

Association of Schools  
Collett, FHEC, St Luke's  
Policies, Guidance and Procedures



# Capability Procedures

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Date for review: 1 September 2020

## **1. Introduction**

This procedure has been produced in consultation with the professional associations/trade unions and is recommended for adoption by HfL. For schools that subscribe to the schools HR advisory service, an HR adviser is always available to provide guidance in relation to the implementation of this procedure.

This procedure applies only to teachers, Headteachers and support staff employed by the school where there are serious concerns about performance that have not been resolved through the appraisal process. It does not apply to newly qualified teachers or employees in their probationary period in respect of which there are alternative procedures in place.

This procedure does not form part of any employees contract of employment and it may be amended at any time.

Employees who are subject to the capability procedure are strongly advised to contact their trade union/professional association for support. A list of accredited county professional association and trade union representatives can be found on the Hertfordshire Grid for Learning.

## **2. Purpose, scope and principles**

A capability procedure is necessary for promoting fairness and order in the treatment of individuals and is designed to help and encourage all employees to achieve and maintain high standards of performance at work.

With the exception of very serious concerns, this procedure should only be followed when concerns have been identified over a reasonable period of time. In the first instance performance issues should normally be dealt with informally between the employee and line manager as part of day to day management. It would not usually be appropriate to react to one observation that falls below expectations by invoking this procedure. In such cases detailed feedback and appropriate support should be given to ensure that the concerns are understood and can be acted upon. It is reasonable to follow up a weak observation by undertaking another to give an employee a chance to show it was a one-off. A reasonable period of time (at least a week) should be allowed for the individual to reflect on the observation and any support or advice given before a follow up observation is carried out.

Concerns raised about performance as well as support and advice given at all stages should be well documented.

Relevant training should be considered, noting that training can take many forms and does not have to be external.

At every formal stage in the procedure, the employee will:

- be advised in writing of the nature of the performance concerns
- have the right to be accompanied by their accredited trade union/professional association representative or work colleague
- have a right of appeal against any penalty imposed

### **3. Misconduct**

In some circumstances performance may be unsatisfactory due to an employee's own negligence or wilful misconduct. In such cases the disciplinary procedure should be used rather than the capability procedure.

#### **Definition and separation of roles**

##### **4.1 Employees**

Every employee has a contractual responsibility to perform at an appropriate level and the requirement to meet any relevant standards, this includes compliance with the schools' code of conduct. Employees are, therefore, expected to be committed to achieving appropriate levels of performance.

##### **4.2 Line manager**

The process will usually be undertaken by the Headteacher, but may be delegated to another senior colleague, such as a deputy head, assistant head or business managers (for non-teaching staff). In some circumstances formal capability meetings may be arranged and conducted by an appropriate senior line manager with the Headteacher's agreement. The Headteacher or line manager will consider the evidence, reach a conclusion and issue a warning as necessary. The Headteacher or line manager will specify the improvement required and support to be provided as part of the warning process.

##### **4.3 Chair of governors**

It is possible that as part of the normal working relationship between the Headteacher and chair of governors, they will have discussed details of concerns about the employee. If that is the case, the chair of governors can take no part in any hearing.

In cases where the Headteacher is the subject of concerns, the chair of governors will carry out the functions normally allocated to the Headteacher in this procedure. The chair of governors will need to take advice from a HR adviser. The chair of governors will be responsible for organising hearings or appeals at any stage.

##### **4.4 Other governors**

The governing body has quite specific tasks to perform under this procedure in relation to appeal and dismissal hearings, when they will be expected to form a panel of three governors. Governors who are employees of the school should not form part of the panel. It is inappropriate for governors to be involved in detailed discussion or consideration of performance concerns at any other time. It is also inappropriate for details of any capability cases to be discussed at a full meeting of the governing body.

In some exceptional circumstances there may not be enough governors without prior involvement to form a panel at a hearing; the Governance team can assist in finding governors from other schools in such instances.

