

MODEL POLICY FOR MANAGING TEACHER CAPABILITY

(1) This policy sets out the terms reached by those participating in the Council's Consultation and Negotiation Framework, however the NEU and NASUWT did not reach agreement on the final version of this Policy.

For School's (e.g. some Academies) not participating in the Council's Consultation and Negotiation Framework

(2) This Model Policy was provided by the Solihull School's HR Service.

The school must undertake negotiation and consultation with relevant Trade Union/ Staff Association representatives before this policy is adopted by the School Governing Body. Advice is available from your HR provider on how to undertake this if required.

Version	Date	Summary of changes
4	April 2018	GDPR compliant (additional paragraph added to page 3-4)
5	August 2022	General Update

Overview

The School Staffing [England] Regulations 2009 (amended 2012) require Governing bodies to have procedures for dealing with any lack of capability of their employees. They must also have regard to any guidance from the Secretary of State in managing capability. his procedure is consistent with such guidance.

In April 2012, the Secretary of State for Education published revised guidance entitled “Teacher appraisal and capability”.

The Education (School Teachers’ Appraisal)(England) Regulations 2012 come into force on 1 September 2012.

This procedure does not apply to employees who are still subject to a probationary period.

Introduction

The purpose of capability procedures is to support members of staff to fully perform their duties and to address issues of under-performance on a formal basis. The aim is to deal with those cases where, despite appropriate management support [*provided through the new model Teacher appraisal procedure which includes the informal stages of support and monitoring, see section entitled ‘Teachers Experiencing Difficulties’*] the employee is lacking in key areas of ability, skill, competence or knowledge and is consequently unable to carry out their required duties to an acceptable standard.

Employees are normally competent, effective and are able to develop through the range of opportunities provided by the school. There are, however, occasions when a significant gap may develop between the requirements of a job and the individual’s performance and, if not appropriately addressed, the situation may affect pupils’ education and the performance of the school.

This procedure sets out the process for managers or governors to follow when addressing issues of under-performance, which have not been possible to resolve through the appraisal procedure.

The appraiser/line manager should have been, at all stages, working with the employee to consider what measures and support can be put in place to try and help improve their performance.

If serious or persistent weaknesses are identified in an employee’s performance, appraisal should cease and, the school’s capability procedure be introduced.

Any decision to cease appraisal and move to capability procedures must be made by the Headteacher [or Chair of Governors where the capability of the Headteacher is in question].

Where an appraiser or line manager has concluded that it may be necessary to move into the capability procedure an “**Investigatory/Transition Meeting**” should be arranged to review the weaknesses in performance and to consider the evidence

whether appraisal should cease and, capability procedures commence.

An Investigatory/Transition Meeting, of this type, does not form part of the formal Capability Procedure, which would not begin unless a Formal Interview is held under this policy. Until that point, the employee continues to be managed under the appraisal policy.

The Investigatory/Transition Meeting will, if capability procedures are instigated, inform the formal interview in the capability procedure where the employee and their representative should be provided with the evidence from the appraisal or monitoring procedures which has prompted its implementation.

CAPABILITY PROCEDURES AND THE PURPOSE OF THIS GUIDANCE

Capability is a separate, albeit related, procedure from appraisal that should be adopted in such a way that is supportive, constructive and helpful to the individual.

It should provide an opportunity for:

- encouragement, support and assistance
- the setting of clear, constructive objectives (targets) for improvement
- discussion and consideration of all relevant factors
- the manager and individual to work together to address the concerns
- employee representation

This guidance is intended to help deal with issues associated with the capability of employees. It is essential to make it absolutely clear to any employee who has moved into a capability process that this is the case. This decision should not come as a surprise and the school should be open and transparent about the procedure being used and the reasons for adopting it. There must be no ambiguity about this; employees must be completely aware that they are subject to capability procedures and appraisal arrangements have been superseded.

Where it is clear that the necessary improvements in performance have not been achieved through appraisal arrangements and serious weaknesses exist, schools will need to consider how the capability process can be used to address those weaknesses, supporting the employee's performance and informing a strategy designed to bring to an end capability procedures, as quickly as possible.

In some cases, however, where sufficient improvement cannot be achieved despite comprehensive support, or the concerns highlighted are of particular gravity, it may be necessary to bring the employee's employment at the school to an end via this policy.

This guidance recommends a procedure that should ensure fairness, efficiency and is in accordance with good employment practice.

A written record of all meetings conducted under this procedure will be made, either by the person holding the meeting or by an additional person arranged by the Council/school to take notes. The Council/school processes any personal data collected during the capability procedure in accordance with its data protection policy. Any data collected is held securely and accessed by, and disclosed to, individuals only for the purposes of completing the capability procedure. Inappropriate access or

disclosure of employee data constitutes a data breach and should be reported in accordance with the Council/school's data protection policy. It may also constitute a disciplinary offence, which will be dealt with under the Council/school's disciplinary procedure.

