

The Oak Tree Federation Capability Procedure



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The Oak Tree
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Document summary

This Capability Procedure sets out the formal capability procedure for schools.

Improving staff performance positively impacts on service delivery. This Capability Procedure for Schools sets out a fair and systematic approach to address shortfalls in an employee's performance. It can be used to address performance concerns for both teachers and support staff.

This policy sits alongside the [Appraisal Policy](#).

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Model Capability Procedure for Schools

Key points

- This is an agreed procedure for managing unacceptable performance.
- It is important to manage performance in a fair and consistent way.
- At all stages of the Capability Procedure the overarching aim will be to enable the employee to make the required improvements in performance through constructive feedback and support.
- The Personnel Advisory Team can support schools and managers to implement the Capability Procedure at a whole school and individual level.
- Unacceptable performance should be identified and dealt with as soon as possible. Where the required improvement has not been achieved as part of the appraisal process, the employee's performance will be managed using the Capability Procedure.
- In the case of teachers (including the head teacher), the statutory appraisal process ceases when the Capability Procedure is invoked.
- For all other staff, the usual appraisal or performance management cycle will also cease whilst this procedure is being applied. *(DELETE this bullet point if your school is using another capability procedure for support staff.*
- Formal warnings may be issued as part of this procedure. Employees have a right of appeal against any warnings.
- At any stage of the formal procedure, as an alternative to appealing against a formal warning, an employee may request to have a statement placed on their personal file, indicating their views and comments regarding the formal action taken.
- For employees who only work in term time, this procedure must be suspended over the school holidays. For any leadership group staff there may be exceptions to this according to contractual terms.
- Performance related pay progression will not be considered when an employee's performance is being monitored under this procedure.
- Headteachers may choose to delegate the monitoring of teaching staff under the Capability Procedure to another manager who will hold QTS.
- At any meeting held under this procedure, the head teacher/manager/governors may be accompanied by a representative from Personnel and Training.
- Managers can access relevant documentation to use throughout this process from the [Manager's Toolkit](#).

1. Who does this procedure apply to?

1.1. This procedure applies to *(EITHER teachers, including head teachers) (OR to all staff)* about whose performance there are serious concerns that the appraisal process is unable to address.

1.2. This procedure does not apply to staff in their first year of service. For staff in their first year of service, other than Newly Qualified Teachers (NQTs), please refer to the [Supported Introduction to Employment Policy](#).

1.3. In the case of Newly Qualified Teachers please refer to the [East Sussex NQT Induction Handbook](#) and the document 'NQT induction: Guidance on managing poor performance'.

1.4. For employees who are in their first year in a new post but who have continuous service, the Appointment Support Procedure will apply along with this procedure. The Appointment Support Procedure can be located in the [Supported Introduction to Employment Policy](#).

2. What is unacceptable performance?

2.1. It is performance that falls below the standards that have been set for, or that could reasonably be expected of, an employee. In the case of teachers this will include the national teachers' standards that are in place. Managers should also consider whether the employee is fulfilling the requirements of their job description, particularly in relation to specific additional roles and responsibilities related to leadership e.g. TLR post holders etc.

2.2. Under the Employment Rights Act 1996 performance can be assessed by reference to skill and/or aptitude, for example, a lack of skill or ability in achieving objectives.

3. How does it differ from discipline?

3.1. A clear distinction should be made between unacceptable performance which is due to a lack of skill, ability, knowledge, experience or aptitude. Unacceptable performance due to lack of care and/or wilful refusal may be considered to be misconduct and should be addressed using the [Disciplinary Policy and Procedure](#).

3.2. If a case is initially dealt with under the [Disciplinary Policy and Procedure](#) and it becomes clear that performance issues are due to a lack of capability rather than misconduct, the matter should transfer to this procedure (and vice versa).

4. What if an employee's health is affecting their performance?

4.1. If it is clear that an employee's health is affecting their *attendance* at work, managers should contact the Personnel Advisory Team and refer to the [Attendance Management Procedure](#). Where an employee's health is affecting their *performance* at work, managers should consider making a referral to Occupational Health before commencing with any stage of this procedure to ensure relevant medical advice is taken into account. Managers should contact the Personnel Advisory Team for advice.