##### **4.5 Expert advice**

The Headteacher or chair of governors may need to seek expert advice at the outset or during the process. For schools that subscribe to the Schools' HR advisory team, advice from an HR adviser is always available.

#### **4.6 Advisory staff**

It will often be appropriate for the school to seek specialist or outside advice in dealing with sustained and/or serious poor performance or lack of capability, as part of the general support role, in giving or arranging advice and support for individual employees and in providing evidence for formal meetings.

### **5. Right to be accompanied**

An employee has the right to be accompanied and supported, at each formal stage of the procedure where action may be taken (including appeal), by a work colleague or an accredited professional association/trade union representative.

The employee should give advance notice if he/she is to be accompanied, and by whom. If the professional association/trade union representative or work colleague is unavailable at the time of the meeting or hearing, the employee should contact the individual who convened the meeting to postpone the hearing (once) to a time that is mutually convenient to all parties. Any postponement should be within a reasonable timescale and should not normally extend beyond five working days.

### **6. Informal management period**

**Before** embarking on the capability procedure, management should ensure that through normal performance appraisal and management supervision:

- the employee has been alerted to concerns
- the employee has an agreed job description, which is fully understood and there is a clear agreed expectation of standards of performance
- that concerns about a teachers performance have been raised within the schools' monitoring procedures including the appraisal process and appropriate support and reviews undertaken
- a performance improvement plan (PIP) has been set with support and a timescale for review (usually between four to six weeks dependent upon the severity of the underperformance)
- a copy of this procedure has been given to the employee

### **7. The capability procedure**

**See Appendix 1 for a procedural flowchart**

Where performance concerns have not been successfully addressed and managed using:

- the normal appraisal management channels; and
- informal methods

An assessment will be undertaken to decide if there are grounds for taking formal action under this procedure.

The investigation involved will depend on the circumstances but may involve reviewing the employees personnel file including appraisal records, gathering relevant documents, monitoring the employees work and if appropriate interviewing the employee and/or other individuals confidentially in respect of the employees work. The employee should be invited in writing to attend a formal capability meeting with their professional association/trade union representative or work colleague. At least five working days' notice will be given. The letter will inform the employee that the appraisal process is suspended and will no longer apply whilst the employee's performance is being managed under the capability procedure. The letter will contain sufficient information about the performance concerns and possible consequences, e.g. a first written or final written warning could be issued, to enable the employee to prepare their case for formal capability meeting. Any copies of written evidence will be enclosed with the letter together with a copy of the capability procedure.

Where it is known that an individual is a member of a professional association or trade union and the name and contact details of their representative are available it is advised that the representative in question be consulted when arranging any formal meetings in order to minimise the possibility of delays.

## **7.1 Formal capability meeting**

**7.1.1** The meeting is intended to establish the facts. At this meeting the Headteacher or senior line manager (with the Headteacher's knowledge and agreement) will:

- identify the performance concerns, the support already given as part of the appraisal policy, the standards required and where the shortfall in their performance has occurred
- provide written evidence of the concerns identified (e.g. from job descriptions, supervision notes, classroom observations, examples of pieces of work that do not meet the required standards)
- consider and discuss any causes and reasons for the shortfall including any reasons why the measures taken so far have not led to improvement. The employee should be given the opportunity to discuss any contributory factors they feel may have affected their performance and/or refute the evidence presented if appropriate
- after reviewing the evidence before them and taking into account any contributing factors the employee has put forward, the Headteacher or line manager will decide whether:
  - to move into a further period of monitoring without issuing a warning
  - to issue a first written warning
  - to issue a final written warning (serious cases only)

At which point the following will also apply:

- set a PIP and targets for the future standard of performance with agreed objectives set out showing clearly how these will be achieved and measured
- identify the support to be provided to assist the employee in reaching the required PIP (e.g. additional supervision, coaching, observing exemplar lessons) the employee should also be invited to suggest what support that they feel they may benefit from
- 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 but should usually be six weeks or half a term. It is for the school to determine the set period. It should be reasonable and proportionate, but not excessively long, and should provide sufficient opportunity for significant improvement to take place

- notes must be taken of the meeting and a copy given to the employee

If, following response from the employee, it is accepted that it is not appropriate to proceed with the formal capability process; the matter could be addressed via performance appraisal or relevant management support.

