

**School Employment Manual**

# **Capability Policy**

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

April 2013



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## Introduction

Governors of schools with delegated budgets are required to adopt policies and procedures for dealing with capability issues for both teaching and support staff.

They are strongly advised to adopt the procedure set out in Appendix 1. This has been the subject of consultation with all recognised unions and the Local Authority believes that this represents a reasonable and fair approach to such situations, which would stand scrutiny by an Employment Tribunal or other agency.

If Governors wish to adopt a different procedure there should be consultation with relevant trade unions before it is formally adopted by the Governors. Having adopted the procedure Governors should ensure that it is made known to all existing and new employees.

This procedure is not intended to be punitive. Rather its purpose is to achieve and maintain an acceptable standard of employee competence. For this reason other than in cases of very serious incompetence, Employment Tribunals will expect an employer to exercise its powers in an incremental way which gives an employee reasonable opportunity to improve their performance to an acceptable level.

The procedure gives the major role in managing the process to the Head Teacher including all formal action up to, and including dismissal. Clearly, a problem will arise if it is the Head Teacher's competence, which is the cause of concern. In general terms, where this occurs, the Chair of Governors will undertake the role defined for the Head Teacher in these procedures. However, this is not appropriate in all cases and in these circumstances Governors are advised to consult their HR provider.

Head Teachers and Governors are **strongly advised** to seek advice and support from relevant professionals and should consult their HR provider regarding any procedural issues. In particularly contentious cases, HR providers can also support Head Teachers at formal meetings.

#### Trade Union Officials

Where formal action is being considered against a trade union official the case will be discussed with a full-time trade union officer/official in accordance with the ACAS Code of Practice. Advice in these cases will be sought from the HR provider.

### **Minimum Standards**

Every school in Lincolnshire has a duty to provide a policy that addresses the competency of all of the staff within the school. This should be done in a supportive way, giving the employee every opportunity to improve their performance and to be able to demonstrate that improvement. This policy should be used in conjunction with the appropriate Appraisal Policy (Teaching or Support Staff).

### **Roles and Responsibilities**

- **Governors**

Adopting the policy, adapting for local circumstances and monitoring its use.

Forming and serving on an Appeals Committee

- **Head Teacher**

Managerial responsibility for the implementation of the policy and being accountable for its implementation and delivery

- **Senior Leadership Team**

To be familiar with the policy; they will promote and monitor the policy actively through their teams and through their work planning process, delivery, employment practices and employee development

- **Staff**

All employees will have access to, understand and implement this policy through their work and actions, supported by team discussions and training.

- **HR Providers**

Provide advice on the application of the policy and support to the Head Teacher and Governors

### **Managing the Process**

All staff with any supervisory responsibilities should ensure that employees understand the standards of work that are expected of them and the need to identify as soon as possible any potential problems.

With appropriate support and training most issues can be dealt with using the Appraisal Scheme.

An employee should be given full opportunity to respond to any issues raised and to explain if anything is affecting his/her performance at work. All circumstances should be taken into account before proceeding further.

The employee should be supported to improve or resolve the situation as soon as it becomes apparent. This may be done purely through counselling discussion with the objective of encouragement and help.

Where a programme of additional support is being considered the following suggestions may be of help:

- in-service training
- work observation by a suitably experienced person (either from the school or external)
- modified timetable or workload for a specified period
- assistance with planning and work content
- work-sharing with more experienced person
- visits to other schools to observe good practice
- regular meetings with a mentor within the school

The above is not exhaustive and will apply to both teaching and support staff as appropriate.

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

Where targets for improvement are set they should be clearly defined with appropriate timescales. They should be revised as necessary and where possible agreed between the two parties. Targets should be SMART i.e. Specific, Measurable, Attainable, Reasonable and Time-limited.

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

Meetings between Head Teacher/managers and employees are strictly confidential to those attending and should normally be held within the employee's normal working hours.

The complete history and background of a capability case may be requested at an appeal hearing or at an Employment Tribunal. It is therefore essential that comprehensive records are made of any level of capability action. The note taker will be either the Schools Clerk to Governors or an appropriate member of the administration team. These notes will not be verbatim.

Full records of discussions including targets and timescales set must be kept and shared with the individual concerned.

Where satisfactory improvement has been made the decision will remain 'live' for a period of up to one year. If, subsequently there is deterioration in performance the Head Teacher/manager can return to that point in the procedure within the agreed timescale.

