



# THE VALLEY SCHOOL

## POLICY – CAPABILITY PROCEDURE

JUNE 2019 (RESOURCES COMMITTEE)

### KEY PRINCIPLES

#### “Learn to Believe – Learn to Achieve”

#### “Different for Different”

Our staff are our key asset and we will value and develop their skills so that they can be most effective and rewarded in their role. All attempts will be made to avoid the need to have reference to the capability procedures.

However, the need of our pupils are paramount and if there are serious concerns about performance that have not been resolved by other reasonable processes, the capability procedures will be applied fairly and transparently.

### KEY STATUTORY REGULATIONS AND SIGNIFICANT LINKS

- <https://www.gov.uk/browse/education>
- <https://www.teachers.org.uk/>
- <http://www.nasuwf.org.uk/>
- <https://www.unison.org.uk/>

### KEY RESPONSIBILITIES & KEY PRACTICES

#### 1 Introduction

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

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

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

#### 2 Purpose, Scope and Principles

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

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

reasonable period of time (at least a week) should be allowed for the individual to reflect on the observation and any support or advice given before a follow up observation is carried out.

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

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

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

This procedure applies to:

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

The procedure does not apply to:

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

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

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

### **3 Extenuating Circumstances**

#### **3.1 Ill Health & Absence**

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

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

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

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

#### **3.2 Misconduct**

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

### **4 Definition and Separation of Roles**

#### **4.1 Employees**

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

#### **4.2 Line Manager**

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

### **4.3 Chair of Governors**

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

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

### **4.4 Other Governors**

The Governing Body has quite specific tasks to perform under this procedure in relation to appeal and dismissal hearings, when they will be expected to form a Panel of 3 Governors. Governors who are employees of the school should not form part of the Panel. It is inappropriate for Governors to be involved in detailed discussion or consideration of performance concerns at any other time. It is also inappropriate for details of any capability cases to be discussed at a full meeting of the Governing Body.

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

### **4.5 Expert Advice**

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

### **4.6 Advisory Staff**

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

## **5. Right to be Accompanied**

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

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

- familiarise him/herself with the case
- assist the employee in preparing any case they wish to present
- confer with the employee before and after the meeting or hearing
- present and sum up the employee's case, as appropriate and as agreed with the employee
- address the meeting or hearing and ask appropriate questions, as agreed with the employee

- respond on the employee's behalf to any view expressed at a meeting or hearing and
- ask for adjournment if necessary

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

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

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

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

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

## **6. Management Period**

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

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

## **1. The capability procedure**

**See Appendix 2 for a procedural flowchart**

Where performance concerns have not been successfully addressed and managed using:

- the normal appraisal management channels; and
- informal methods

An assessment/investigation will be undertaken to decide if there are grounds for taking formal action under this procedure.

The degree of assessment/investigation involved will depend on the circumstances but may involve reviewing the employees personnel file including appraisal records, gathering relevant documents, monitoring the employees work and if appropriate interviewing the employee and/or other individuals confidentially in respect of the employee's work. The employee should be invited in writing to attend a formal capability hearing with their professional association/trade union representative or work colleague. At least five working days' notice will be given. The letter will inform the employee that the appraisal process is suspended and will no longer apply whilst the employee's performance is being managed under the capability procedure. The letter will contain sufficient information about the performance concerns and possible consequences, e.g. a first written or final written warning could be issued, to enable the employee to prepare their case for formal capability meeting. Any copies of written evidence will be enclosed with the letter together with a copy of the capability procedure.

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

## **7.1 Stage 1 – formal capability hearing**

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

- identify the performance concerns, the support already given as part of the appraisal policy, the standards required and where the shortfall in their performance has occurred
- provide written evidence of the concerns identified (e.g. from job descriptions, supervision notes, classroom observations, examples of pieces of work that do not meet the required standards)
- consider and discuss any causes and reasons for the shortfall including any reasons why the measures taken so far have not led to improvement. The employee should be given the opportunity to discuss any contributory factors they feel may have affected their performance and/or refute the evidence presented if appropriate
- after reviewing the evidence before them and considering any contributing factors the employee has put forward, the Headteacher or line manager will decide whether:
  - to move into a further period of monitoring without issuing a warning
  - to issue a first written warning
  - to issue a final written warning (serious cases only)

At which point the following will also apply:

- set a PIP and targets for the future standard of performance with agreed objectives set out showing clearly how these will be achieved and measured
- identify the support to be provided to assist the employee in reaching the required PIP (e.g. additional supervision, coaching, observing exemplar lessons) the employee should also be invited to suggest what support that they feel they may benefit from

- set out the timetable for improvement and explain how performance will be monitored and reviewed. The timetable will depend on the circumstances of the individual case but should usually be six weeks or half a term. It is for the school to determine the set period. It should be reasonable and proportionate, but not excessively long, and should provide sufficient opportunity for significant improvement to take place
- notes must be taken of the meeting and a copy given to the employee

If, following response from the employee, it is accepted that it is not appropriate to proceed with the formal capability process; the matter could be addressed via performance appraisal or relevant management support. Otherwise, the decision and reasons for it will be put in writing.