## **7.2 Monitoring and review period following a formal capability meeting**

A performance monitoring and review period will follow the formal capability meeting. Formal monitoring, evaluation, guidance and support will continue during this period. The member of staff will be invited to a formal review meeting, (date to be agreed at the first meeting and confirmed in the outcome letter of the formal capability meeting under section 7.1.1). If there is no improvement and depending on the stage of the process a first written or final written warning may be issued. A further review period should be put in place followed by a formal review meeting. Once a final warning is given and the decision of the formal review meeting is that there has been insufficient improvement following a further period of 4/6 weeks then a dismissal hearing will be convened (see section 8 below).

## **7.3 Arranging a formal review meeting**

The formal review meeting allows the employee to respond to concerns about performance and present their case with the support of their professional association/trade union representative or work colleague.

The employee must receive written notice of the meeting, at least five working days in advance by recorded delivery or delivery by hand of:

- the purpose, time and place of the meeting
- the areas in which the employee has not met the required performance standards set out in the PIP
- a copy of this procedure (if not provided previously)
- the right to be accompanied by a work colleague or their professional association/trade union representative (and no one else)
- details of who will be attending the meeting (e.g. head, employee, expert witness/es)
- relevant documentation (e.g. copies of objectives, the support provided, and capability/review meeting minutes)

If the employee cannot attend a meeting the employee should inform the Headteacher immediately and an alternative date will be arranged. The employee must make every effort to attend the hearing and failure to attend without good reason may be treated as misconduct. If the employee fails to attend without good reason or is persistently unable to do so (for example health reasons) a hearing may be convened and the decision taken based on the available evidence.

### **7.3.1 Conducting a formal review meeting**

Follow the guidelines set out in section 7.1

### **7.3.2 Outcome of formal review meeting**

There are four possible outcomes to the formal review meeting:

- outcome 1: Sufficient improvement, in which case the capability procedure will cease and appraisal process will resume
- outcome 2: There has been some improvement, and there is confidence that more is likely, but further support or monitoring is required and the monitoring, review period and PIP will be extended
- outcome 3: If no, or insufficient improvement has been made, the employee will receive either a first written warning if one wasn't issued at the commencement of the formal capability meeting or a final written warning
- outcome 4: If the employee has previously received a final written warning either at the formal capability meeting or following a subsequent formal review meeting and there has still not been sufficient improvement then a performance capability hearing will be arranged to consider if dismissal is an appropriate outcome (see section 8 below)

### **7.3.3 Duration of warnings**

In circumstances where a written or final written warning is issued it will be placed on the employees personnel file normally for a period of 12 months, unless the employee is notified to the contrary. After the active period the warning will remain permanently on the employees personnel file but will be disregarded in deciding the outcome of future capability proceedings.

### **7.3.4 Appeal against a warning**

An employee may appeal against a warning or dismissal at any stage within seven calendar days specifying the grounds of appeal.

The appeal hearing may be a complete rehearing of the matter or it may be a review of the fairness of the original decision in the light of the procedure that was followed and any new information that may have come to light. This will be at the school's discretion depending on the circumstances of the case.

### **The warning stage**

Where a senior line manager issued a warning, appeals may be heard by the Headteacher.

## **8. The dismissal stage – formal performance capability hearing**

**8.1** A panel of three governors will normally hear the case at this stage unless it is felt appropriate for the Headteacher to do so. If the case concerns the Headteacher a panel of governors would hear the case.