### **Sickness Absence During the Procedure**

If long term sickness absence appears to have been triggered by the commencement of monitoring or a formal capability procedure, the case will be dealt with in accordance with the school's absence policy and will normally be referred to the occupational health service to assess the appropriateness or otherwise of continuing with monitoring or formal procedures. In some cases it may be appropriate for formal procedures to continue during a period of sickness absence. However, the views of the occupational health physician will always be taken into account before a decision is reached.

### **Conditions of Service**

Conditions of Service are not affected by the application of the Capability Procedures although consideration should be given as to whether an employee should progress up the pay spine when their capability is in question. The conditions of service for both teaching and support staff allow for the withholding of increments where service has been unsatisfactory. It is strongly advised, however that this is not considered until the individual is within the second stage of the procedure.

### **Employee Representation**

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

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

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

### **Role of Governors**

Governors should not normally be involved with the capability procedure before an appeal hearing following the dismissal of an individual. Where it is the Head Teacher's capability that is in question the Chair of Governors or other appropriate Governor will assume the role of the manager.

Governing bodies need to ensure that they have a properly established capability appeal committee, the members of which are untainted by earlier proceedings. It is advised that the committee would not normally include staff governors.

The Chair of Governors should be kept informed of the progress of any case but not be given the details in case he/she is involved later at the appeal stage.

Where dismissal is being considered the decision will normally be taken by the Head Teacher unless certain circumstances apply. See Appendix 5.

### **Role of the Local Authority**

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

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

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

### **Links**

Appraisal Policy  
Disciplinary Policy

### **Further Advice**

HR Provider

Signed: \_\_\_\_\_  
Chair of Governors

Dated: \_\_\_\_\_

## **Appendix 1**

### **SCHOOLS' MODEL CAPABILITY PROCEDURE**

#### **Introduction**

A work performance/capability issue may arise when an employee is failing in a significant or persistent way, to carry out their responsibilities or duties in a satisfactory manner. This may be due to a lack of professional insight, an inability to cope with reasonable workloads or not being able to meet identified standards. Alternatively it may be due to an inability to prioritise work, a lack of aptitude for the work itself, inadequate training or a difficulty in adapting to change in the workplace (i.e. new technology).

Where an employee may be under-performing the Head Teacher or other line manager will have identified this through the appraisal process and on-going supervision. In circumstances where the Head Teacher's capability is in question the Chair of Governors must make arrangements for this to be done in consultation with the Local Authority.

#### **Objectives**

The objective of this procedure is to;

- Contribute towards the improvement of the performance and effectiveness of the school
- Ensure that the school is a fair employer, meeting all relevant legal requirements regarding any capability related decisions it may take in relation to any employee
- Support Head Teachers/managers in carrying out their responsibilities for the maintenance of high standards of work performance by all employees
- Ensure that all employees are treated in a fair, consistent and understanding manner in relation to capability issues
- Improve the standard of work performance of an individual employee, wherever necessary and practicable
- Help protect the school, its employees and service users from the consequences of poor work performance

#### **Records**

A copy of the discussion note and letter to the employee should be kept by the Head Teacher/manager and placed in the employee's "supervision" file where this process is used. If individual "supervision" files are not used, it should be placed in a designated confidential and secure location within the school. It should not be placed in the employee's personal file. Only letters relating to the formal procedure should be on the employee's personal file and should be removed when the cases are no longer "live".

#### **Serious incapability**

In exceptional cases where one performance error or defect has serious consequences (i.e. if it results in the serious jeopardy of the health and safety of pupils or other employees) the principles/procedure in this policy will not apply. Instead the principles/procedure for gross misconduct as outlined in the Disciplinary Policy should be followed. This should include a full investigation.

### **Initial Stage**

Initial identification of an employee's apparent poor performance should be raised at normal regular supervision or performance management meetings in accordance with the School's Appraisal and Performance Procedure. It is expected that the majority of performance related issues will be resolved promptly and informally using this procedure.

If the outcome of that procedure is that unsatisfactory improvement has been made then the employee will be informed that they will proceed to the first formal stage of the Capability Procedure.

### **First Formal Stage**

The first step in the formal process is a Formal Capability Meeting. A sample letter (letter 1) is attached

The employee will be sent a copy of the Capability Procedure.

The employee may be accompanied by a work colleague, recognised trade union representative, or a recognised trade union officer.

The Head Teacher/manager may also be accompanied by their HR provider or other person offering management support as appropriate.

