

# Hertfordshire County Council

## Children, Schools and Families

### Model Policies for Schools

# Model Capability Procedure for Schools

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Four Swannes have adopted this reviewed model policy effective from May 2012.



## 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 professional associations and is recommended to governing bodies for adoption.

The Capability Procedure is intended to be used for problems which are serious in themselves, or serious because they remain unresolved after normal supervision has not achieved satisfactory solutions. Many problems and difficulties can and should be resolved informally. The Headteacher should be able to demonstrate in writing that clear advice and help has 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. 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.

This procedure applies to:

- all employees of the school, including the Headteacher, except NQTs and staff still in their probationary procedure (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)
- Support Staff who are still in their probationary period (concerns should be dealt with under the Probationary Procedure)
- 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).

At every stage in the procedure, with the exception of the management period, 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.

### 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 reach the required standard must be considered.

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

Short absences should not delay any part of the formal stage 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 a satisfactory level. Employees are, therefore, expected to be committed to achieving satisfactory levels of performance.

#### 4.2 The Headteacher

In all cases, except where the Headteacher is the subject of concerns, interviews at Stages 1 and 2 of the 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.

#### 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 appeal hearings or in dismissal hearings.

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

#### 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 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 some exceptional circumstances there may not be enough 'clean' governors to form a panel at a hearing, the SSE Governance team can assist in finding Governors in such instances.

#### 4.5 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.

#### 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. 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.

## 5 MANAGEMENT PERIOD

Before embarking on the Capability Procedure, management should ensure that through normal performance management 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 (regular meetings, monitoring, objectives set, training and mentoring etc.), and
- a reasonable timescale for improvement has been set and the employee has been informed of the programme of support in writing.

## 6 THE CAPABILITY PROCEDURE STAGES

See Appendix 2 for a procedural flowchart.

Performance management will be suspended when an employee enters 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.

### 6.1 Fast Track

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.

### 6.2 Stage 1

Where performance concerns have been unsuccessfully addressed and managed using the normal management channels (see section 5), the employee should be invited to attend a meeting with their professional association/union representative or work colleague and no-one else.

6.2.1 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);
- provide the employee with a copy of this procedure;
- 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 Local Authority and will be intended to encourage improvement and, wherever possible, to avoid recourse to the next stage.

6.2.2 The employee should be made aware that at the end of the assessment 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 assessment period. Once the facts are gathered, the following three options will be considered:

- Option 1  
conclude that performance is now satisfactory, advise the employee of that in writing and take no further action;
- Option 2  
arrange a continuing programme of support and monitoring, without moving to Stage 2 of the 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 to Stage 2 of the procedure;
- Option 3  
arrange a First Formal interview. This is the start of Stage 2.

### 6.3 Stage 2

Stage 2 of the Capability Procedure commences with the First Formal Interview.

### 6.3.1 Arranging a First Formal Interview

The First formal interview at Stage 2 initiates Stage 2 of the Capability Procedure. It allows the 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 notice of the interview in writing, at least 10 working days in advance by recorded delivery or delivery by hand of:

- The purpose, time and place of the interview;
- Specific concerns, confirming that this is a formal interview under the Capability Procedure;
- A copy of this procedure (if not provided previously);
- 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, expert witness/es)
- 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 interview. The documents must be presented in hard copy and with sufficient copies for those, except witnesses, who will attend the interview.

If an employee is unable to attend a formal interview 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 interview. 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.

### 6.3.2 Conducting a First Formal Interview

Follow the guidelines set out in para 6.2.1.

### 6.3.3 Outcome of First Formal Interview

There are four possible outcomes to the first formal interview:

- Outcome 1  
Take no further action, since improvement has been satisfactory
- Outcome 2  
There has been some improvement but further support or monitoring is required through the First Assessment Period (see 7)
- Outcome 3  
Oral or first written warning (depending on the severity of poor performance), which will remain on file for 1 year from the date of entry into the formal procedure. Further support and monitoring is required through the First Assessment Period (see 7). A review meeting will be held after a pre agreed length of time where 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;
- Outcome 4  
Final written warning, which will remain on file for 2 years from the date of entry into the formal procedure. Support and monitoring will be given through the First Assessment Period (see 7) The outcome will be either that there has been sufficient improvement, or that dismissal proceedings will be started.

#### 6.3.4 Where a Warning is issued (Oral, First or Final)

The Headteacher or Chair of Governors 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 First Assessment Period;
- 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.
- Write to the employee within 3 working days of the formal interview recording the outcome and the above points. Hand-deliver the letter or send by recorded post.

#### 6.3.5 Appeal against a Warning



An employee may appeal against a warning at any stage. (see section 10 for appeals process)

## 7 FIRST ASSESSMENT PERIOD

The First Assessment Period begins from the date of the First Formal Interview at Stage 2.

The First Assessment Period should last between 4 and 20 working weeks.

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

### 7.1 First Assessment Review Meeting

At the end of the First Assessment Period, there will be a 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 three possible outcomes at this stage:

- Satisfactory Performance  
The level of performance is now satisfactory and there is confidence that it can be sustained. In these circumstances, the Capability Procedure will end with a letter from the Headteacher
- Unsatisfactory Performance (where an Oral or First Written Warning was issued previously)  
Performance continues to be unsatisfactory, in which case a first or final written warning will be issued. The employee has the right to appeal against this warning.

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.

A Final Assessment Period will take place (section 8) and a Final Evaluation Meeting will be arranged after an assessment period of 4 working weeks.

- Unsatisfactory Performance (where a final written warning was issued previously)  
Performance continues to be unsatisfactory, in which case a dismissal hearing will be arranged

## 8 FINAL ASSESSMENT PERIOD

The Final Assessment Period will last for 4 working weeks.

A Final Evaluation Meeting will take place at the end of the Final Assessment Period. This meeting will be to discuss the employee's 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:

- Satisfactory Performance  
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
  
- Unsatisfactory Performance  
If performance is unsatisfactory, a dismissal hearing will be arranged (see section 9 below)

## 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.

In arranging a dismissal hearing, 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.

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.

## 10 APPEALS

An employee may appeal against any warning given. Appeals at any stage should be made within 5 working days of the receipt of the warning 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 this case 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 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

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 subject to 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 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.

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) Discharge of specific responsibilities associated with a particular appointment 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) Organisation of the teaching or work area and management of suitable materials and equipment, including adequate course preparation;
- e) Ability to teach and/or supervise pupils;
- f) Maintenance of an adequate level of class discipline and control;
- g) Setting and appropriate marking of pupils' work;
- h) Keeping suitable records of pupils' 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.



