



# **CAPABILITY PROCEDURE**

**For School Based Employees**

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## **Important Information on the application of the procedure**

The capability procedure has been recommended by Central Bedfordshire Council for its employees following collective consultation with the Trade Unions and Professional Associations, and should the procedure not be followed appropriately or an alternative procedure adopted by the school, Central Bedfordshire Council may not accept any liability for any subsequent legal action taken by an employee.

### **1. PURPOSE**

- 1.1 This procedure is designed to help and encourage all employees within schools with delegated budgets to achieve and maintain an acceptable standard of performance.
- 1.2 This procedure provides a fair and consistent approach to supporting employees in fully performing their duties and to address issues of under-performance on a formal basis. It is also designed to deal with those cases where, despite normal management support, the employee remains lacking in some area of ability, skill, competence or knowledge and is therefore unable to carry out the required duties to an acceptable standard.
- 1.3 Lack of capability is defined as a situation in which an employee fails to perform his or her duties to a professionally acceptable standard. The required standard should be appropriate to the level of the job and the skills and experience reasonably expected of an individual in that position.
- 1.4 It is the Headteacher/ Governor's responsibility to set appropriate performance standards for all employees and to ensure that each member of staff has the ability, knowledge, guidance and support to perform his/her job to an adequate standard and in accordance with his/her job description. The required standards for those employed on Teachers terms and conditions are set by the school and other relevant professional organisations (for example, part 7 of the School Teachers' Pay & Conditions document – Contractual Framework for Teachers) and will form part of the standards for these groups of staff and will be managed in accordance with the schools Performance Management Policy.
- 1.5 The Headteacher will decide whether to invoke the Capability Procedure in consultation with the employee's line manager or supervisor following an investigation of the professional problems and after seeking advice from their HR provider.
- 1.6 With regard to teaching staff it is possible that evidence from the appraisal process or subsequent reviews will inform the judgement about whether to suspend the appraisal procedure and move to the capability procedure.
- 1.7 In the case of long term absence, where the capability procedure has been invoked on the grounds of poor performance, the capability procedure on the grounds of ill health will run in parallel. Special provisions on dealing with absence including those relating to ill health are set out in a separate policy in Chapter 4 of the Personnel Handbook.
- 1.8 The procedure is to be applied when an employee is unable to carry out the duties of his or her post because of lack of capability as assessed by reference to skill, competence, aptitude or any other physical or mental quality where the person is not willfully under performing. The evidence from the appraisal review will be a key element in deciding when the capability procedure should be invoked.

- 1.9 **All members of staff subject to the capability procedure should be strongly advised to contact their trade union or professional association for advice.**
- 1.10 Headteachers who plan to initiate action under the policy are advised to consult their HR provider before proceeding and to obtain HR support.
- 1.11 Concerns about performance in the NQT induction year should be raised in the first instance with the appropriate Local Authority Officer supporting NQTs as well as with the Central Bedfordshire Council's Statutory Schools HR Manager, Schools and the Schools HR Provider. NQTs should also be advised to contact their trade union or professional association.
- 1.12 The Headteacher may delegate the management of this procedure to a person who is either a deputy Headteacher or another appropriate senior member of staff.

## **2. SCOPE OF THE PROCEDURE**

- 2.1 The procedure applies to all school based staff. If there are capability concerns regarding an NQT, please refer to this document:

[https://www.education.gov.uk/consultations/downloadableDocs/Statutory%20guidance%20for%20the%20induction%20of%20NQTs%20\(England\)%20-%20Consultation%20Draft%20\(v2\).pdf](https://www.education.gov.uk/consultations/downloadableDocs/Statutory%20guidance%20for%20the%20induction%20of%20NQTs%20(England)%20-%20Consultation%20Draft%20(v2).pdf)

- 2.2 In the case of the capability procedure being applied to a Headteacher the governing body of the school should manage this procedure with advice from their HR provider and should also inform the Council's Statutory Schools HR Manager.
- 2.3 The procedure applies to employees who are trade union and professional association representatives but no action should be taken beyond the informal stage until the circumstances of the case have been discussed with a senior or regional trade union or professional association representative and a representative from the HR Schools Team of the Council.

