

# CAPABILITY PROCEDURE FOR TEACHING AND SUPPORT STAFF IN VOLUNTARY AIDED SCHOOLS

This model procedure will apply to both teaching and non-teaching staff working in Wiltshire Schools and was agreed with the following recognised unions: ATL, NUT, NAHT, NASUWT, ASCL, Unison and GMB.

It has been **updated in 2012 and 2013** in consultation with the above unions to

- align with the Teachers Appraisal Policy and Procedure, to remove references to the previous 2006 Teachers Performance Management policy and General Teaching Council and
- to align with The School Staffing (England) (Amendment) Regulations 2012 and the requirement to provide information about staff capability.

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## **Duties, Responsibilities and Powers of the Governing Bodies of Voluntary Aided Schools and Local Authority Advisory Rights**

- i. The governing bodies of Voluntary Aided schools are the employers of the school's teaching and support staff. The Governing Body of a Voluntary Aided School therefore has the power to dismiss a member of staff at the school.
- ii. The Local Authority does not have an automatic statutory right of attendance at dismissal proceedings, but the governing body may accord the Local Authority rights to attend and give advice. Where the Local Authority is accorded such advisory rights, any advice given must be considered by those concerned before making a decision. Such an agreement must be given in writing and may only be withdrawn by notice in writing to the Local Authority.
- iii. Where such rights are accorded the Local Authority through a representative (usually an HR Advisor), has an entitlement to attend (which it may decide not to exercise), for the purposes of giving advice at all proceedings relating to any decision that someone working at the school should be dismissed. Any advice given by the HR Advisor must be considered by those concerned before a decision is made.
- iv. Where advisory rights are accorded to the Local Authority and the Local Authority decides that a Voluntary Aided school has acted unreasonably and/or unfairly in relation to an employee dismissal it reserves the right to pass on the related costs, including litigation, to the Governing Body concerned. This could include failing to take appropriate professional advice or failing to adhere to Wiltshire Council's minimum HR procedures.
- v. Similar advisory rights may be accorded to the relevant Diocesan Authorities.
- vi. In addition to the above advisory rights where a Voluntary Aided school buys its HR Advisory services from the Local Authority under the '*Right choice for schools*' arrangement it is essential that the HR Advisory service is informed of all formal disciplinary proceedings and is invited to attend these for the purposes of giving advice.

### **1. Policy Statement**

- 1.1** Governing bodies have a statutory obligation to adopt formal policies and procedures for dealing with staff performance issues (School Staffing (England) Regulations 2009). A sound standard of performance is essential for the efficient and effective management of schools.
- 1.2** This procedure is primarily concerned with ensuring that an employee whose standard of performance is unacceptable in one or more areas is clearly informed what standards are expected and receives support towards achieving those standards. This procedure should only be initiated when normal support mechanisms in the school have failed to resolve the issues.
- 1.3** It provides for an outcome which is fair and constructive. It is not intended that the procedure should replace normal communication between the Head teacher and a member of staff in the day to day running of a school, whereby comments may be made informally. It is important that staff are made fully aware of any complaint regarding their work at the time the complaint is received so that they are able to respond in a timely way.
- 1.4** This procedure is designed to help the school maintain the required employee standards of performance. It allows those who do not maintain those standards the

opportunity to improve. It provides a method of dealing with any apparent shortcomings in performance and can help an employee to become effective again. It provides for matters to be dealt with in a fair and consistent manner.

- 1.5 This procedure is therefore recommended by Wiltshire Council for adoption by the Governing Body and following its adoption, the procedure must be made known to all staff and remain accessible to them.
- 1.6 Schools buying the HR Advisory service are strongly encouraged to read this procedure in conjunction with the guidance notes provided.

## 2. Who does this procedure apply to?

- 2.1 This procedure is informed by Sections 35(8) and 36(8) of the Education Act 2002, and the ACAS Code of Practice on Disciplinary and Grievance Procedures 2009. It has been drawn up following consultation with the recognised Trade Unions and Teachers' Professional Associations. It applies to and is designed to help and encourage employees within schools with delegated budgets.
- 2.2 The procedure will apply to all employees of the school. This does not include contractor's employees and those who are managed centrally to work in more than one school.
- 2.3 This procedure does not apply where there are matters of:
  - **misconduct**; which is dealt with under a separate procedure adopted by the Governing Body, this procedure should be used if it is clear that the employee is capable of reaching the required standard and has actively not done so;
  - **grievance** which is dealt with under a separate procedure adopted by the Governing Body;
  - **ill health** for which there is a separate procedure adopted by the Governing Body (\* see footnote<sup>1</sup>);
  - **bullying, harassment, discrimination and/or victimisation** which are dealt with in the first instance, under the Dignity at Work Policy.