4.2. You need to consider whether an employee has a disability as defined in the Equality Act 2010 and therefore whether reasonable adjustments need to be made. Guidance and advice on the Act is available from the Personnel Advisory Team.

5. Who is responsible for managing the process?

5.1. The headteacher or a delegated manager is responsible for managing the process. In the case of the unacceptable performance of a headteacher the Chair of Governors manages the process. The person managing this process is referred to as 'the manager' throughout the policy.

5.2. Other employees in the school or external advisers may be asked to participate in providing support or in the monitoring arrangements.

6. Can a grievance be raised during this process?

6.1. In the event that an employee raises a grievance in the course of the capability procedure, or there remains an outstanding grievance, the school will consider suspending this procedure until the outcome of the grievance investigation is known; each case will, however, be considered on its merits to ensure that the school is acting reasonably.

7. Absence during this process

7.1. If employees become unwell during a period of performance monitoring. Careful consideration should be given to any health related problems and the Occupational Health Team are available to provide advice where required. The [Attendance Management Procedure](#) will be applied should absence occur.

7.2. Odd days of absences should not delay any part of this procedure. Reasonable steps should be taken to enable the employee to attend meetings. If necessary, the meeting will be rearranged on one occasion within 5 working days of the original date.

7.3. In the case of long term absences the procedure may be suspended and resumed on the employee's return to duty.

8. Who can offer to support the employee during the process?

8.1. If at any time during the capability procedure the employee wishes to seek counselling they can contact the County Council's partner organisation PPC Worldwide on 0800 282 193. (Include this paragraph if your school purchases this service OR insert an alternative paragraph about the staff counselling that you provide)

8.2. The County Council's recognised unions also provide advice and support direct to their members.

8.3. All employees are able to seek support from the Teacher Support Network on 08000 562 561.

9. Representation

9.1. Employees may be accompanied by a Trade Union Representative or a current workplace colleague, not acting in a professional capacity, at all meetings held under this capability procedure.

9.2. Action relating to the unacceptable performance of an accredited union representative can lead to a dispute if it is seen as an attack on the functions of a trade union. Therefore, although normal standards will apply to trade union representatives as employees, action under this procedure should be discussed with a senior trade union representative or full-time official before this procedure is started.

10. Records

10.1. Full and detailed records should be kept by the manager at each stage of the procedure identifying the reasons for the employee's failure to meet the required standards of performance and the manager's response. These records should include the agreed targets, timescales and the support that is being put in place for the employee. Notes of all meetings should be kept and made available to the employee.

11. Support for Teacher's Performance

11.1. Where concerns about an employee's performance are identified, in the first instance it will be appropriate to deal with these issues as part of normal day to day management and supervision or in accordance with the usual appraisal processes. Using the formal capability procedure will then only be necessary if focused support (as set out in the Model Appraisal Policy) was not successful.

12. Application of the capability procedure.

12.1. Managers are encouraged to seek advice and guidance from the Personnel Advisory Team on the application of the Capability Procedure.

12.2. A representative from the Personnel Advisory Team can attend all meetings held under this procedure to support the manager.

12.3. Any employee who is subject to formal performance monitoring under the capability procedure on 1 September will not be eligible to be considered for pay progression. In addition, any employee who has been subject to formal performance monitoring under the capability procedure in the preceding academic year leading up to 1 September will not be eligible to be considered for pay progression until the following September at the earliest.

13. Formal capability meeting

13.1. The employee will be given at least five working days' notice of the formal capability meeting. The notification will contain sufficient information regarding the concerns about performance and their possible consequences to enable the employee to prepare to answer the case at a formal capability meeting. It will also contain copies of any written evidence; the details of the time and place of the meeting; and will advise the employee of their right to be accompanied by Trade Union Representative or a current workplace colleague, not acting in a professional capacity. The manager will be supported by a representative from the Personnel Advisory Team.

13.2. This meeting is intended to establish the facts. It will be conducted by the headteacher or another manager as delegated or by the Chair of Governors (for headteacher capability meetings). The discussion should be full and wide-ranging in an environment of support. The meeting allows the employee to respond to concerns about their performance and to make any relevant representations. The employee's explanations must be considered and explored to determine precise reasons for unacceptable performance. This may provide new information or a different context to the information/evidence already collected.