## **3. PRINCIPLES**

- 3.1 The employee will be given the opportunity to explain his/her view of his/her performance at all stages of the procedure.
- 3.2 The Headteacher/ Governing Body must ensure that when undertaking any Capability procedure, no employee is disadvantaged on the basis of a protected characteristic as per the [Equality Act 2010](#).
- 3.3 The employee has the right to be accompanied by a trade union/professional association representative or work colleague (the employee chooses which) at all formal stages of this procedure. If the representative cannot attend on the proposed date the employee can suggest an alternative time and date so long as it is reasonable and is not more than five working days after the original date. The five day time limit may be extended by mutual agreement.
- 3.4 Meetings associated with the procedure will be postponed once on the grounds of self certified or medically certified illness. The meeting may proceed in the absence of the employee if the delay would otherwise compromise the maximum time set aside for the procedure. In such circumstances a full account of the outcomes of the meeting will be provided to the employee and the employee's representatives. The employee will be allowed to send a trade union or professional association representative or work colleague to attend meetings in their absence due to

sickness.

- 3.5 If an employee fails to attend an arranged meeting for reasons that are outside his/her control and unforeseeable when the meeting was arranged the meeting will be rearranged in the first instance. If the reason for non attendance was due to circumstances that the line manager judges were reasonably foreseeable or within the employee's control then the meeting will continue in the employee's absence.
- 3.6 The employee shall be given a minimum of five working days notice (excluding bank holidays) together with any relevant documentation prior to any meetings associated with this procedure into the formal procedure (but see paragraphs 3.8 to 3.9 below).
- 3.7 Normally the period given for improvement will be no more than two terms after entry into the formal procedure (but see paragraphs 3.8 to 3.9 below).
- 3.8 Meetings might determine that where the capability issue relates to specific responsibilities, consideration should be given to the reallocation of these duties with appropriate consequences for pay (no safeguarding payments will be applicable in these circumstances).
- 3.9 In extreme cases where the requirements of the service do not permit any delay, where pupils' education is jeopardised or where performance has seriously deteriorated, not more than four weeks will be given for the employee to demonstrate a satisfactory improvement from the date of the first written performance warning. In such cases it may also be deemed necessary to miss one or more stages of the capability procedure as appropriate. Headteachers' should seek the advice of their HR provider in such cases.
- 3.10 Willful failure to comply with clear advice and instruction or negligence which involves a measure of personal blame and instances of lack of capability and misconduct together will be dealt with under the conduct procedures.
- 3.11 Where it appears that the employee has committed a single error and the actual or potential consequences of that error are so serious as to make it impossible to allow the employee to continue in employment the gross misconduct provisions of the conduct procedure will apply.
- 3.12 If performance does not improve sufficiently to meet the targets set, yet the Headteacher considers that there has, nonetheless, been a significant improvement, consideration can be given to extending the time allowed to reach the desired standard before moving onto the next stage of the process and consideration may be given to a different balance of duties or an alternative post. This will take place in consultation with the employee and can occur at any stage in the procedure.
- 3.13 If performance improves to the extent that this procedure is suspended but then deteriorates again within the duration of a 'live' performance warning this procedure may be reinstated at the same point in the process as previously reached.
- 3.14 The employee has the right to appeal against any written performance warnings that may be issued. The appeal process will run concurrently with subsequent stages of the procedure. Appeals must be submitted within five working days of receipt of the letter confirming the action taken. Appeals should be made in writing to the Headteacher stating the grounds for appeal. The appeal will be heard by the appropriate Panel of the governing body or Headteacher (if they have not been involved in the process).

