



Capability Procedures for School Employees

This Policy is based upon the Guidance Document from the NAHT

Overview

The School Staffing (England) Regulations 2009 require Governing bodies to have procedures for dealing with any lack of capability of their employees. They must also have regard to any guidance from the Secretary of State in managing capability. This procedure is consistent with such guidance. In April 2012, the Secretary of State for Education published revised guidance entitled "Teacher appraisal and capability".

The Education (School Teachers' Appraisal) (England) Regulations 2012 came into force on 1 September 2012.

This procedure does not apply to newly qualified teachers who are undergoing induction, or employees who are still subject to a probationary period.

Introduction

Employees are normally competent, effective and are able to develop through the range of opportunities provided by the school. There are, however, occasions when a significant gap may develop between the requirements of a job and the individual's performance and, if not appropriately addressed, the situation may affect pupils' education and the performance of the school.

The purpose of capability procedures is to support members of staff to fully perform their duties and to address issues of under-performance on a formal basis. The aim is to deal with those cases where, despite appropriate management support (normally provided through the appraisal procedure) the employee is lacking in key areas of ability, skill, competence or knowledge and is consequently unable to carry out their required duties to an acceptable standard.

This procedure sets out the process for managers or governors to follow when addressing issues of underperformance, which have not been possible to resolve through the appraisal procedure.

The appraiser/line manager should have been, at all stages, working with the employee to consider what measures and support can be put in place to try and help improve their performance.

If serious or persistent weaknesses are identified in an employee's performance, appraisal should cease and the school's capability procedure be substituted.

Any decision to cease appraisal and move to capability procedures must be made by the head teacher (or chair of governors where the capability of the head teacher is in question).

Where an appraiser or line manager has concluded that it may be necessary to move into the capability process an "investigatory/transition meeting" should be arranged to review the weaknesses in performance and to consider the evidence whether appraisal should cease and capability procedures commence.

An **investigatory/transition meeting**, of this type, does not form part of the formal capability procedure, which would not begin unless a formal interview is held.

Until that point, the employee remains subject to appraisal.

The investigatory/transition meeting

The employee, appraiser/line manager and head teacher (or chair of governors where the capability of the head teacher is in question) will be present at the meeting. As the outcome of the meeting may have serious consequences, the employee should be encouraged to be accompanied by a trade union representative or a colleague.

The meeting will consider:

- the evidence which has given rise to specific concerns about the employee's performance;
- the seriousness of the concerns and their impact on the performance of the school;
- the support that has been provided to date;
- the time for which the concerns have persisted and over which the support has been provided;
- the degree of improvement that has been achieved and whether or not this has been sustained;
- the extent to which the employee has shown insight and engaged with the support provided throughout the appraisal process;
- any mitigating factors.

Once these matters have been considered, the head teacher will adjourn the meeting for a period, to allow sufficient reflection, before reaching a decision. Normally within five days the meeting will be reconvened and the decision will be communicated to the employee verbally and in writing.

The decision will be either to continue with appraisal procedures or to initiate the capability process through the convening of a formal interview.

The transition to the capability procedure will not normally be made unless there is robust evidence that:

- specific underperformance, against identified standards, has existed for a significant period of time;
- the underperformance is either serious or has persisted despite the provision of appropriate support.

The investigatory/transition meeting will, if capability procedures are instigated, inform the formal interview in the capability procedure where the employee and their representative should be provided with the evidence from the appraisal or monitoring procedures which has prompted its implementation.

Capability procedures and the purpose of this guidance

Capability is a separate, albeit related, procedure from appraisal that should be adopted in such a way that is supportive, constructive and helpful to the individual.

It should provide an opportunity for:

- encouragement, support and assistance;
- the setting of clear, constructive objectives (targets) for improvement;
- discussion and consideration of all relevant factors;
- the manager and individual to work together to address the concerns;
- employee representation.

This guidance is intended to help deal with issues associated with the capability of employees. The Head Teacher will make it absolutely clear to any employee who has moved into a capability process that this is the case. This decision should not come as a surprise and the school will be open and transparent about the procedure being used and the reasons for adopting it. There is no ambiguity about this; employees must be completely aware that they are subject to capability procedures and appraisal arrangements have been superseded.