## 3. Link to the teachers appraisal policy

- 3.1 The formal stage of the capability procedure will apply to those teachers (including the headteacher) for whom there are serious performance concerns that have not been successfully resolved during the supportive review stage of the appraisal process. The formal capability process should only be invoked where performance concerns have been identified and the teacher made aware of these under the appraisal policy and any corrective action taken has failed to bring about an improvement.

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<sup>1</sup> The School's Capability Policy and Procedure will apply if an employee's disability or health issue is affecting their work but they are not absent from work. The School's Ill Health and Sickness Absence Management Policy and Procedure cannot be applied where 'absence' is not an issue but performance standards are not being met by the employee. [Added November 2011] on the introduction of the School's Ill Health and Sickness Absence Management Policy and Procedure.]

- 3.2** If the appraiser is not satisfied with progress following the appraisal review held as part of the appraisal process, the teacher will be notified in writing that the appraisal process will no longer apply and that their performance will be managed under the formal stage of the capability procedure.
- 3.3** Teachers whose concerns are linked to Appraisal process and who are subject to a monitoring period under the formal capability procedure will not return to the Appraisal process until this monitoring period has ended and performance has been considered to have been maintained at a satisfactory level during the monitoring period.

#### **4. Who is responsible for maintaining standards of performance?**

- 4.1** The Governing Body has the overall responsibility for ensuring the standards of the school are maintained, with powers to delegate to the headteacher responsibilities up to and including initial staff dismissal decisions. Under the Education Act 2002 School Staffing (England) Regulations 2009, the Head teacher should be given the delegated responsibility to make decisions up to the initial dismissal decision, (except in certain circumstance, see 4.2 below) following which there is an opportunity to appeal to a hearing with Governors. Dismissal and notice periods are effective from the date of the initial dismissal decision. Should the appeal be successful reinstatement will also be from the original date with no break in continuity.
- 4.2** Headteachers may therefore lead the process of making the initial dismissal decision unless the following circumstances apply:
- the headteacher is unwilling to perform these functions and their previous history at the school did not include any such responsibilities.
  - the headteacher has been directly involved in the capability procedures which potentially could lead to a dismissal, or has instigated a proposal to dismiss or has made judgements on performance during appraisal.
- 4.3** In situations where it is not appropriate for the headteacher to perform these functions (see paragraph 3.2 above), the staffing hearing of the Governing Body will be responsible for the process of making such decisions.
- 4.4** The Governing Body should nominate three of its members, who are not staff members to form the staffing hearing and a different three Governors, to form the appeals hearing. No member of the governing body may form part of the hearing if they have a direct pecuniary interest in the matter. Where the Chair of Governors acts as critical friend to the headteacher they should not sit on the hearing.
- 4.5** HR will offer advice at all stages of these procedures to client schools. It is strongly recommended that Head teachers' seek advice from an HR Advisor (Schools) as early as possible. However where action under the formal stages of the procedure is being considered advice from the LA must be sought. The LA is normally represented by an HR Advisor (Schools). Costs incurred by the Council arising from the dismissal or resignation of an employee will be met outside of the schools budget unless the Council has good reason for deducting the whole or part of those costs from the school. It will be for the Council to determine what is 'a good reason'.