- 3.15 Under the Education Act 2002 the governing body can delegate the initial decision to dismiss to the Headteacher. The School Staffing Regulations 2003 (in accordance with Sections 35 and 36 of the Education Act 2002) allow that the Headteacher should have the delegated responsibility to make the initial decision to dismiss following which there is an opportunity for the employee to appeal to a panel of governors. In relation to the capability procedures this stage comes after the Final Written Performance Warning. Any decision to delegate responsibility for staff dismissals to the Headteacher should be considered by the whole governing body and formally agreed and minuted by them.
- 3.16 If the governing body decide not to delegate this responsibility it will be necessary to establish a Panel of ideally three governors and delegate to them the initial decision to dismiss (or determine any other appropriate outcome of the capability procedure).
- 3.17 It is essential when an investigation commences that the employee and their trade union or professional association representative are provided with a clear statement as to the investigation process (i.e. who will conduct this) and who will make the judgement with regard to the initial decision to dismiss (or other appropriate outcome). This can be done in the form of a meeting with the employee and their representative or a letter of confirmation. For clarity, the Headteacher must not both investigate and make any judgement with regard to the initial decision to dismiss.
- 3.18 Any informal action taken should not be formally documented. However, the immediate supervisor should retain their own brief notes, together with any written comments that may be made by the employee. These should be disregarded after a period of 6 months. Informal notes should indicate details of any agreed action/assistance (which may include training or other appropriate action); and timescales in which the employee is expected to improve their performance. A review date should be arranged for a future date and during that review, an assessment of their performance must be undertaken, at which point the decision may be made to extend the review period or to instigate formal capability proceedings.

#### **4. Stage 1 - First Formal Meeting**

- 4.1 It is not intended that the capability procedure should replace the normal interchange between the immediate supervisor and a member of staff in the day to day running of the school or department whereby comments may be made informally. Concerns are likely to be raised when reviewers feed back with regard to evidence obtained as part of the appraisal process.
- 4.2. In the event of a more serious or ongoing concern relating to performance, the Headteacher should meet with the employee to discuss the matter.
- 4.3 A letter summarising the concerns, indicating the date, time and location of the meeting and reminding the employee that the next meeting could result in a performance warning in accordance with the procedure should be sent at least five working days prior to the meeting. A copy of the capability procedure should be sent with the letter and the employee should be reminded of their right to be accompanied to the meeting by a trade union or professional association representative.

The purpose of the meeting will be to establish:-

- The appraisal or the informal process is suspended and the capability procedure invoked

- That the employee is fully aware of the standards required
  - That the agreed standards have been set at a reasonably attainable level
  - Whether the context in which the employee works has altered significantly
  - That the volume of work is reasonable
  - Whether poor performance is a training issue to be addressed
  - The resources and equipment available are appropriate
  - What support will be given to the employee
  - Timescale for this stage
- 4.4 At this meeting, the employee should be given the opportunity to explain any extenuating circumstances that have led to the concerns regarding their performance.
- 4.5 A system of supporting and advising the employee and monitoring the achievement of agreed targets and standards must be established. Support may take the form of training, visits to other departments or schools, or in some cases it may be appropriate to employ the services of a school improvement adviser consultant or an adviser from an appropriate agency. In the case of teaching staff this may include classroom observation and feedback.
- 4.6 A record must be kept of the agreed targets, support to be provided and timescales for improvement. A copy of this must be given to the employee. Timescales may vary, depending on the complexities of the job and the level of support/assistance required. Guidelines are given in Appendix 1. The employee should also be advised of the next stage in the process as set out in paragraph 5 below.
- 4.7 At the end of the review period a meeting to review performance will take place between the Headteacher and the employee. Five working days notice must be provided of this meeting.
- 4.8 The possible outcomes are detailed below:-
- Performance has improved satisfactorily and targets have been met in which case no further action will be required. This will be confirmed to the employee in writing. The appraisal process will resume; or
  - Significant improvement has been made, but the review period will be extended to allow the employee additional time to meet all the targets set. The appraisal process continues to be suspended;
  - The appraisal process continues to be suspended because there has been unsatisfactory improvement to performance in which case the employee will need to be advised that a First Written Performance Warning is now being issued and the process is immediately moving onto Stage 2.
- 4.9 Employees should also be advised that they have the right of appeal against any written performance warning imposed.
- 4.10 In the case of unsatisfactory improvement the employee should be advised that if performance has not improved by the next review meeting a Final Written Performance Warning may be issued. The Headteacher will consider whether the targets set need to be amended in discussion with the employee and whether additional forms of support may be appropriate to help the employee achieve the standard required.
- 4.11 A date will be set for the next review meeting. A letter will be sent to the employee within five working days detailing the outcome of the meeting.