Where it is clear that the necessary improvements in performance have not been achieved through appraisal arrangements and/or serious weaknesses exist, the school will need to consider how the capability process can be used to address those weaknesses, support the employee's performance and inform a strategy designed to bring to an end capability procedures as quickly as possible.

In some cases, however, where sufficient improvement cannot be achieved despite comprehensive support, or the concerns highlighted are of particular gravity, it may be necessary to bring the employee's employment at the school to an end as soon as possible.

Following is the procedure that will ensure fairness and efficiency and is in accordance with good employment practice.

Managing performance

Good management, clear expectations and appropriate support will go a long way towards addressing weaknesses in performance. Any concerns a manager has about the performance of any employee should be raised with the individual as early as possible. Normally this will be part of the appraisal procedure. Early identification of problems through that procedure will help to avoid the need for formal capability procedures.

As good employment practice; managers will ensure the following have taken place:

- the employee has received appropriate induction to their job (including statutory induction for newly qualified teachers);
- the employee has been issued with a clear job description;
- the employee has been told clearly what is expected of them in terms of the level of their performance;
- the employee's performance has been regularly monitored and feedback has been given.

Managers and governors will provide as appropriate, at every stage of the procedure:

- the practical and consistent application of support, advice and guidance to the individual by a professional approach;
- training or retraining as necessary following any identification of an individual's needs;
- the establishment of performance criteria and monitoring of performance against the criteria within predetermined time periods;
- clear written information regarding the alleged shortcomings in the employee's performance.

They should also ensure that any individual whose performance is unsatisfactory is clear about:

- the level of concern;
- the evidence used to reach this conclusion;
- the expected level of performance required;
- the type of support available;
- the consequences of failing to improve their performance.

Individual employees are expected to co-operate constructively with arrangements put in place to address weaknesses in performance. Where an employee believes a manager is behaving unreasonably these concerns should be raised within this procedure or the school's grievance procedure.

Throughout the operation of appraisal and capability procedures the manager or governor(s) should keep clear written records and make sure that the concerns about performance are fully explained and set out in writing for the individual employee.

Capability procedures

The aim of the procedure must be to improve the performance of an employee causing concern to a level that is acceptable as quickly as possible. Employees whose performance reaches an acceptable level will cease to be the subject of capability procedures. Their performance will then be the subject of normal monitoring under appraisal arrangements.

Key features of the procedure

- **The timings are recommendations which may be varied where it is appropriate to do so.**

The procedure proposes a normal upper limit of 8 weeks before the formal assessment of staff capability. This period of assessment may be shortened where, for example, it becomes clear that an acceptable level of improvement is beyond the ability of the person assessed, or where there is a refusal to accept that improvement is required despite the reasonableness of the proposed measures to achieve improvement.

- **A shortened procedure of up to four weeks would be appropriate in particularly serious cases.**

The shortened procedure of up to four weeks would apply in particularly serious cases where the education, health or wellbeing of children is in jeopardy. Examples of this might be where a teacher's classroom control is so poor and order insufficient so teaching and learning are seriously compromised, or where the majority of children under a teacher's care fail to progress in that teacher's lessons despite significant support already having been provided through the school's appraisal arrangements.

- **Urgent action is required if sickness absence intervenes during a capability procedure.**

If long term sickness absence (see definition in the school's sickness absence management policy) appears to have been triggered by the commencement of capability procedures, the case should be referred immediately to the employer's occupational health service to assess the person's health and fitness for continued employment. Schools must take a considerate and sympathetic approach, but in general the length of time they may wait for a person's health to improve before considering whether to terminate employment on health grounds should be subject to occupational health guidance.

Staff Capability Procedure

This procedure should only be adopted where the reasons for using it have been fully explained to the employee subject to capability. The use of capability procedures should be totally open and transparent and the employee should be provided with a copy of the procedure.

