set out showing clearly how these will be achieved and measured, 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.

At the end of the discussion the agreed targets should be retained by the Headteacher and employee and should be used as a working document during future meetings.

Support will be given to the employee as appropriate by the Headteacher or senior members of staff, advisers or officers of the LA and will be intended to encourage improvement and, wherever possible, to avoid recourse to the formal procedure.

The employee should be made aware that at the end of the review period a meeting will be held at which his/her performance will be assessed against the previously agreed targets, following discussion of the documentary evidence gathered during the review period. Once the facts are gathered, the following three options will be considered:

- conclude that performance is now satisfactory, advise the employee of that in writing and take no further action;
- arrange a continuing programme of support and monitoring, without using the formal procedure, setting timescales for review. This process will be expected to reach a firm conclusion within a specified time; either that the performance is now satisfactory, or that it is necessary to move into the formal procedure;
- arrange a formal interview. This is the start of the formal Capability Procedure.

Performance Review Periods

The aim of the review periods, both at the informal and formal stages, is to allow an employee a set period of time to address the performance issues identified and to reach the targets/objectives agreed by both employee and Headteacher.

During the review period managers should monitor and assess the employee's performance against the agreed objectives and give ongoing feedback during the period to the employee. The manager should also ensure that any support agreed is delivered accordingly. The length of the review period will be whatever is reasonable considering the circumstances.

This may vary in length due to the different complexity of posts and the learning periods associated with them. Since three review periods are normally given under this procedure (excluding management stage) a single review period should be between 4 and 6 weeks (although this may be shorter or longer depending on the circumstances). For example, a longer period may be appropriate where there is a training or development need which would then need to take reasonable account of the time to put this development into practice, or where a change in line manager may mean that a longer period is needed for fair and accurate assessment.

In exceptional circumstances a shorter review period may be appropriate, e.g. where an employee's performance has been persistently below the required standard and all reasonable support has been given to the employee with no demonstrable improvement as a result.

6 Stage 3 – Formal Stage

The formal Capability Procedure commences with the first formal interview:

- The formal interview, the outcome of which may be further support or an oral or written warning;
- In cases where a warning is given, a review meeting usually between 4 and 6 working weeks will be held (with a maximum length of 20 working weeks). The outcome will be either that improvement has been achieved and no further action is necessary, or that a final written warning will be issued;
- In cases where a final written warning has been issued, a final review meeting, not more than 24 working weeks after the date of entry into the formal procedure i.e. - at the start of Stage 3, the first formal interview. The outcome will be either that there has been sufficient improvement, or that dismissal proceedings will be started.

6.1 Arranging a Formal Interview

The formal interview at Stage 3 initiates the formal stage of the Capability Procedure. It provides an opportunity to deal with more serious problems in a structured way. It allows an employee to prepare a response to allegations about performance and make his/her case in the company of their union representative or work colleague.

The employee must receive, **at least 10 working days in advance, notice in writing by recorded delivery or delivery by hand** of:

- The purpose of the hearing;
- Specific concerns, confirming that this is a formal interview under the Capability Procedure;
- A copy of this procedure (if not provided at the informal stage);
- The right to be accompanied by a work colleague or his/her trade union representative (and no one else);
- Details of who will be attending the interview (e.g. Head, employee, employee's representative, expert witness/es)
- The time and place of the interview;
- Relevant documentation (e.g. copies of targets, the support provided, review meeting minutes);
- The requirement for the employee to provide, at least 3 working days before the interview, 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.

If an employee is unable to attend a formal interview (or hearing) he/she may choose to provide written permission to the effect that his/her companion may act on full authority and he/she will accept any decision that their representative has been party to. He/she may also choose to provide a written response.

Alternatively, if he/she cannot attend for a genuine reason, and are not willing for his/her representative to act on their behalf, it may be reasonable to arrange another hearing. 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.

6.2 Outcome of Formal Interview

There are four possible options as outcomes to the formal interview:

- a) Take no further action, since improvement has been satisfactory
- b) There has been some improvement but further support or monitoring is required
- c) Oral or first written warning, which will remain on file for 1 year from the date of entry into the formal procedure
- d) Final written warning, which will remain on file for 2 years from the date of entry into the formal procedure.

6.3 Where a Formal Warning is issued

The interview should:

- identify the professional shortcomings;
- give clear guidance on the improved standards of performance needed to end the Capability Procedure;
- explain the support that will be available and how performance will be monitored over the following weeks;
- depending on the level of warning issued, identify the timetable for improvement and agree a date for interim review meetings and the next formal review meeting;
- make it clearly understood that failure to improve may lead to dismissal.

A letter will be sent to the employee **within 3 working days of the formal interview** recording the outcome and the above points.