Managing performance

Good management, clear expectations and appropriate support will go a long way towards addressing weaknesses in performance. Any concerns a manager has about the performance of any employee should be raised with the individual as early as possible. Normally this will be part of the appraisal procedure. Early identification of problems through that procedure will help to avoid the need for formal capability procedures.

It is important that all information associated with this procedure is treated as strictly confidential and should not be discussed with anyone who is not directly involved in the procedure.

As good employment practice it is strongly advised that managers ensure the following have taken place:

- The employee has received appropriate induction to their job (including statutory induction for early career teachers).
- The employee has been issued with a clear and up to date job description.
- The employee has been told clearly what is expected of them in terms of the level of their performance.
- The employee's performance has been regularly monitored, support has been put in place and feedback has been given.

Managers and governors must provide as appropriate at every stage of the procedure:

- the practical and consistent application of support, advice and guidance to the individual by a professional approach;
- training or retraining as necessary following any (mutual wherever possible) identification of an individual's needs;
- the establishment of performance criteria and monitoring of performance against the criteria within predetermined time periods;
- clear written information regarding the alleged shortcomings in the employee's performance.

They should also ensure that any individual whose performance is unsatisfactory is clear about:

- The level of concern
- The evidence used to reach this conclusion

- The expected level of performance required
- The type of support available
- The consequences of failing to improve their performance.

Individual employees should co-operate constructively with arrangements put in place to address weaknesses in performance. Where an employee believes a manager is not acting in accordance with the policies in place to support them, these concerns should be raised within this procedure or a school's grievance procedure.

Throughout the operation of appraisal and capability procedures the manager or governor(s) should keep clear written records and make sure that the concerns about performance are fully explained and set out in writing for the individual employee.

Capability procedures

The aim of the procedure must be to improve the performance of an employee causing concern to a level that is acceptable (i.e. at least meets OFSTED's minimum requirements) as quickly as possible. Employees whose performance reaches an acceptable level will cease to be the subject of capability procedures. Their performance will then be the subject of normal monitoring under appraisal arrangements.

Key features of the procedure

The timings are recommendations which may be varied where it is appropriate to do so

The procedure proposes a period of 8 to 12 weeks (as determined by the Headteacher), of support provided through the model Teacher Appraisal procedure which includes the informal stages of support and monitoring, see section entitled 'Teachers Experiencing Difficulties', before the formal assessment of staff capability. This period of assessment may be shortened where, for example, it becomes clear that an acceptable level of improvement is beyond the ability of the person assessed, or where there is a refusal to accept that improvement is required despite the reasonableness of the proposed measures to achieve improvement.

A shortened capability procedure of up to four weeks would be appropriate in particularly serious cases

The shortened capability procedure of up to four weeks would apply in particularly serious cases where the education, health or wellbeing of children is at risk. Examples of this might be where a teacher's classroom control is so poor that teaching and learning are seriously compromised, or where a number of children under a teacher's care fail to progress in that teacher's lessons despite significant support already having been provided through the school's appraisal arrangements.

Urgent action is required if sickness absence intervenes during a capability procedure

If long term sickness absence [see definition in the school's Sickness Absence Management Policy available on the Schools [Extranet](#)] may have been triggered by the

commencement of capability procedures, the case should be referred immediately to the occupational health service to assess the person's health and fitness for continued employment and their ability to attend relevant meetings whilst the employee may be off work sick. Schools must take a considerate and sympathetic approach, but in general the length of time they may wait for a person's health to improve before considering whether to terminate employment on health grounds should be dealt with in accordance with the Sickness Absence Management policy.

STAFF CAPABILITY PROCEDURE

This procedure should only be adopted where the reasons for using it have been fully explained to the employee subject to capability. The use of capability procedures should be totally open and transparent and, the employee should be provided with a copy of the procedure.

Formal Meeting

The formal meeting initiates the capability procedure. It provides an opportunity to deal with serious problems in a more structured way than under the appraisal procedure. It allows the employee to prepare a response to serious concerns about performance and make a case in the company of a union representative or colleague. At least 5 working days' notice must be given for the meeting, explaining clearly to the employee that they are now moving from arrangements that are part of the appraisal process into formal capability procedures. There should be no ambiguity about this step taking place and the possible consequences of following the capability procedures should be clearly explained.

The meeting may provide new information or put a different perspective on the evidence collected including any evidence gathered as part of the appraisal process. If it becomes clear that further investigation is needed the meeting should be adjourned for an appropriate length of time to allow this to happen.