## **5. What are the principles?**

- 5.1** It is important that staff are made aware of the school's standards and expectations of performance and the possible consequences of falling below this.
- 5.2** Employees should be encouraged to seek the advice of a trade union or professional association at an early stage. At the formal stage of the procedure the employee will be informed of their right to be accompanied at meetings by a work colleague or trade union representative. The accompanying person can address the meeting but not answer questions on behalf of the employee.
- 5.3** The employee will have the right of appeal against any formal warning under this procedure.
- 5.4** The procedure ensures that at all stages the employee will be heard in good faith and that there is no pre judgement of the outcome of any particular review meeting. The use of one stage of the procedure does not mean the next stage follows automatically. When the employee achieves the standard of performance required, there will be a further period of monitoring to ensure the improvement is maintained. The procedure may be suspended during this period and re-invoked if performance lapses to an unacceptable standard. When it is necessary to re-invoke this procedure, this will be at the stage which applied at the time the procedure was suspended.
- 5.5** The procedure will be withdrawn when improvements in performance have been both achieved and maintained and will be confirmed in writing. *See Toolkit 8 Model Letter 13 - Withdrawal of Procedure.*
- 5.6** Where the headteacher is the subject of the procedure, the Chair of the Governing Body or other designated Governor, will replace the headteacher in initiating any action which has to be taken. In such cases the Chair of Governors should notify and contact their HR Advisor (Schools) for advice before any action is taken.
- 5.7** For the purposes of this procedure "headteacher" means the most senior member of staff who has management responsibility for the employee concerned.
- 5.8** It is recognised that an employee being supported through this procedure is likely to find the situation stressful, the headteacher should make the employee aware of the wellbeing services available through the school. A confidential Employee Well-Being Helpline (01225 713147) is available where the school subscribes to these particular services. Full details are available on 'Schools HR Online'.
- 5.9** Where there is a performance concern identified during the appraisal process and this procedure has been invoked it would be usual to suspend the appraisal process.

## **6. Raising a Grievance**

- 6.1** Where an employee raises a grievance during a capability process the process may

be temporarily suspended in order to deal with the grievance. Where the grievance and capability concerns are related it may be appropriate to deal with both issues concurrently. A discussion will therefore take place between school management, Human Resources and the employee (normally through their trade union representative or directly if they are not represented) about whether or not the procedure should be suspended so that the grievance issues can be dealt with separately under the grievance procedure or whether the grievance should be raised by the employee at relevant capability interviews, reviews, hearings or appeal.

**6.2** Suspending the capability procedure because a grievance has been raised would normally take place when:

- There is an allegation that management have failed to follow procedure;
- There is possible discrimination.

**7. Capability Procedure – Informal Stage (Only for Support Staff and Teachers where concerns are not linked to the appraisal process)**

**7.1** Unless 4.2 applies the headteacher will convene a meeting with the employee. See *Toolkit 8 Model Letter 1 – Invite to Informal Meeting*. At the meeting the headteacher will outline the performance shortcomings, the performance standards required and the timeframe over which improvement will be expected and how this will be measured and monitored. This will be confirmed in writing. See *Toolkit 8 Model Letter 2 – Follow up from Informal Meeting*. It is important that the employee is made aware of the consequences of the failure to improve. If the employee requests to be accompanied at this stage their request should not be unreasonably denied.

**7.2** The employee must also be given a copy of this procedure.

**7.3** In discussion with the employee the headteacher will also decide on the support and help that will be put in place. The nature of the shortcomings will determine the nature of the help and support to be provided. This could include:

- Mentoring and/or coaching
- Provision of suitable training
- Management and / or peer support
- Review of commitments
- Appropriate equipment.

**7.4** The employee must be supported for a period of time which is reasonable considering the post, the nature of the shortcoming (s) and the employee's length of service before a decision is taken to move to the formal stage; this would normally be between four and twelve weeks. Timescales set may be subsequently extended.

**7.5** Where the employee's performance improves to the standard required the employee should be informed of this and also reminded of the need to maintain the improved standard. The procedure may be suspended on the understanding that it

will be re-invoked if performance becomes unsatisfactory at any time in the future.  
*See Toolkit 8 Model Letter 12 – Suspension of Procedure – Monitoring Period*

- 7.6 When the employee demonstrates s/he is maintaining the improved standard, s/he should be informed in writing that the procedure is being withdrawn. *See Toolkit 8 Model Letter 13 – Withdrawal of Procedure.*

## 8. Capability Procedure – Formal Stage

### Teachers – transferring from the informal stage of the capability procedure

- 8.1 Those teachers (and headteachers) for whom serious performance concerns have been identified but have not been successfully addressed by the appraisal process will be informed in writing by their headteacher, or if the headteacher the Chair Governors, that the appraisal process will no longer apply and that their performance will be managed instead under the formal stage of the capability procedure