13.3. The manager conducting the meeting may conclude that there are insufficient grounds for pursuing the capability issue and that it would be more appropriate to continue to address the remaining concerns through the appraisal process. In such cases, the capability procedure will come to an end. The manager conducting the meeting may also adjourn the meeting if, for example he or she decides that further investigation is needed, or that more time is needed in which to consider any additional information.

13.4. If the manager conducting the meeting concludes that the formal capability procedure should be implemented, the meeting will continue. During this meeting, or any other meeting which could lead to a formal warning being issued, the manager conducting the meeting will:

- identify the professional shortcomings and the employee's unacceptable performance clearly and openly for example, which of the standards expected of teachers are not being met;
- give clear guidance on the improved standard of performance needed to ensure that the employee can be removed from formal capability procedures (this may include the setting of new objectives focused on the specific weaknesses that need to be addressed, any success criteria that might be appropriate and the evidence that will be used to assess whether or not the necessary improvement has been made);
- identify any support that will be available to help the employee to improve their performance;
- set out the timetable for improvement and explain how performance will be monitored and reviewed. The timetable will depend on the circumstances of the individual case. It is for the school to determine the length of the monitoring and review period, however, it should be reasonable and proportionate. The monitoring and review period should not be excessively long, usually no more than ten working weeks and a minimum of four working weeks

13.5. The manager must inform the employee that they are being issued with a formal written warning and that failure to improve within the set period could lead to their dismissal. In very serious cases, this warning could be a final written warning. The employee has a right of appeal against the warning.

13.6. The decision to issue a final warning at the first formal capability meeting should be made by the manager in conjunction with advice from the Personnel Advisory Team and having heard representations from the employee.

13.7. In issuing a final warning, the school may choose to consider whether the following circumstances apply, although this list is not exhaustive:

- Performance is likely to endanger the health and safety of other people;
- Performance will have a significant impact on the school;
- An employee's performance has already been reviewed as part of this procedure, only for it to deteriorate again in a relatively short period of time;
- If there is evidence that the education of the pupils is being put in jeopardy. Where this is the case, the school will provide evidence to support the decision, which will include an explanation as to why the problem was not resolved at an earlier stage.

13.8. In very serious cases, it may be appropriate to implement the formal procedure without having addressed the issues informally, depending on the circumstances.

13.9. Where a warning is issued, the employee will be informed in writing of the issues covered in the meeting and given information about the timing and handling of the review stage and the procedure and time limits for appealing against the warning.

14. Monitoring and review period following a formal capability meeting

14.1. A performance monitoring and review period will follow the formal capability meeting. Formal monitoring, evaluation, guidance and support will continue during this period. At the end of the monitoring and review period, the employee will be invited to a formal review meeting, unless they were issued with a final written warning, in which case they will be invited to a decision meeting (see below).

14.2. During the monitoring and review period a timetable of regular meetings with the manager will be arranged both to review progress against the identified objectives and improvements required and to confirm that the agreed support plan has been implemented.

14.3. Feedback should be given promptly and any progress made should be discussed and recognised with the employee. If there are any further concerns these must be identified at the meeting and the support and monitoring in place should be reviewed. These sessions may coincide with or replace normal or existing management meetings.

15. Formal review meeting.

15.1. At the end of the monitoring and review period, a formal review meeting is convened. The purpose of the formal review meeting is to determine whether satisfactory progress has been made; a review meeting will be held at the end of each monitoring period.

15.2. The employee will be given at least five working days' notice of this meeting and the notification will give details of the time and place of the meeting and will advise the employee of their right to be accompanied by a Trade Union Representative or current workplace colleague, not acting in a professional capacity. The notification should also inform the employee that this meeting could result in a final written warning being issued. The manager will be supported by a representative from the Personnel Advisory Team.

15.3. If the manager conducting the meeting is satisfied that the employee has made sufficient improvement, the capability procedure will cease and the appraisal process will re-start.

15.4. If some progress has been made and there is confidence that more progress is likely, it may be appropriate to extend the monitoring and review period and to hold a second formal review meeting.

15.5. Where the monitoring and review period is extended, the manager will determine a reasonable length of time for the extension but time should provide sufficient opportunity for the expected progress to take place.

15.6. If no, or insufficient improvement has been made during the monitoring and review period, the employee will receive a final written warning.

15.7. Where a final warning is issued, the employee will be informed in writing that failure to achieve an acceptable standard of performance (within the set timescale), may result in dismissal.