## **5. STAGE 2 - SECOND FORMAL MEETING**

- 5.1 At the end of the second review period a meeting to review performance will take place between the Headteacher and the employee. Five working days (excluding Bank Holidays) notice must be provided of this meeting.
- 5.2 There are several possible outcomes as detailed below:-
- Performance has improved satisfactorily and targets have been met in which case no further action will be required. This will be confirmed to the employee in writing. The appraisal process will resume; or
  - Significant improvement has been made, but the review period will be extended to allow the employee additional time to meet all the targets set. The appraisal process continues to be suspended;
  - Unsatisfactory improvement to performance in which case the employee will be advised that a Final Written Performance Warning is now being issued. The employee should be advised that if performance does not improve by the next review a Capability Hearing may be scheduled that may result in the employee's dismissal.
- 5.3 The employee should also be advised that they have the right of appeal against any written performance warning imposed.
- 5.4 The Headteacher will consider whether the targets set need to be amended in discussion with the employee and whether additional forms of support may be appropriate to help the employee achieve the required standard of performance.
- 5.5 A timescale will be set for the review period and a date set for Stage 3 of the procedure - Final Formal Meeting (Capability Hearing). A letter will be sent to the employee within five working days detailing the outcome of the meeting.

## **6. STAGE 3 - FINAL FORMAL MEETING (Capability Hearing)**

- 6.1 At the end of the third review period a meeting to review performance will take place between the Headteacher and the employee. Five working days' notice must be provided of this meeting.
- 6.2 There are several possible outcomes as detailed below:-
- Performance has improved satisfactorily and targets have been met in which case no further action will be required. This will be confirmed to the employee in writing. The appraisal process will resume.
  - Significant improvement has been made but the review period will be extended to allow the employee additional time to meet all the targets set. The appraisal process continues to be suspended.
  - Unsatisfactory improvement to performance – the employee will be advised that as a final written performance warning has already been issued a meeting of the appropriate Panel of the governors will now be convened.

### **6.3. CAPABILITY HEARING**

- 6.4 The Procedure for the Capability Hearing is detailed at Appendix 4.



- 6.5 The Capability Hearing will be with either the Headteacher or the Panel (see paragraph 3.16). The employee must be notified in writing and be given five working days ) notice of the hearing. The employee should be notified of the right to be accompanied by a trade union or professional association representative or work colleague.
- 6.6 Where the employee is to be represented by a recognised trade union or professional association, the date of the hearing should be a mutually convenient one. The employee can request a delay of up to five working days if necessary.
- 6.7 Evidence in connection with the employee's capability which has been collected during the previous stages of the capability procedure and the performance management process will be admissible as part of the proceedings and should be shared with all parties at least ten working days before the Hearing.
- 6.8 If the Headteacher or employee proposes to call witnesses to give evidence at the hearing, their identity should be disclosed to the other side at least ten working days in advance, unless exceptional circumstances prevent this.
- 6.9 The employee and Headteacher/panel of governors will receive advance copies of written statements to which reference will be made at the hearing. It is preferable that the authors of statements attend the hearing as a witness.
- 6.10 The Hearing will be postponed once on the grounds of self certified or medically certified illness. With the agreement of the employee the Hearing could go ahead in their absence. Where there is ongoing absence due to ill-health advice may be sought from the schools Occupational Health provider on the fitness of an employee to attend a Hearing.
- 6.11 Where the school is a community, voluntary controlled, community special or maintained nursery school and there are serious concerns relating to performance against the Headteacher, or any other member of staff where dismissal may be a possible outcome (see 6.12), a representative from Central Bedfordshire Council's Schools HR Statutory Services Team must be invited to accompany the Headteacher or Panel as a representative of the Director of Children's Services. Failure to be accompanied will be viewed by the Council as "acting unreasonably" in the meaning of the Education Act.
- 6.12 There are several possible outcomes to the Hearing as detailed below:-
- Performance has improved satisfactorily and targets have been met in which case no further action will be required. This will be confirmed to the employee in writing. The performance management process will resume; or
  - When considering a decision to dismiss the Headteacher or the governing body, as appropriate, may decide to issue a further Written Performance Warning (on the same terms) or :
  - The hearing might determine that where the capability issue relates to management duties rather than classroom teaching, consideration should be given to the reallocation of duties with appropriate consequences for pay.
  - The Panel may determine that the employee should no longer work at the school on the grounds of capability if he/she is not performing adequately. If an employee is dismissed as a result of the hearing they should be advised that the Headteacher will make a referral to the Department for Education.
  - Employees should also be advised that they have the right of appeal against their

dismissal.