### Support staff

- 8.2 In relation to employees other than teachers and Head teachers whose performance is being managed as per point 8.1 above, if, after monitoring and support provided within the informal stage, the employee's performance remains unsatisfactory the Head teacher will arrange a further meeting with the employee. This is the first meeting in the formal stage of the procedure. *See Toolkit 8 Model Letter 4 – Invite to Formal Meeting*
- 8.3 The employee is informed of his/her right to be accompanied by a trade union representative or workplace colleague.
- 8.4 The employee must be given at least ten working days written notice of the meeting and confirmation of the nature of the concerns and any accompanying documents that will be referred to at the meeting, including a further copy of the procedure.
- 8.5 At the meeting the employee will be given an opportunity to comment on the concerns and to ask any questions.
- 8.6 The headteacher will then consider what action s/he proposes to take. The Head teacher will inform the employee both verbally and in writing.
- 8.7 The options at this stage of the procedure are:
- 8.7.1 An end to the procedure** As a result of the discussions the headteacher considers that the employee's performance has reached the required standards, and therefore, after a monitoring period of three to six months, can withdraw the procedure if performance continues to be satisfactory. *See Toolkit 8 Model Letter 12 – Suspension of Procedure – Monitoring period & Model letter 13 – Withdrawal of Procedure*
- All employees will revert back to the appropriate appraisal process following the successful monitoring period
- Support staff whose performance deteriorates once the monitoring period has ended should be managed by recommencing the capability procedure from the informal stage
- Teaching staff whose performance deteriorates following a successful completion of the monitoring period under capability and have reverted back to



the appraisal process , will first be managed by raising concerns regarding performance under the relevant section of the appraisal process

- **8.7.2 Set timescale under formal stage.** Employees who have made some progress but further support is required, a timescale is set under the formal stage of the procedure. See *Toolkit 8 Model Letter 5 – Written Warning / extension to formal stage*
- **8.7.3 Issue first written warning.** Employees whose performance has not reached the required standard may be issued a first written warning with a further review date. This review meeting will take place within the formal procedure (para 8.7) – See *Toolkit 8 Model Letter 5 – Written Warning / Extension to Formal Stage*
- **8.7.4 Issue first and final warning.** Employees whose performance has not reached the required standard and is considered very unsatisfactory may be issued a First and Final Written Warning with a further review date. This review meeting will take place within the formal procedure (para 8.7). See *Toolkit 8 Model Letter 6 – First and final / Final Written Warning*.

**8.8 Formal review meeting for employees who have a first / first and final written warning on file:** At the review meeting the headteacher will discuss the employee's performance with them.

**8.9** The options at this stage of the procedure are:

**8.9.1** As a result of the discussions the headteacher considers that the employee's performance has reached the required standards, and therefore, after a monitoring period of three to six months, can withdraw the procedure if performance continues to be satisfactory. See *Toolkit 8 Model Letter 12 – Suspension of Procedure – Monitoring Period & Model Letter 13 – Withdrawal of Procedure*.

All employees will revert back to the appropriate appraisal process following the successful monitoring period.

Support Staff whose performance deteriorates once the monitoring period has ended should be managed by recommencing the capability procedure from the informal stage.

Teaching staff whose performance deteriorates following a successful completion of the monitoring period under capability and have reverted back to the appraisal process, will first be managed by raising concerns regarding performance under the relevant section of the appraisal process.

**8.9.2** Employees who have made some progress but further time is required, extend the period and remain within this stage of the formal procedure, setting a new date for review. See *Toolkit 8 Model Letter 5 – Written Warning/Extension to formal stage*.

**8.9.3** Employees who have a first written warning on file whose performance has not reached the required standard or deteriorated, by the date of review may be issued with a final written warning, with a further review date. This further review meeting will take place within the formal procedure. See *Toolkit 8 Model Letter 6 First and Final/Final Written Warning*

**8.9.4** Employees who have a first and final written warning on file whose performance has not reached the required standards or deteriorated by the date of review will be invited to attend a staffing panel as detailed in paragraph 9 below. See *Toolkit 8 Model letter 7. – Invite to Capability Hearing*.