### **7.1.2 Monitoring and review period following a formal capability hearing**

A performance monitoring and review period will follow the stage 1 formal capability hearing. Formal monitoring, evaluation, guidance and support will continue during this period and there should be an informal feedback meeting/s. At the end of the review period a letter will be sent to the employee advising either

- that performance has improved to a satisfactory level and no further action will be taken
- that substantial but insufficient improvement has been made and the review period will be extended
- that insufficient improvement has been made and the matter will be progressed to a stage 2 capability hearing (or stage 3 if a final written warning was initially issued)

## **7.2 Stage 2 – formal capability hearing**

The formal hearing allows the employee to respond to the assessment that his/her performance has failed to improve and to explain the failure. The stage 2 hearing may also be instigated if there is further evidence of poor performance during the period of the first written warning.

The employee must receive written notice of the meeting, at least five working days in advance by recorded delivery or delivery by hand of:

- the purpose, time and place of the meeting
- the areas in which the employee has not met the required performance standards set out in the PIP and previous warning
- the right to be accompanied by a work colleague or their professional association/trade union representative (and no one else)
- details of who will be attending the meeting (e.g. head, employee, expert witness/es)
- relevant documentation (e.g. copies of objectives, the support provided, and capability/review meeting minutes)

### **7.2.1 Conducting the stage 2 formal capability hearing**

Follow the guidelines set out in section 7.1

### **7.2.2 Outcome of the stage 2 formal capability hearing**

There are three possible outcomes to the **stage 2 hearing**:

- outcome 1: Sufficient improvement, in which case the capability procedure will cease and appraisal process will resume
- outcome 2: There has been some improvement, and there is confidence that more is likely, but further support or monitoring is required and the monitoring, review period and PIP will be extended
- outcome 3: If no, or insufficient improvement has been made, the employee will receive either a first written warning if one wasn't issued at the commencement of the formal capability meeting or a final written warning if a first writing warning has already been issued

The decision will be confirmed in writing.

### **7.2.3 Monitoring and review period following stage 2 capability hearing**

A performance monitoring period will follow the stage 2 formal capability hearing. Formal monitoring, evaluation, guidance and support will continue during this period and there should be an informal feedback meeting/s. At the end of the review period a letter will be sent to the employee advising either:

- that performance has improved to a satisfactory level and no further action will be taken
- that substantial but insufficient improvement has been made and the review period will be extended
- that insufficient improvement has been made and the matter will be progressed to a stage 3 capability hearing

At all stages if the employee cannot attend a meeting the employee should inform the Headteacher immediately and an alternative date will be arranged. The employee must make every effort to attend the hearing and failure to attend without good reason may be treated as misconduct. If the employee fails to attend without good reason or is persistently unable to do so (for example health reasons) a hearing may be convened and the decision taken based on the available evidence.

## **7.3 Stage 3 – formal capability hearing (The dismissal stage)**

**7.3.1** A panel of three governors will normally hear the case at this stage unless it is felt appropriate for the Headteacher to do so. If the case concerns the Headteacher a panel of governors would hear the case.

The employee will be given no less than five working days' notice in writing of the hearing.

The letter will contain:

- the purpose, time and place of the hearing
- the areas in which the employee has not met the required performance standards set out in the PIP and final written warning
- the right to be accompanied by a work colleague or their professional association/trade union representative and no one else

- details of who will be attending the meeting (e.g. Headteacher, employee, expert witness/es)
- the requirement for the employee to provide to the school, at least four working days before the hearing, six hard copies of all documents that he/she intends to present at the hearing and enough copies for all those, except witnesses who will be present at the hearing
- all relevant documentation that will be used as evidence at the hearing (e.g. copies of objectives, the support provided, and review meeting minutes)

Copies of all relevant documents will be sent by the school to the panel members before the hearing.

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

- the local authority must be invited to send an adviser. The school must send all of the papers for the hearing to the HR adviser no later than the date on which the papers are sent to the employee
- the school will invite an HR adviser and will send all of the papers for the hearing to the HR adviser no later than the date on which the papers are sent to the employee

Where the outcome is dismissal, a copy of the outcome letter will be sent to the director of Children's Services once the time period for appeal has elapsed. The director of Children's Services will then formally confirm dismissal by letter to the employee.

Dismissal on the grounds of capability shall be with notice.

The outcome will be confirmed in writing to the employee as soon as reasonable practicable and usually within five working days.

## **8 The Dismissal Stage**

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

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

The letter will contain:

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

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

Dismissal on the grounds of capability shall be with notice.

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



## **9. Appeals**

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

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

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

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

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

The following general points are important:

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

## **10. Disputes about the Procedure**

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

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

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

## **11. Expiry of Warnings and References**

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

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

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

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

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

## **Appendix 1 – Performance concerns that may be addressed via the Capability Procedure**

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

### All Staff

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

### Teaching staff only

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

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

## Appendix 2 – Capability Procedure Flowchart