- 6.13 The employee will be provided with written confirmation of the outcome of the Capability Hearing, together with details of their right to appeal, within five working days of the conclusion of the hearing.

## **7. APPEALS**

- 7.1 An employee may lodge an appeal against any Formal Warning issued under this procedure. Appeals must be submitted in writing to the appropriate person within five working days of receiving the written confirmation. Employees should clearly state their grounds for appeal.

- 7.2 The Procedure for the Capability Appeal Hearing is detailed in Appendix 4.

## **8. VARIATIONS**

- 8.1 The following variations in action may be appropriate in certain circumstances:-

- When considering a decision to dismiss the Headteacher or the governing body, as appropriate, may decide to issue a further Written Performance Warning (on the same terms) and extend the warning on file.
- Redeployment to an alternative post in the school, with appropriate adjustments to terms and conditions of service.
- In cases where the incapability relates to a management role the sanction may include the withdrawal of allowances/ responsibilities specifically related to an area of responsibility (for example, a teaching and learning responsibility payment for a teacher). No safeguarding relating to the withdrawal of allowances will be payable
- Provision is available within the procedure for warnings up to and including a Final Written Performance warning to be issued at any stage from paragraph 4 onwards. Should a Final Written Performance warning be given under this provision, a review period of up to 4 weeks should be established. This provision is more likely used in extreme cases (where, for example the pupils' education is jeopardised or the health and safety of pupils was in jeopardy). The review period will need to reflect the targets set.

## **9. TIMESCALES AND WARNINGS**

### **9.1 First Written Performance Warning**

The first written warning will remain live on file for a period of twelve months. The warning will be disregarded for the purpose of recommencing the capability procedure after the twelve month period has elapsed.

In normal circumstances the employee will be allowed between four weeks and eight weeks to demonstrate improvement in performance and meet the targets set.

### **9.2 Final Written Performance Warning**

The final written warning will remain live on file for a period of twelve months. The warning will be disregarded for the purpose of recommencing the capability procedure after the period of twelve months has elapsed.

In normal circumstances the employee will be allowed between four weeks and

eight weeks to demonstrate improvement in performance and meet the targets.

### 9.3 **Dismissal**

Dismissal will be with pay in lieu of notice. The notice will run from the date of the initial decision to dismiss.



**Appendix 1**

**Performance Targets & Support**

**Employee: (Name)**

**Date of Meeting:**

**Attendees:**

**Implementation of capability procedure**

- \* Performance Management procedure is suspended and the capability procedure invoked
- \* Support available is reasonable within school / LA resources and is provided in accordance with the timescales

**Review of performance**

It was agreed by all parties that appropriate targets, supports and review dates had been set in accordance with the Capability Procedures.

<b>Agreed Level of Achievement / Target for Employee</b>	<b>Support to be provided by School</b>	<b>Success Criteria (details of criteria to be assessed to determine if targets have been met)</b>	<b>Review Date (Updates)</b>

Employee's signature ..... Date: .....

Employer's signature ..... Date: .....