Formal interview

1. The formal interview initiates the capability procedure. It provides an opportunity to deal with serious problems in a more structured way than is appropriate under the appraisal procedure. It allows the employee to prepare a response to serious concerns about performance and make a case in the company of a union representative or colleague. At least 5 working days' notice must be given for the interview, explaining clearly to the employee that they are now moving from arrangements that are part of the appraisal process into formal capability procedures. There should be no ambiguity about this step taking place and the possible consequences of following the capability procedures should be clearly explained.
2. The interview may provide new information or put a different perspective on the evidence collected including any evidence gathered as part of the appraisal process. If it becomes clear that further investigation is needed the interview should be adjourned for an appropriate length of time to allow this to happen.
3. There are three options at formal interview:
 - a return to the appraisal process (where new information, a different perspective on the information collected, or further investigation suggests that the matter is not as serious as it first seemed);
 - or
 - a first written warning;
 - or
 - a final written warning.
4. The latter options are relevant to any case where continued concern about the standard of performance is justified. The decision regarding which level of warning to issue will depend on the seriousness of the problem. If performance is unsatisfactory a first warning will normally be the next step and will commence an assessment period of up to 8 weeks. In cases of particularly serious concern, for example, where the health and safety or education of children is in jeopardy, it is possible to move directly to a final written warning. This will invoke an assessment period not exceeding 4 weeks.
5. A decision should be made after all the facts and any representations from the employee have been considered. The head teacher, line manager or chair of governors should adjourn the meeting briefly to consider the appropriate option before delivering a decision to the employee. Any appeal against a warning must be made within 5 working days of receipt of the written confirmation, and will normally be heard within 10 working days of notification of appeal; and must not interrupt the progress of the procedure, unless the appeal decision leads to the matter being reconsidered.
6. Where a written warning is issued, the head teacher, manager or governor leading the procedure should ensure the remainder of the meeting is used to:
 - set out the professional shortcomings;

- give clear guidance on the improved standard of performance needed to end the capability procedure and set appropriate objectives/targets;
 - explain the support that will be available, and how performance will be monitored over the following weeks;
 - depending on the level of warning issued, to identify the timetable for improvement and agree a date for the next or final evaluation meeting;
 - make it clearly understood that failure to improve may lead to dismissal; and
 - make sure the employee and their representative are given suitable opportunity to contribute to the meeting.
7. Written notification should be sent to the employee immediately after the formal interview recording the result of the investigations, the main points discussed at the meeting, confirming the decision, and where a warning is issued, giving information about the handling of the next stage.

First assessment stage: following a first written warning

8. **Weeks 1 to 8** – Regular observation, monitoring and evaluation of performance, with guidance, training if necessary, and support to the employee.
9. If at any point during this stage the evidence suggests a more serious problem, a decision may be taken to move directly to a final written warning.
10. **Week 9** – Evaluation meeting to assess performance over the previous weeks. At least 5 working day’s notice must be given for the meeting and the employee may be accompanied by a union representative or colleague. If the level of performance has been satisfactory and there is confidence that it can be sustained the capability procedure can end here with a letter from the head teacher.

Where performance is satisfactory, but there is a genuine expectation that the improvement will not be maintained, a further period of assessment may be instigated at the discretion of the head teacher. This should be long enough to allow performance to be properly evaluated. Once this period, of no more than 4 weeks, has passed a further evaluation meeting should be held to assess performance and next steps.

11. If an evaluation meeting concludes that performance has continued to be unsatisfactory a **final written warning** should be issued. Formal monitoring, evaluation, guidance and support should continue for a further period. Arrangements for this should be explained at the meeting. The employee must be told clearly that failure to achieve an acceptable standard, with confidence that it can be maintained, may result in dismissal.

The decision and main points of the meeting should be recorded in writing to the employee, as soon as possible. Any appeal against a final warning must be made within 5 working days, and normally heard within 10 working days of notification of appeal and must not interrupt the progress of the procedure, unless the appeal decision leads to the matter being reconsidered.

Second assessment stage: following a final written warning

12. **Weeks 1 to 4** – Regular monitoring and evaluation of performance, with guidance, training if necessary, and support to the employee.
13. **Week 5** – Final evaluation meeting to report the assessment of performance over the previous weeks. At least 5 working days' notice must be given for the meeting and the employee may be accompanied by a union representative or colleague. If performance has been satisfactory, and there is sufficient confidence that it can be maintained, the capability procedure can end here.
14. If performance is unsatisfactory the employee should be told that the matter will be referred to the governing body's staff dismissal committee. The result of the assessment, main points of the meeting and date of the dismissal committee hearing (if known), should be recorded in writing to the employee as soon as possible.

Dismissal committee stage

15. The governing body should set up a staff dismissal committee with at least three governors. In the case of other employees, the governing body may delegate this responsibility to the head teacher. The committee or head teacher must hear the representations and recommendations brought by the head teacher, line manager or governor conducting the capability evaluation, and any representations that the employee may wish to make. The governing body should also set up a separate staff appeal committee to hear any appeal against a dismissal decision.