The employee will be given no less than five working days' notice in writing of the hearing.

The letter will contain:

- the purpose, time and place of the hearing
- the right to be accompanied by a work colleague or their professional association/trade union representative and no one else
- details of who will be attending the meeting (e.g. Headteacher, employee, expert witness/es)
- the requirement for the employee to provide to the school, at least three working days before the hearing, six hard copies of all documents that he/she intends to present at the hearing and enough copies for all those, except witnesses who will be present at the hearing

- all relevant documentation that will be used as evidence at the hearing (e.g. copies of objectives, the support provided, and review meeting minutes)

Copies of all relevant documents will be sent by the school to the panel members before the hearing.

**8.2** At any hearing where dismissal is to be considered, the following provisions apply:

- at any community or voluntary controlled school the local authority must be invited to send an adviser. The school must send all of the papers for the hearing to the HR adviser no later than the date on which the papers are sent to the employee
- at any voluntary aided, foundation school or academy the school is encouraged to invite an HR adviser. If an HR adviser is to be in attendance the school must send all of the papers for the hearing to the HR adviser no later than the date on which the papers are sent to the employee

Where the outcome is dismissal in a community or voluntary controlled school (whose staff are employed by the County Council), a copy of the outcome letter will be sent to the director of Children's Services once the time period for appeal has elapsed. The director of Children's Services will then formally confirm dismissal by letter to the employee.

Dismissal on the grounds of capability shall be with notice.

The outcome will be confirmed in writing to the employee as soon as reasonable practicable and usually within five working days.

## **9. Appeal procedure**

An employee may appeal against any warning or dismissal. Appeals should be made within seven calendar days of the receipt of the outcome letter. Appeals must be made to the chair of governors, who will arrange a panel of three governors who have not previously been involved in the case to hear the appeal as soon as is reasonably practical. Where a senior line manager issued a warning, appeals may be heard by the Headteacher.

If an appeal is not made within seven calendar days the school will assume the employee accepts the decision.

At least four working days before the hearing, the employee shall provide all documents that he/she intends to present at the hearing. The documents must be presented in hard copy and with sufficient copies for those, except witnesses, who will attend the hearing. Copies of all the papers to be presented will be sent to panel members prior to the hearing.

Panel members must not discuss any aspect of the case or the contents of the case papers with anyone, including other panel members, before the hearing.

The decision of an appeal panel at each stage will be final and will be reported to the governing body. The outcome of the appeal will be confirmed in writing to the employee as soon as reasonably practicable and usually within five working days.

New evidence will only be considered if relevant and there is a good reason why this was not included as part of the original hearing.

#### **10. Disputes about the procedure**

Where there is evidence of poor performance there will be no access to the grievance or harassment and bullying policies and procedures for matters related to the application of the capability procedure.

Where issues arise, for example identified support has not been provided; they should be raised during the support programme and at any subsequent formal meeting/hearing and appeal process.

If the complaint concerns matters that are unrelated to the capability process, it can be raised under the Grievance Procedure.