## Appendix 2

### NOTES OF GUIDANCE ON THE CAPABILITY PROCEDURE

- 1.1 Issues of capability should be distinguished from issues of conduct. Issues of conduct usually involve a significant measure of personal responsibility and should be dealt with using the conduct procedure. (See Chapter 4, Section 1 of the Personnel Handbook). Issues of capability could describe a situation stemming from lack of skill, aptitude or experience.
- 1.2 Issues of capability should also be distinguished from issues of disability.
- 1.3 Consideration should also be given to personal reasons which may have a bearing on capability in assessing an appropriate approach to the issues of concern. Advice on health issues may be obtained via the schools Occupational Health provider.
- 1.4 Headteachers are encouraged to contact their HR provider in determining how best to approach individual issues of capability at either informal or formal stages.
- 1.5 The scheme refers to the Headteacher but this may mean any senior member of staff.
- 1.6 Throughout the procedure whether formal or informal, staff should be encouraged to seek the support of a trade union or professional association representative. Their representative may be present at any meeting, formal or informal occasioned by the capability procedure. Union involvement throughout brings experience and benefits to the process.
- 1.7 Except where paragraphs 3.8 to 3.10 of the procedure apply, an employee will not be dismissed under the capability procedure unless at least one warning has been given with the opportunity to improve as described in this procedure.
- 1.8 Headteachers should regularly monitor and assess individual performance against the requirement of each post. This monitoring is part of good day to day management and it should be possible, as part of this process, to identify any capability issues at an early stage. As a general principle all problems should be dealt with carefully but promptly. The job description should be examined to ensure that the standard required from the individual is realistic, that sufficient training has been given and that the volume of work is reasonable. The individual should be provided with a reasonable and realistic opportunity of succeeding in the post. It would be helpful to keep a record of all monitoring. A regular opportunity should be found to talk with staff when monitoring has been undertaken.
- 1.9 With regard to teaching staff, it must be recognised that the implementation of the capability procedure results in the suspension of the performance management process. This might have implications for the pay of the individual teacher and it must be recognised, therefore, that using the capability process is a serious and significant step.
- 1.10 Governors will have a specific role in accordance with the capability procedure and care must be taken not to involve them with details of the issues at the early stages of the process.

- 1.11 It is essential when the process commences that the employee and their trade union or professional association representative are provided with a clear recorded statement of the performance concerns and who will determine the outcome to the process. This could be in the form of a note of the meeting with the employee and their representative with a follow up letter of confirmation. The employee should be made aware that the procedure could result in their dismissal.
- 1.12 If governors are to be involved in the formal stage of the process (a Hearing or an Appeal) the Headteacher must apply the procedures without their involvement until the appropriate procedural point (eg. If any governor is prematurely involved this may preclude him or her from being involved in the further stages of the procedure).
- 1.13 Where the Headteacher feels there is cause for concern about the professional competence or performance of a member of staff he or she shall orally inform the employee of this concern and encourage them to seek the advice of their trade union or professional association. A copy of the capability procedure should be given to the employee. It is strongly recommended that the schools HR provider should be involved in the process as early as possible.
- 1.14 Meetings under the capability procedure should normally be held during the school working day.
- 1.15 Where it is deemed appropriate to observe an employee the Headteacher or another senior member of staff may carry out the observation. The observation should not be too frequent so as to be oppressive but sufficient for the purpose of effective evaluation and should normally be followed by feedback (the framework required by the Performance Management Regulations would be helpful in this regard). It would be exceptional for more than one member of staff to be engaged in the observation at any one time. Observation may be undertaken by professionals external to the school where deemed appropriate by the Headteacher.
- 1.16 Any targets that are set must be realistic in relationship to the timescales. Efforts should be made to ensure that meetings are timed to be mutually convenient for all parties.
- 1.17 Communication with the employee by the Headteacher should convey the purpose of the procedures and the efforts that are being made to assist the member of staff to improve his or her performance. As the concept of reasonableness is important throughout the procedure it is helpful to endeavour to agree realistic targets and timescales for their achievement at each stage. Clear performance criteria against each target will also be helpful in ensuring that members of staff understand what is required to be successful at the point of review.
- 1.18 Support and training will need to be identified within the resources available to the school. Where possible this should include, for example, an opportunity to observe other teachers, receive assistance with planning and the provision of a mentor. The employees view should be sought as to what support or training he or she believes would be helpful. In setting targets consideration must be given to the timescales within the procedure which would be reasonable for the employee to attain the targets set.
- 1.19 Where an employee wishes to appeal against a formal sanction the grounds of the appeal should be clearly stated by the employee in stating the request to appeal. Employees will continue to have the right to be represented at hearings and appeals by their trade union or professional association representative or a work colleague.

- 1.20 If, having exhausted the procedure a decision is taken to dismiss it would not be expected that the employee would carry out further duties while any period of notice is being served. The notice period will run from the date of the hearing where the initial decision to dismiss was made.
- 1.21 Where a member of staff involved in Capability Procedure is an official representative of a recognised trade union (including a school representative) no action should be taken beyond the informal procedures until the circumstances of the case have been discussed with the relevant full time trade union official or County representative. In such cases governing bodies may wish to seek the advice of the schools HR provider or the authority as early as possible. Normal standards should, however, be applied to the capability procedures for trade union representatives.
- 1.22 In accordance with the 2016 School Teachers' Pay and Conditions document, consideration may be given to withholding a Teacher's pay progression where there is clear evidence of unsatisfactory performance as a result of a capability procedure.