If following the Appraisal procedure there is unsatisfactory improvement then formal targets will be discussed at the First Formal Meeting (or a further meeting if appropriate) and a date will be set for review allowing at least 4 working weeks. Support and training will again be agreed and provided as appropriate and will be confirmed in writing by the Head Teacher/manager.

Following this period the employee will be reminded of the review date with at least 5 school days' notice (see sample letter 3). Again both parties may be accompanied as appropriate.

### **Review**

At the review there will be three possible outcomes:

1. satisfactory review and no further action required
2. significant improvement made but extension of review period required
3. unsatisfactory review and progression to the second formal stage.

Where previous meetings have been held by a manager, it is important that the Head Teacher attends this meeting if prior to the review it is felt that satisfactory improvement has not been made and that progression to the second stage is a likely outcome.

Where the Head Teacher decides to progress to the second stage he/she will inform the Chair of Governors before issuing the letter to the individual confirming the decision (see sample letter 3). In very serious cases the Head Teacher may consider progressing immediately to the third formal stage.

The decision will remain 'live' for a set period of time (see Guidance Notes) and therefore if satisfactory improvement proves only to be of a temporary nature then the Head Teacher has the option of returning immediately to this point in the procedure.

Attached to the letter will be the targets that are to be met as discussed in the review meeting (or further meeting if appropriate), the level of support that will be provided and the timescale in which improvement needs to be achieved. This needs to be a period of at least 4 working weeks. A date for review will also be included.

### **Second Formal Stage**

The second formal stage will commence at the review meeting.

Again, there will be three possible outcomes:

1. satisfactory review and no further action required
2. significant improvement made but extension of review period required
3. unsatisfactory review and progression to the third formal stage.

Where the Head Teacher decides to progress to the third formal stage he/she will inform the Chair of Governors before issuing the letter confirming the decision (see sample letter 3).

The letter will include specific targets and the level of support that will be provided and will state that, if targets are not met, there is the possibility of dismissal. A date for review will be set with a minimum period of 4 weeks.

### **Third Formal Stage\***

The third formal stage will commence at the review meeting.

Again, there will be three possible outcomes:

1. satisfactory review and no further action required
2. significant improvement made but extension of review period required
3. dismissal on the grounds of capability

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

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

For community, voluntary controlled, community special and maintained nursery schools, following any initial dismissal determination, notification of the decision must be sent to the Authority who will within 14 days issue a termination of employment letter. If a subsequent appeal reverses the dismissal decision the termination notice will be rescinded. See sample letter 4a.

For foundation, voluntary aided and foundation special schools, following any initial dismissal determination, notification of the termination of the contract will be issued by the school. If a subsequent appeal reverses the dismissal decision the termination notice will be rescinded. See sample letter 4b.

The employee will be given ten working days from the announcement of the decision to lodge an appeal with the Clerk to the Governors. The letter from the employee **must** set out the basis for any appeal (see i to iii below). The employee will be given a least one working week's notice of the date of an appeal hearing.

The appeal process will consider dismissal decisions on one or more of the following grounds:

- i. The procedure: the procedure was not followed.
- ii. The decision: the conclusions of the Head Teacher/Disciplinary Committee were unreasonable.
- iii. There is relevant new evidence.

***\* If alternative arrangements have been made (see appendix 5) then the review meeting will be replaced by a formal capability hearing before a committee of governors with the procedure the same as that of an Appeal Hearing. The employee will still have the right of appeal to the Capability Appeal Committee.***

#### **Capability Appeal Meeting**

The Capability Appeal Committee must be a properly constituted committee of Governors. Members of the committee will be untainted by earlier proceedings. The committee will normally be made up of three Governors, one of whom will be nominated as Chair.

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

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

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

## **Appendix 2**

### **Sample Letters**

#### ***Sample Letter 1 sent by Head Teacher/Manager to the employee.***

Dear \_\_\_\_\_

#### **FORMAL CAPABILITY MEETING**

I am writing to inform you that I have concerns in respect of your capability as \_(job title)\_\_\_\_\_ at this school. This follows the processes we have undertaken in relation to your appraisal and on-going supervision.

In order to address these concerns I am writing to invite you to a meeting at \_\_\_\_\_(time) on \_\_\_\_\_ (date) to be held in \_\_\_\_\_ (place). Also present at the meeting will be \_\_\_\_\_

The aim of the meeting is to discuss my concerns and to agree with you a plan of action in order for you to achieve the required standard of performance. This will include an appropriate timescale with a future date for review.