## **9 Staffing Panel**

- 9.1** The headteacher will prepare a report to present to the Staffing Panel (*Toolkit 5/5a Model Staffing Panel Report*)
- 9.2** The employee will be invited to a staffing panel (*Toolkit 8 Model letter 7 Invite to Staffing Panel*) giving at least ten working days written notice. The employee should be advised of their right to be accompanied by a workplace colleague or trade union representative and will be provided with a copy of the report and all relevant documentation that will be presented at the staffing panel.
- 9.3** At the staffing panel ( *Toolkit 5c Agenda for staffing panel*) the headteacher or his/her nominee will present the evidence for the areas of concern, the process followed and the support and training given and make recommendations. The employee will be given the opportunity to respond.
- 9.4** The staffing panel chaired by the headteacher / panel of governors will consider the evidence regarding the employee's performance and consider the recommendations and determine whether:
- To dismiss the employee with notice
  - To give the employee further time to improve
  - To consider whether alternative employment is available within the school and can be offered to the employee (see paragraph 9.6 below)
  - To withdraw the procedure
- 9.5** The decision must be confirmed in writing within five days of the hearing. If the decision is dismissal then the employee must be notified of his/her right to appeal.
- 9.6** If redeployment is possible it is unlikely to be equivalent employment. Any offer of reasonable redeployment will be made in writing and the employee will be given reasonable time to consider the offer. Following acceptance of redeployment salary will be paid at the appropriate rate for the post regardless of any previous salary paid in any previous post. Redeployment will only be made to an established current vacancy. The Academy is not obliged to create a post for the employee.

## **10. Referral to other agencies**

**10.1** The Teaching Agency (TA) will not in future need to be informed of registered teachers who are dismissed through this procedure or where the capability proceedings would have led to dismissal had the employee not resigned. The regulatory arrangements no longer cover cases of incompetence or underperformance in teachers.

10.2 Regulation 8 (The School Staffing (England) (Amendment) Regulations 2012)  
Provision of information about staff capability

10.3 If a teacher from this school applies for a teaching post at another school or academy the governing body must at the request of the governing body or proprietor (as the case may be) advise in writing whether or not that member of staff has, in the preceding two years, been the subject of the procedures established by the governing body in accordance with Regulation 8 and, if so provide written details of the concerns which gave rise to this, the duration of the proceedings and their outcome.

## **11. Right of Appeal**

11.1 An employee has the right to appeal against the decision to issue any written warnings, or dismissal in line with the academy's appeal policy.

## **12 Written Records**

A record of the documentation relating to the case will be retained and will include:

- The details of the shortfall in performance standards
- The employee's views
- Any grievances raised during the capability process
- Findings made and actions taken and by whom
- The reason for actions taken
- Whether an appeal was lodged
- The outcome of the appeal
- Subsequent relevant developments
- Notes of any formal meetings
- Records will be treated as confidential and kept in accordance with the General Data Protection Regulations 2016 and the Data Protection Act 2018 so that an employee has the right to request and have access to relevant information. In certain circumstance (for example to protect a witness) it may be appropriate to withhold some information. Information about how an employee's data is used and processed is provided in the School's/Academy's Privacy Notice (insert name of school/academy).

## **13. Related policies and other information**

A comprehensive toolkit is provided only to client schools of the HR Advisory service to support this Capability Policy and Procedure:

Toolkit 1 – Guidance notes for managers

Toolkit 2 – Process flow-chart

Toolkit 3 – Tips for meetings

Toolkit 4 – Model action plan  
Toolkit 5 – Model staffing hearing report  
Toolkit 5a – Agenda for Capability Hearing  
Toolkit 6 – Guidance notes for employees as FAQs  
Toolkit 7 – Tip for Setting Targets  
Toolkit 8 – Model Letters

Model Letter 1 - Invite to Informal Meeting  
Model Letter 2 - Follow up from Informal Meeting  
Model Letter 3 - Follow up from Second Informal Meeting – Extension to Informal Stage  
Model Letter 4 - Invite to Formal Meeting  
Model Letter 5 – First Written Warning / Extension to Formal stage  
Model Letter 6 – First and Final/Final Written Warning  
Model Letter 7 - Invite to Capability Hearing  
Model Letter 7a - Invite to Rearranged Capability Hearing  
Model Letter 8 - Outcome of Capability Hearing  
Model Letter 9 - Invite to Capability Appeal Hearing  
Model Letter 10 - Outcome of Capability Appeal Hearing  
Model Letter 11 - Final Notice Letter  
Model Letter 12 - Suspension of Procedure – Monitoring Period  
Model Letter 13 - Withdrawal of Procedure

Appeal Policy

#### **14. Equalities Impact Assessment**

This policy has had an equality impact assessment conducted by a joint equality impact assessment panel and the results of these assessments are published on the Wiltshire Council website. If on reading this procedure you feel there are any equality and diversity issues, please contact a Schools HR Advisor who will, if necessary, ensure the policy/procedure is reviewed by the HR Policy Team.