Management guidance: applying the procedures

1 Role of governors

Governors should not normally be involved with a capability procedure before the dismissal stage. The exception to this is where a governor or governors are involved in considering an appeal against a warning or in a capability procedure against a head teacher. It is important to be prepared for the possibility of dismissal. The use of governors to hear any grievances or appeals against warnings should be limited to ensure that a sufficient number of impartial governors remain available for the dismissal and dismissal appeal committees. Normally at least 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.

2 Role of headteacher

The head teacher may act as the line manager for an individual employee, but in any case will take any decision to initiate the capability process. Where the head teacher has performed both of these roles, the governing body will not normally delegate the initial dismissal decision to the head teacher.

3 Role of advisers

Local authority advisers, or other advisers with education and personnel experience, may be invited to advise those involved in capability procedures and where appropriate assist with the process, including classroom/task observation and providing support.

4 Representation at formal interview, evaluation meetings and dismissal hearing

An employee has a legal entitlement to be accompanied by a union representative or colleague at a dismissal hearing. If the employee's chosen companion is not available at the time proposed for the interview, meeting or hearing, and the employee proposes an alternative that is reasonable and falls within 5 working days of the day proposed for the interview, the interview panel should give careful consideration to rearranging the event to the time proposed by the employee.

5 Notice

Notice of 5 working days must be given for any formal capability interview. The dates of successive evaluation meetings should be fixed at the preceding interview or meeting and notice should only be necessary if it is rearranged. Notice of at least 5 working days must be given for a staff dismissal committee or dismissal appeal hearing.

6 Support for the employee

Those monitoring the performance should offer feedback, instruction, advice and guidance to help the employee improve performance. If further training, mentoring or assistance from colleagues would be helpful, these should be arranged as soon as possible and should be organised within the timing of the procedure.

7 Monitoring arrangements

Monitoring should include observations of a range of relevant duties and functions. An objective record of the monitoring should be kept and used to assist with the evaluation of performance.

8 Written records

A written record should be made of all interviews with the employee and any action taken following such an interview should be set out in writing and shared with the employee. Except in agreed circumstances any formal warnings should be disregarded for disciplinary and future capability purposes after a specified period of satisfactory performance. These periods are 12

months for a first written warning and 24 months for a final written warning. The qualifying period for the written warning to stay on record should be made clear in the written notification of the outcome.

9 Staff who are absent through illness during the procedure

Absence which is triggered by the capability procedure, and which line managers or governors believe is likely to be long term, is covered in the key points above and should be referred immediately to the occupational health adviser to assess whether the employee is fit for continued employment. Short absences should not delay any part of the capability procedure. Reasonable steps should be made to enable the employee to attend evaluation meetings, but where the employee is unable to attend, these may proceed in their absence if delay would otherwise compromise the maximum time set aside for the procedure. In such circumstances a full account of the evaluation should be provided in the letter confirming the decision taken

10 Disputes about the procedure

Any disagreements or grievances about the interpretation of the procedure, or the application of any related matters not covered in the procedure, must not delay any of the component stages of the capability procedure or the overall timetable determined as appropriate for handling any particular case.

11 Appeals against warnings or dismissal

Appeals will be heard by the governing body's appeal panel, normally comprised of previously uninvolved governors. However, previous involvement does not necessarily mean that a governor is tainted and thereby ineligible to serve on an appeal committee. Appeals should normally be restricted to considering the reasonableness of the decision made, any relevant new evidence, or any procedural irregularities. An employee is entitled to be accompanied at an appeal hearing by a union representative or colleague. The appeal decision should be confirmed in writing and the employee told that there is no further appeal against the decision. Where the reasonableness of the decision is being questioned the test, that should apply for overturning it, is whether the decision was so unreasonable that it was one that no other decision maker, acting with proper regard to his or her responsibilities, could have chosen to take. Where monitoring would otherwise be continuing, it should not be halted while an appeal is pending.

12 Grievances

In exceptional circumstances an employee may raise a grievance about the behaviour of a head teacher, another manager or governor during the course of a capability procedure. Exceptionally it may be appropriate to suspend the procedure until the grievance can be considered. Such a delay should only be considered where there is a strong indication that the employee has been mistreated.

Agreed by Governors Resources Committee: September 2020