There are three options at formal meeting:

- a return to the appraisal process [Where new information, a different perspective on the information collected, or further investigation suggests that the matter is not as serious as it first seemed.]

or

- a first written warning

or

- a final written warning

The latter options are relevant to any case where continued concern about the standard of performance is justified. The decision regarding which level of warning to issue will depend on the seriousness of the problem and/ or consideration of any live warnings. If performance is unsatisfactory a first warning will normally be the next step and will commence an assessment period of up to 8 weeks. In cases of particularly serious concern, for example, where the health and safety or education of children is at risk, it is possible to move directly to a final written warning. This will invoke an assessment period not exceeding 4 weeks.

A decision should be made after all the facts and any representations from the employee have been considered. The Headteacher, line manager or chair of governors should adjourn the meeting to consider the appropriate option before delivering a decision to the employee. Any appeal against a warning must be made within 5 working days of receipt of the written confirmation and, will normally be heard within 10 working days of notification of appeal; and must not interrupt the progress of the procedure, unless the appeal decision leads to the matter being reconsidered.

Where a written warning is issued, the Headteacher, manager or governor leading the procedure should ensure the remainder of the meeting is used to:

- set out the professional shortcomings;
- give clear guidance on the improved standard of performance needed to end the capability procedure and set appropriate objectives/targets;
- explain the support that will be available, and how performance will be monitored over the following weeks;
- depending on the level of warning issued, to identify the timetable for improvement and agree a date for the next or final evaluation meeting;
- make it clearly understood that failure to improve may lead to dismissal; and
- make sure the employee and their representative are given suitable opportunity to contribute to the meeting.

Written notification should be sent to the employee immediately after the formal interview recording the result of the investigations, the main points discussed at the meeting, confirming the decision, and where a warning is issued, giving information about the handling of the next stage.

First assessment stage: following a first written warning

Weeks 1 to 8 - Regular observation, monitoring and evaluation of performance, with guidance, training if necessary, and support to the employee.

If at any point during this stage the evidence suggests a more serious problem, a decision may be taken to move directly to a final written warning.

Week following completion of assessment stage (i.e. week 9) – Evaluation meeting to assess performance over the previous weeks. At least 5 working days' notice must be given for the meeting and the employee may be accompanied by a union representative or colleague. If the level of performance has been satisfactory and there is confidence that it can be sustained the capability procedure can end here with a letter from the Headteacher.

Where performance is satisfactory, but there is a genuine expectation that the improvement will not be maintained, a further period of assessment may be instigated at the discretion of the Headteacher. This should be long enough to allow performance to be properly evaluated. Once this period, of no more than 4 weeks, has passed a further evaluation meeting should be held to assess performance and next steps.

If an evaluation meeting concludes that performance has continued to be unsatisfactory a **final written warning** should be issued. Formal monitoring,

evaluation, guidance and support should continue for a further period. Arrangements for this should be explained at the meeting. The employee must 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 should be recorded in writing to the employee, as soon as possible. Any appeal against a final warning must be made within 5 working days, and normally heard within 10 working days of notification of appeal and must not interrupt the progress of the procedure, unless the appeal decision leads to the matter being reconsidered.

Second assessment stage: following a final written warning

Weeks 1 to 4 Regular monitoring and evaluation of performance, with guidance, training if necessary, and support to the employee.

Week 5 (week following the second assessment stage) - Final evaluation meeting to report the assessment of performance over the previous weeks. At least 5 working days notice must be given for the meeting and the employee may be accompanied by a union representative or colleague. If performance has been satisfactory, and there is sufficient confidence that it can be maintained, the capability procedure can end here.

If performance is unsatisfactory the employee should be told that the matter will be referred to the governing body's Staff Dismissal Committee. The result of the assessment, main points of the meeting and date of the dismissal committee hearing (if known), should be recorded in writing to the employee as soon as possible.

Dismissal committee stage

The governing body should set up a Staff Dismissal Committee comprising at least three governors.

In the case of other employees, the governing body may delegate this responsibility to the Headteacher, however this should not be undertaken if the Headteacher has had any prior involvement. The Staffing Regulations 2009 (amended in 2012) allow for delegation of dismissal to the Headteacher in some situations. However, this should be carefully considered and is not recommended when the employee undergoing capability procedures is a teacher as it is unlikely that the Headteacher will have had no prior involvement.

The committee or Headteacher must hear the representations and recommendations brought by the Headteacher, line manager or governor conducting the capability evaluation, and any representations that the employee may wish to make. The governing body should also set up a separate Staff Appeal Committee to hear any appeal against a dismissal decision.