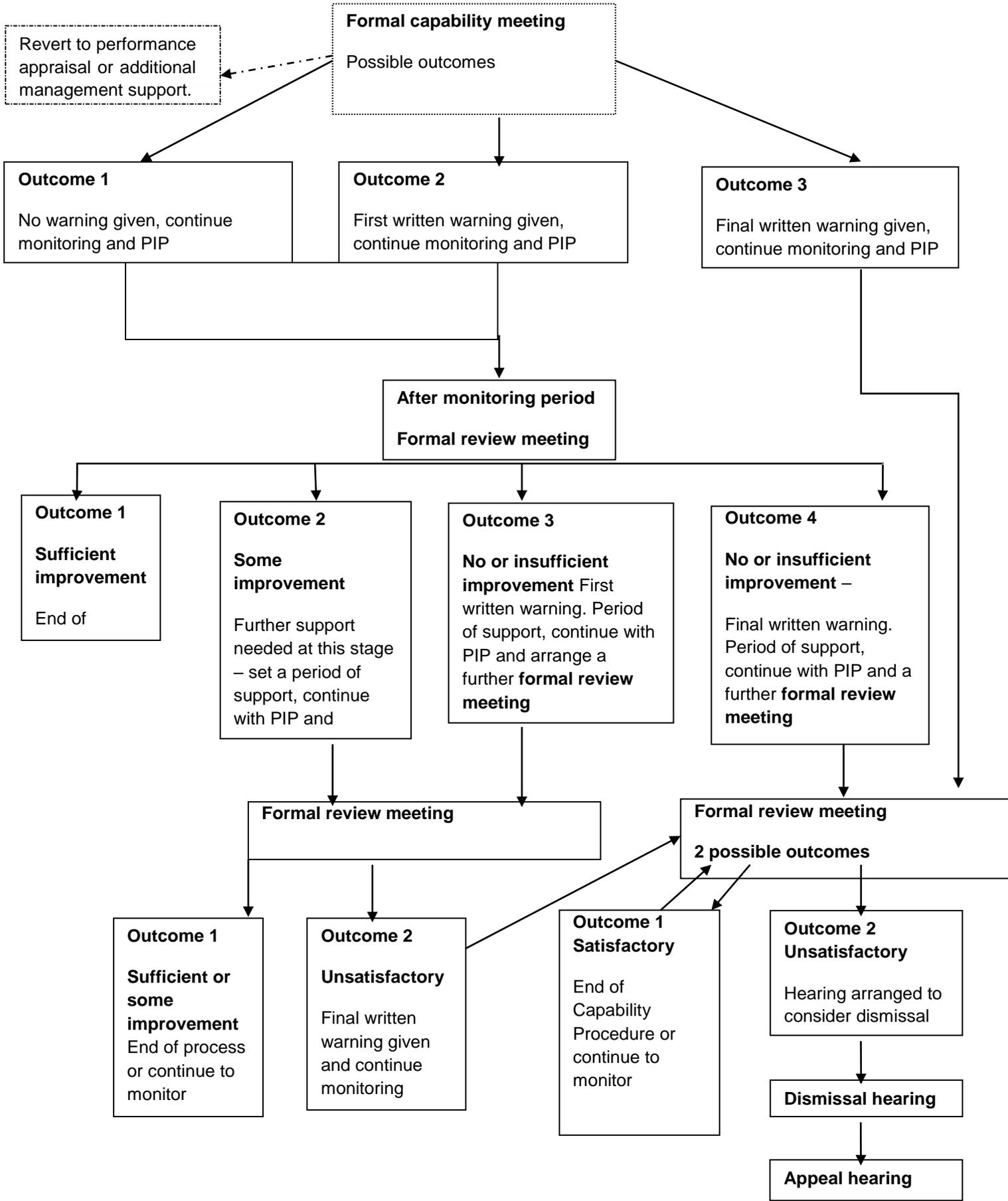
#### **11. Expiry of warnings and references**

If an employee is subject to the capability procedure, or has a live warning in place at the time of a reference request, this must be referred to in any employment reference.

There may be occasions when an expired warning cannot be disregarded, such as where the performance is satisfactory throughout the period the warning is in force, only to lapse very soon thereafter. Where such a pattern emerges, an employee's record of previous warnings will be borne in mind in deciding how long any new warning will last or whether it is appropriate to undertake disciplinary action instead, on the basis that the employee has been able to previously demonstrate that capability is not in question.

The employee will need to be at work throughout the relevant warning period. If they should be absent from work for any reason, for example sickness this period will not count for the purposes of the warning period.

**Appendix 1 – Capability procedure flowchart**



**NB: There is a right of appeal against any warning and termination**