## Appendix 3

### EMPLOYEE GUIDANCE ON THE CAPABILITY PROCEDURE

- 1.1 The capability procedure is applied to an employee who is unable to carry out the duties of his or her post because of lack of capability as assessed by reference to skill, competence, aptitude, or any other physical or mental quality where the person is not willfully under performing. Evidence from performance management review or appraisal can be used during the capability procedure.
- 1.2 All members of staff subject to the capability procedure are strongly advised to contact their trade union or professional association representative for advice.
- 1.3 The scheme refers to the Headteacher but this may mean any senior member of staff.
- 1.4 The capability procedure is designed to help and encourage all employees within schools with delegated budgets to achieve and maintain an acceptable standard of performance. The procedure provides a fair and consistent method of dealing with alleged failures to achieve the expected standards.
- 1.5 Lack of capability is defined as a situation in which an employee fails to perform his or her duties to a professionally acceptable standard. A required standard should be appropriate to the level of the job and the skills and experience reasonably expected of an individual in that position. There is a responsibility on Headteachers and managers to ensure that members of staff have the ability, knowledge, guidance and support to perform their job to an adequate standard and in accordance with the relevant job description.
- 1.6 Employees will be given an opportunity to explain their view of performance at all stages of the procedure. Employees have the right to be accompanied by a trade union or professional association representative or a work colleague at any stage of the procedure (paragraph 4.2 onwards). If the representative cannot attend on the proposed date the employee can suggest an alternative time and date so long as it is reasonable and is not more than five working days after the original date (the five day time limit can be extended by mutual agreement).
- 1.7 Meetings associated with the procedure will be postponed once on the grounds of a self certificated or medically certified illness. Meetings will only proceed in the absence of the employee if delay would otherwise compromise the maximum timescales set aside for the procedure. In such circumstances a full account of the outcomes of the meeting will be provided to the employee and the employee's representatives. The employee will be allowed to send a trade union or professional association representative or work colleague to attend meetings in their absence due to sickness.
- 1.8 If an employee fails to attend an arranged meeting for reasons that are outside his or her control and are unforeseeable when the hearing was arranged then the hearing will be rearranged in the first instance. If the reason for non attendance was due to circumstances that the manager judges were reasonably foreseeable and within the employee's control then the hearing will continue in the employee's absence.
- 1.9 Employees will be given a minimum of five working days notice (excluding bank holidays) together with any relevant documentation prior to meetings associated with the procedure.



- 1.10 In extreme cases where the requirements of the service do not permit any delay, where pupils' education is jeopardised or where performance has seriously deteriorated not more than four weeks will be given for the employee to demonstrate a satisfactory improvement from any Written Performance Warning. In such cases it may also be deemed necessary to miss one or more stages of the capability procedure as appropriate.
- 1.11 If performance does not improve sufficiently to meet the targets set, yet the Headteacher or line manager consider that there has been a significant improvement, consideration can be given to extending the time allowed to reach the desired standard before moving into the next stage of the process.
- 1.12 If performance improves to the extent that this procedure ceases but then deteriorates again within the duration of a live warning this procedure may be reinstated at the same point in the process as previously reached.
- 1.13 Employees have the right to appeal against any Written Performance Warnings that may be issued. The appeal process will run concurrently with the subsequent stages of the procedure. Appeals must be submitted within five working days of receipt of the letter confirming the disciplinary action taken. Appeals should be made in writing to the Headteacher following the process outlined in the conduct procedures. The appeal will be heard by the Headteacher or an appropriate Panel of the governing body (employees are advised to see paragraph 3.13 to 3.16 of the procedure with regard to the role of the Headteacher).
- 1.14 Meetings under the capability procedure should normally be held during the school working day.
- 1.15 With regard to teaching staff, it must be recognised that the implementation of the capability procedure results in the suspension of the performance management process. This might have implications for the pay of the employee and it must be recognised, therefore, that using the capability process is a serious and significant step.
- 1.16 A copy of the capability procedure will be given to employees at the outset of the process. Employees are strongly advised to involve their trade union and professional association representatives with regard to ensuring a full and comprehensive understanding of the implications of the procedure.
- 1.17 Support and training will need to be identified within the resources available to the school. Where possible this should include, for example, an opportunity for the teacher subject to the procedures to observe other teachers, receive assistance with planning and the provision of a mentor. The employee's view should be sought as to what support or training he or she believes would be helpful. In setting targets consideration must be given to the timescales within the procedure which would be reasonable for the employee to attain the targets set.
- 1.18 Employees should note that the procedure could result in their dismissal (usually after a series of warnings). In these circumstances it would not be expected that the employee would carry out further duties while any period notice was being served. The notice period would run from the date of the hearing where the initial decision to dismiss had been made.