Management Guidance: Applying the procedures

1. Role of Governors

Governors should not normally be involved with a capability procedure before the dismissal stage. The exception to this is where a governor or governors are involved in considering an appeal against a warning or in a capability procedure against a

Headteacher. It is important to be prepared for the possibility of dismissal. The use of governors to hear any grievances or appeals against warnings should be limited to ensure that a sufficient number of impartial governors remain available for the dismissal and dismissal appeal committees. Normally at least three governors are required for the dismissal committee and no fewer for the appeal, but where this number is not reasonably practicable it can be reduced to two.

2. Role of Headteacher

The Headteacher may act as the line manager for an individual employee, but in any case, will take any decision to initiate the capability process. Where the Headteacher has performed both of these roles, the governing body will not delegate the initial dismissal decision to the Headteacher.

3. Role of advisers

Local Authority advisers, or other advisers with education and human resources experience, may be invited to advise those involved in capability procedures and where appropriate assist with the process, including classroom/task observation and providing support. HR involvement is advised at all formal meetings.

4. Representation at formal interview, evaluation meetings and dismissal hearing

An employee has a legal entitlement to be accompanied by a recognised trade union representative or nominated work colleague at any hearing that may result in their dismissal. If the employee's chosen representative/companion is not available at the time proposed for the interview, meeting or hearing, and the employee proposes an alternative that is reasonable and falls within 5 working days of the day proposed for the interview, the interview panel should give favourable consideration to rearranging the event to the time proposed by the employee. This would be in line with ACAS guidelines.

5. Notice

Notice of 5 working days must be given for any formal capability interview. The dates of successive evaluation meetings should be fixed at the preceding interview or meeting and notice should only be necessary if it is rearranged. Notice of at least 5 working days must be given for a staff dismissal committee or dismissal appeal hearing.

6. Support for the employee

Those monitoring the performance should offer feedback, instruction, advice and guidance to help the employee improve performance. If further training, mentoring or assistance from colleagues would be helpful, these should be arranged as soon as possible and should be organised within the timing of the procedure. Employees should be given access to Employee Assistance Programme at the outset of any procedure which discusses employee's capability. In cases where health is affected, Occupational Health should also be offered.

7. Monitoring arrangements

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

8. Written records

A written record of all meetings conducted under this procedure will be made, either by the person holding the meeting or by an appropriate person arranged by the school to take notes. The notes made in meetings with the employee and any action taken following such an interview should be set out in writing and shared with the employee. Except in agreed circumstances any formal warnings should be disregarded for future capability purposes after a specified period of satisfactory performance. These periods are 12 months for a first written warning and 24 months for a final written warning. The qualifying period for the written warning to stay on record will be made clear in the written notification of the outcome.

The Council/school processes any personal data collected during the capability procedure in accordance with its data protection policy. Any data collected is held securely and accessed by, and disclosed to, individuals only for the purposes of completing the capability procedure. Inappropriate access or disclosure of employee data constitutes a data breach and should be reported in accordance with the Council/school's data protection policy. It may also constitute a disciplinary offence, which will be dealt with under the Council/school's disciplinary procedure.

9. Staff who are absent through illness during the procedure

Sickness absence during the capability procedure, and which line managers or governors believe is likely to be long term, is covered in the key points above and should be referred immediately to Occupational Health to assess whether the employee is fit to attend relevant meetings during their period of absence. Occupational Health will need to be informed in general terms of the procedure involved. Schools must, take into account this information in considering the length of time they might reasonably be prepared to wait for the teacher's health to improve before continuing with the procedures. Short absences should not delay any part of the capability procedure. Long term absences should be managed in line with the Sickness Absence Management Policy. Reasonable steps should be made to enable the employee to attend evaluation meetings, but where the employee is unable to attend, these may proceed in their absence if delay would otherwise compromise the maximum time set aside for the procedure. In such circumstances a full account of the evaluation should be provided in the letter confirming the decision taken.

10. Disputes about the procedure

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

11. Appeals against warnings or dismissal

Appeals will be heard by the governing body's appeal panel. The appeal panel must not have had any prior involvement in the case. Appeals should normally be restricted to considering the reasonableness of the decision made, any relevant new evidence, or any procedural irregularities. An employee is entitled to be accompanied at an appeal hearing by a trade union representative or colleague. The appeal decision should be confirmed in writing and the employee told that there is no further appeal against the decision. Where the reasonableness of the decision is being questioned the test, that should apply for overturning it, is whether the decision was so unreasonable that it was one that no other decision maker, acting with proper regard to his or her responsibilities, could have chosen to take. Where monitoring would otherwise be continuing, it should not be halted while an appeal is pending.

12. Grievances

In exceptional circumstances an employee may raise a grievance about the conduct of a Headteacher, line manager or governor during the course of a capability procedure. Exceptionally it may be appropriate to suspend the procedure until the grievance can be considered. Such a delay should only be considered where there is a strong indication that the employee has been mistreated.