15.8. Where a final warning is issued, a final programme of support and monitoring should be discussed and agreed, emphasising that significant and rapid improvement in performance is required. If the required improvement in performance is not achieved by the end of the final review period, the manager may refer the case to a hearing where continuation of employment will be considered.

15.9. Notes will be taken of formal review meetings and a copy will be sent to the employee who will also be given information about the handling of any further monitoring and review period and the procedure and time limits for appealing against the final warning. At the end of the final review period, the employee will be invited to a decision meeting.

16. Decision meeting

16.1. The employee will be given at least five working days' notice of the meeting and the notification will give details of the time and place of the meeting and will advise the employee of their right to be accompanied by a Trade Union Representative or a current workplace colleague, not acting in a professional capacity.

16.2. If an acceptable standard of performance has been achieved during the final monitoring and review period, the capability procedure will end and the appraisal process will re-start. If performance remains unsatisfactory, the manager will inform the employee that they have decided that their employment should be terminated and that a dismissal hearing will be convened to consider the case.

16.3. The employee should be suspended on full pay pending the dismissal hearing, which should be arranged as soon as possible following the final review meeting.

17. Dismissal Hearing

17.1. The employee will be given at least *ten working days* notice, or a shorter period as mutually agreed of the date of a hearing. The invitation to a dismissal hearing will clearly state the areas of concern around the employee's performance and the right to representation. Copies of the management case will be enclosed. This will include any supporting information and witness statements that may be referred to at the hearing.

17.2. The employee should be informed that either party can produce witnesses and/or written witness statements and relevant supporting documents at the dismissal hearing, should they wish to do so. The employee is required to submit any supporting statements or documentation *five working days* before the hearing. This should include enough copies for all parties attending the hearing otherwise circulation of paperwork may be delayed.

17.3. All paperwork will therefore be circulated to both parties at least *five working days* before the dismissal hearing as no additional documentation will be accepted as evidence on the day unless this is agreed by all parties.

17.4. If the Governing Body has delegated the power to dismiss to the Headteacher, then the Headteacher accompanied by a representative from Personnel and Training will hear the case, providing they have not taken part in the review process. Alternatively, the dismissal hearing will be heard by a panel of three governors accompanied by a representative from Personnel and Training. Normally three governors are required for the dismissal committee and no fewer for the appeal, but where this number is not reasonably practicable it can be reduced to two.

18. Attendance at the dismissal hearing

18.1. If the employee is unable to attend the hearing, an alternative date will be arranged on one occasion, ideally within five working days of the first date. If the employee is unable to attend that hearing, it will be held in their absence. A written submission from the employee can be accepted or a representative can present the employee's case on their behalf.

19. Witnesses

19.1. If the manager presenting the case or the employee wishes to call witnesses at the hearing, their identity will be disclosed to the other side in advance, unless exceptional circumstances prevent this where anonymity has to be preserved.

19.2. It is preferable that witnesses who have made statements attend the hearing, although this cannot be mandatory if they are not a Council employee.

20. Dismissal Hearing Procedure

20.1. It is preferable that witnesses who have made statements attend the hearing, although this cannot be mandatory if they are not a Council employee.

20.2. If the dismissal is confirmed the employee will be given contractual or statutory notice on full pay (whichever is the greater). The employee should be told not to attend work during the notice period. The employee will be informed of their right of appeal.

21. Decision to Dismiss

21.1. In Foundation Schools, Voluntary Aided Schools and Foundation Special Schools and academies, the power to dismiss staff in the school rests with the Governing Body. However, this power can be delegated to the Headteacher. Once the decision to dismiss has been taken, the Governing Body or Headteacher will dismiss the employee with notice.

21.2. In Community, Voluntary Controlled, Community Special, and Maintained Nursery schools, the Governing Body has the power to decide that employees should no longer work at the school. However, this power can be delegated to the Headteacher. Once the decision to dismiss has been taken, the Governing Body or Headteacher will notify the Local Authority of the decision and the reasons for it. The Local Authority must then formally dismiss the employee with notice within 14 days of the notification. A letter will then need to be sent to the employee by the Director of Children's Services confirming the dismissal. The effective date of the dismissal will be the date stated in the letter from the Director of Children's Services.