6.4 Appeal against a Warning

It is open to an employee to appeal against a warning at any stage. The appeal should be lodged within 5 working days with the Chair of Governors, who will convene a panel of Governors to hear the appeal within 10 working days. The employee will provide, in at least 3 working days before the hearing, 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 2 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 appeal hearing will not interrupt the timetable or progress of the procedure (unless the appeal decision leads to the matter being reconsidered).**

7 First Assessment Stage

The date of entry into the formal procedure will be the date of the first formal interview at Stage 3. From this date, a maximum period of 20 working weeks will be allowed for regular observation, monitoring and evaluation of performance, with guidance, training as necessary and support as specified at the end of the formal interview.

If, at any point during this period, the circumstances become more serious, a decision may be taken to move directly to a final written warning.

7.1 Review Meeting

At the end of the specified period for the first assessment, there will be a further review meeting to assess performance. At least 5 working days notice will be given for the meeting (although in practice the date for interim reviews and the review meeting will normally be set well in advance). There are two possible outcomes at this stage:

- The level of performance is now satisfactory and there is confidence that it can be sustained. In these circumstances, the Capability Procedure will be ended with a letter from the Headteacher
- Performance continues to be unsatisfactory, in which case a final written warning will be issued

Formal monitoring, evaluation, guidance and support will continue for a further period and the employee will be told clearly that failure to achieve an acceptable standard, with confidence that it can be maintained, may result in dismissal.

The decision and main points of the meeting will be recorded in a letter to the employee.

The employee has a right to appeal against the final written warning.

8 Second Assessment Stage

Assuming that a final written warning has been issued, the confirming letter will specify that there will be a further review after 4 working weeks, which is the final evaluation meeting. Following regular monitoring and evaluation of performance and continuing support, the final review meeting will report the assessment of performance over those four weeks.

At least 5 working days notice must be given for the meeting (although in practice it is expected that the date will be set at the time of the previous formal review meeting).

There are two possible outcomes of the final review meeting:

- Performance has been satisfactory and there is sufficient confidence that it can be maintained. In these circumstances the Capability Procedure will end with a letter from the Headteacher
- If performance is unsatisfactory, a dismissal hearing will be arranged

9 The Dismissal Stage

The Head will normally conduct the hearing at this stage. The exceptions to this are set out in paragraph 6.4 of the Schools' Model Disciplinary Procedure available on the Grid.

In arranging a dismissal hearing again as set out in Section 7 of the Disciplinary Procedure), the Head or the Clerk to the Governing Body (as the case may be) must inform the Area HR Manager who will arrange for a representative of the Director of CSF to attend. The Area HR Manager must also be sent copies of all papers relating to the hearing.

If the case for dismissal is not established, then a warning appropriate to the level of performance may be sustained and further review procedures identified. If the decision is dismissal, then the employee will be informed immediately and advised of the right to appeal. The decision of the Head or Governing Body Panel, the reasons for it and the appeal arrangements will be confirmed in writing to the employee within three working days.

For a community or voluntary controlled school (whose staff are employed by the County Council), a copy of the letter will be sent to the Director of Children, Schools and Families within 14 calendar days. The Director of Children, Schools and Families will then formally confirm dismissal by letter to the employee.

For a voluntary aided or foundation school (whose staff are employed by the governing body), a copy of the letter will be sent to the Chair of Governors within 14 calendar days. The Chair of Governors will then formally confirm dismissal by letter to the employee.

10 Appeals

Appeals at any stage should be made within 5 working days to the Chair of Governors, who will arrange a panel of 3 governors who have not previously been involved to hear the appeal.

The decision of an appeal panel at each stage will be final and will be reported to the Governing Body.

The following general points are important:

- An appeal at the formal interview and assessment stages will not interrupt the procedure (unless the appeal decision leads to reconsideration)
- An appeal will normally involve a re-hearing 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

11 Disputes about the Procedure

Overlapping Capability and Grievance Issues

An employee may raise a grievance after capability proceedings have started against him/her. The Headteacher should consider suspending the capability case for a short period – no more than one week – to consider the implications of the grievance on the capability. If the grievance has been raised before the appeal stage of the procedure and the matters of grievance are linked to those of the capability, then the grievance should be considered within the capability procedure. If the grievance concerns matters that are unrelated to the

capability, then a separate process under the Grievance Procedure will need to start. In almost all cases, the grievance should be considered after the completion of the capability.

12 References

If an employee is in the capability procedure this must be referred to in any employment reference.

13 Referrals to Statutory Bodies

There are statutory duties on employers to refer individual cases to national bodies in the event of a dismissal or resignation when dismissal may have been a likely outcome.

All teachers – not other staff – who are dismissed (or resign) for reasons of incompetence or poor performance must be reported to the General Teaching Council (GTC) for England.

General Teaching Council for England (Disciplinary Functions) (Amendment) Regulations 2003.