## Appendix 4

### PROCEDURE AT CAPABILITY HEARINGS

- 1.1 The Headteacher or a panel of governors (the Hearing Panel) constituted for the purpose will hear the case. The Director of Children's Services (or his or her representative) may be present for the purposes of giving advice only where appropriate.
- 1.2 The scheme refers to the Headteacher but this may mean any senior member of staff.
- 1.3 The Head teacher can present the case **or** hear the case (but cannot do both)
2. Presentation of the Case against the Employee
  - 2.1 The Head teacher (or representative) makes an opening address outlining the case against the employee.
  - 2.2 The Head teacher (or representative) calls witnesses (if any) and taking each one in turn:-
    - questions each witness
    - the employee (or representative) questions each witness
    - the Head teacher (or representative) can further question each witness
    - the governor panel (or Head teacher) can question each witness
    - the witness withdraws.
  - 2.3 The employee (or representative) can question the Head teacher (or representative).
  - 2.4 The governor panel (or the Head teacher) can question the Head teacher (or representative).
3. Presentation of the Employee Case
  - 3.1 The employee (or representative) makes an opening address outlining their case.
  - 3.2 The employee (or representative) calls witnesses, if any, and taking each one in turn:-
    - questions each witness
    - the Head teacher (or representative) questions each witness
    - the employee (or representative) can further question each witness
    - the governor panel (or the Head teacher) can question each witness
    - the witness withdraws.
  - 3.3 The Head teacher (or representative) can question the employee.
  - 3.4 The governor panel (or Head teacher) can question the employee.

#### 4. Summing Up

The Head teacher (or representative) and the employee (or representative) have the opportunity to sum up their case if they so wish, the employee to have the last word.

#### 5. Both parties then withdraw.

#### 6. The Decision

The Head teacher or the panel of governors with the Director for Children's Services (or his/her representative) if in attendance will deliberate in private only recalling the parties to clarify uncertainty with regard to the evidence already given. If recall is necessary both parties return even if only one is concerned with the matter giving rise to doubt.

The decision will be announced to the parties at the end of the hearing whenever possible. The Head teacher or chair of the governor panel will confirm the decision in writing within five working days of the decision.

#### 7. Appeal Hearing

Appeal Hearings will follow the procedure set out above but the appeal will be heard by a panel of governors (but not the same governors that considered the hearing).

An employee may lodge an appeal against the outcome of a capability hearing in writing within 10 working days of the date on which the employee receives written confirmation of the outcome of the meeting.

The letter of appeal from the employee should state whether:-

- It is against the findings of the hearing; and or
- The sanction determined by the hearing; and/or
- The capability procedure has been applied defectively or unfairly; and/or
- New evidence has come to light which was not available at the hearing and which might make a difference to the original decision.

All appeals will be heard at the earliest possible date having regard for proper notice to the parties (five working days minimum notification).

Supporting paperwork to be relied on at the appeal (together with information regarding any witnesses) must be exchanged by the parties at least five working days ahead of the appeal.

#### 8. Dismissal

In voluntary aided or foundation schools once the decision to dismiss has been taken the Governing Body will dismiss the employee with appropriate notice. In community and voluntary controlled schools once the decision to dismiss has been taken the Governing Body will notify the local authority of its decision and the reason for it. The local authority is then required to dismiss within 14 days of the date of the notification.