22. Appeal Against Dismissal

22.1. The employee has the right to appeal against dismissal. The hearing procedure is set out in [Appendix 1](#).

22.2. An employee wishing to exercise their right to appeal against a dismissal must address their appeal letter to the Clerk to Governors within 5 working days of receiving notification of the sanction in writing. An employee must state their reason/s for appealing the decision.

22.3. Appeals against dismissal will be heard by an appeals panel of three governors and they will be advised by a representative from Personnel and Training. Normally three governors are required but where this number is not reasonably practicable it can be reduced to two. Members of an appeal panel will have had no prior involvement in the case.

22.4. Ideally the arrangements for the appeal should be confirmed within 10 working days of receipt of the employee's appeal in writing. The hearing should be convened at the earliest opportunity. The time limits for arranging the appeal hearing are intended as a guide to ensure appeals are heard without undue delay and to ensure that there is no advantage to be gained by either party from stalling for time.

22.5. The employee will be informed in writing of the place, date and time of the appeal hearing at least *10 working days* before the date of the appeal hearing.

22.6. New evidence is permissible at the appeal hearing. If either party wishes to introduce new evidence, they should submit this at least *5 working days* in advance of the hearing. Details of the new evidence together with the names/statements of any new witnesses should be given to the other party. If at the appeal hearing, the new evidence is of such significance that further investigation or information is required, it may be appropriate for an adjournment and to reconvene when this has been completed.

22.7. All paperwork will therefore be circulated to both parties at least *5 working days* before the appeal hearing as no additional documentation will be accepted as evidence on the day, unless this is agreed by all parties.

22.8. Please refer to [Appendix 1](#) for the hearing procedure.

23. Appeal Against warnings issued under this procedure

23.1. An employee wishing to exercise their right to appeal against a warning must address their appeal letter to the manager who issued the warning. The appeal will be heard by a more senior manager or a panel of three governors. Where this number is not reasonably practicable it can be reduced to two.

23.2. In the main, the appeals process is the same regardless of what is being appealed. Where review periods would otherwise be continuing, they should *not* be halted while an appeal is pending.

23.3. If a decision cannot be confirmed on the day of the appeal hearing, a decision will be made *within 2 working days* of the conclusion of the appeal hearing. The decision will be confirmed to the employee in writing within *5 working days* of the conclusion of the appeal hearing.

23.4. The decision of the senior manager or Appeals Panel is FINAL and there is no further right of appeal.

Appendix 1 Format for all hearings held under this procedure

Presentation of the management case

- The Chair hearing the case will make introductions and outline the process to be followed to ensure that everyone present understands what is going to happen.
- The Chair or Panel will be advised throughout the hearing by a personnel practitioner. The personnel practitioner will take notes of the meeting throughout which will then be available to all parties present.
- The manager will then present their case highlighting key points and calling any witnesses if any to present their evidence. The manager will refer to any documents as necessary.
- The employee and/or their representative may question any witnesses or question the manager on their evidence.
- The Chair or Panel hearing the case may also question any person present.
- Each witness will join the hearing to give evidence and leave after doing so, although they may need to be recalled if necessary.

Presentation of the employee's case

- The employee or representative presents their case, referring to any relevant documents, and calling any witnesses as appropriate.
- The manager may question the employee or any of the witnesses on their evidence.
- The Chair or Panel hearing the case may also question any person present.
- Each witness will join the hearing to give evidence and leave after doing so, although they may be recalled if necessary.

Summing up

- The manager summarises the main points of the case.
- The employee or their representative summarises the main points of their case, including any mitigating circumstances.
- At this stage no new evidence may be introduced. The manager, the employee and their representative then leave the meeting.

The Decision

- The Chair or Panel hearing the case will consider whether there is sufficient grounds to issue the warning, final warning or to dismiss the employee because of their poor performance or uphold the appeal. The Chair or Panel should take into account any mitigating circumstances. If further clarification of information is required in order to make a decision, both parties will be recalled, or the hearing adjourned until the information is provided.
- The Chair or Panel should consider all the evidence available at the time of the hearing.
- The Chair or Panel will read out their decision, including the reasons for it. In complex cases deliberation may take some time. If this occurs, a decision should be made within *2 working days* of the conclusion of the hearing, and, in both situations the outcome of the hearing should be confirmed in writing within 5 working days.