You may be accompanied to the meeting by a work colleague, recognised trade union representative, or a recognised trade union officer

This will be a first formal meeting under the School's Capability Policy with the intention of finding a constructive way forward. I enclose a copy of the School's Capability Procedure.

Yours sincerely

#### ***Sample letter 2 sent by the Headteacher to the employee***

Dear \_\_\_\_\_

#### **FORMAL CAPABILITY MEETING**

Following the period of monitoring your capability I am writing to invite you to a formal meeting at \_\_\_\_\_ (time) on \_\_\_\_\_ (date) in \_\_\_\_\_(place). Also present at the meeting will be \_\_\_\_\_

At the meeting a review will take place regarding the targets that have been set and I need to inform you that during the course of the meeting I may consider moving the matter into the second/third formal stage of the procedure.

You may be accompanied to the meeting by a work colleague, recognised trade union representative, or a recognised trade union officer

Yours sincerely

***Sample letter 3 sent by Headteacher to the employee***

Dear \_\_\_\_\_

**CAPABILITY ISSUE –SECOND/FINAL REVIEW (Delete as appropriate)**

Following the formal meeting held on \_\_\_\_\_(date) attended by \_\_\_\_\_(names) I am writing to confirm my decision to progress to the second/ final (delete as appropriate) formal stage of the procedure and to inform you that your capability as \_\_\_\_\_ at this school must improve to an acceptable and sustained standard.

I need to point out that failure to improve may result in your dismissal from this school. (Insert if progressing to final stage).

Please find attached the targets that have been set in order for you to improve including the timescale for this and support that will be provided.

Yours sincerely

Head Teacher

***Sample letter 4a sent by the Head Teacher to the employee following dismissal decision– Community, voluntary controlled, community special and maintained nursery schools .***

Dear \_\_\_\_\_

**CAPABILITY ISSUE – FINAL REVIEW**

Following your final review I am writing to confirm my decision to dismiss you on the grounds of your lack of capability as \_\_\_\_\_ at this school.

I have forwarded a copy of this letter to the Director of Children’s Services to formally request that your employment be terminated on these grounds with effect from \_\_\_\_\_.

You have the right to appeal against this decision to a committee of governors and if you wish to exercise this right you should do so in writing, setting out your grounds of appeal to the Clerk to Governors within 10 working days of the announcement of the decision. The appropriate arrangements will then be made.

Yours sincerely

Head Teacher

***Sample letter 4b sent by the Head Teacher to the employee following dismissal decision– Foundation, voluntary aided and foundation special schools .***

Dear \_\_\_\_\_

**CAPABILITY ISSUE – FINAL REVIEW  
TERMINATION OF YOUR EMPLOYMENT**

Following your final review I am writing to confirm that my decision to dismiss you on the grounds of your lack of capability as \_\_\_\_\_ at this school.

Therefore, I am writing to terminate your appointment as \_\_\_\_\_ on \_\_\_\_\_ on the grounds of capability. This date provides you with the appropriate period of notice in accordance with your terms and conditions of employment and the requirements of employment legislation.

You have the right to appeal against this decision to a committee of governors and if you wish to exercise this right you should do so by writing, setting out your grounds of appeal to the Clerk to Governors within 10 working days of the announcement of the decision. The appropriate arrangements will then be made for a hearing before governors.

Yours sincerely

Head Teacher

## **Appendix 3**

### **Capability Appeal Committee Meeting Procedure**

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

## Appendix 4

### CAPABILITY PROCEDURE FLOW CHART

#### Performance Appraisal stage

Concerns raised by Headteacher/manager



Targets agreed and support provided.



Review period set (up to one term)



Review of performance against targets



#### First formal stage

If no improvement set targets and provide support



Review period set (at least 4 weeks)



Review of performance against targets



If insufficient improvement progress to second formal stage



#### Second formal stage

Re-set targets and provide support



Review period set (at least 4 weeks)



Review of performance against targets



If insufficient improvement progress to third formal stage



#### Third formal stage

Review of performance against targets



If insufficient improvement dismissal from the school by the Authority or school



#### Capability Appeal hearing



Initial dismissal decision upheld or notice rescinded

## Appendix 5

### **CAPABILITY PROCEDURE - ALTERNATIVE ARRANGEMENTS**

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

The Capability Procedure therefore delegates this responsibility to the Head Teacher although in certain circumstances in accordance with the provisions of the Education Act 2003 the Governing Body should apply alternative arrangements if the process reaches the potential dismissal stage.

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

The circumstances are as follows:

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

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