



Wheatley Nursery School

Lynn Wong

Signed by Chair of Governors.

Date: January 2023

Professional Capability Procedure for Schools

Introduction

The School Staffing (England) Regulations 2009 sets out a requirement for governing bodies to establish procedures for dealing with lack of capability on the part of staff employed in schools.

The School Staffing (England) (Amendment) Regulations 2012 requires schools to provide details about whether a headteacher or teacher has been subject to capability procedures in the previous two years.

Schools and local authorities must stay within the legal framework set out in the Staffing Regulations and in other relevant legislation that affects all employers (for example legislation on equality, employment protection and data protection, health and safety).

The model Professional Capability Procedure has been developed from the model published by the Department for Education. It includes additional details where it is considered that these are helpful to the operation of an effective procedure. The Oxfordshire model procedure has been drawn up following consultation with all the recognised Trade Unions and Associations and should be read alongside the model Appraisal Policy (see link at the end of this document).

This model procedure applies to teachers, including headteachers and school support staff. The policy has been written in the context of schools, but the same principles apply to unattached or centrally employed teachers.

General Principles Underlying This procedure

The role of the Local Authority for Community, Voluntary Controlled, Community Special and Maintained Nursery Schools

Throughout this procedure the Director for Children's Services will discharge their responsibilities through the HR Business Partner for Schools.

ACAS Code of Practice on Disciplinary and Grievance Procedures

The Professional Capability Policy will be implemented in accordance with the provisions of the ACAS Code of Practice.

Confidentiality

It is expected that all parties involved in the capability process will maintain confidentiality as appropriate. This is both within and outside of the School (including social media). Governors will be notified in the event that the formal Professional Capability Procedure is applied to a member of staff, but will not be provided with any other detail, as this may prejudice governors' involvement in a later stage if recourse to that stage eventually becomes necessary. Records must be kept no longer than necessary and in compliance with GDPR and Data Protection Act 2018.

If any party does not maintain confidentiality action may be taken under the Disciplinary policy. This does not apply in relation to employees taking advice and liaising with their union representative.

Consistency of Treatment and Fairness

The Governing Body is committed to ensuring consistency of treatment and fairness and will abide by all relevant equality legislation. An equality impact assessment of this policy will be undertaken to ensure that no groups or individuals with protected characteristics are unintentionally disadvantaged by the policy or practice.

Definitions

Unless indicated otherwise, all references to "teacher" include the headteacher.

Delegation

Normal rules apply in respect of the delegation of functions by governing bodies, headteachers and local authorities.

Advice and guidance on any aspect of this procedure can be obtained from the Schools' HR Adviser.

Professional Capability Procedure

1. Purpose

This procedure sets out the arrangements that will apply when the performance of employees falls below the levels of professional capability that are expected of them.

This School expects professional standards of performance and is committed to supporting employees to fulfil the requirements of their role. The School acknowledges that there may be circumstances when an employee does not perform to the required standards. This may happen because the employee does not have the necessary skills, knowledge and/ or experience. The employee may not demonstrate the appropriate behaviours that are required.

This policy aims, through advice and support, to improve to an acceptable level as set by the school, the performance of the employee who is causing concern.

Where poor work performance is assessed to be due to a deliberate or wilful failure to fulfil the duties of an employee's role and/or a deliberate lack of care, the matter will be dealt with under the School's Disciplinary Procedure as this is a conduct concern. (See link at the end of this document.)

2. Application of the procedure

This procedure applies to teachers or headteachers about whose performance there are serious concerns that the appraisal process has been unable to address.

Where there are concerns about the performance of the headteacher, the professional capability procedure will be conducted by the Chair of Governors (or other governor nominated by the Governing Body) supported by a suitably skilled and/or experienced external adviser who has been appointed by the Governing Body for that purpose.

The policy also applies to all support staff employed by the school.

It does not apply to volunteers, contractors, agency workers.

Advice and guidance on the application of this procedure is available from the Schools' HR Adviser.

3. Transition to capability

If, following a period of support and monitoring under the Appraisal Policy for Teachers or Appraisal Policy for Support Staff, the appraiser / headteacher is not satisfied with progress, the employee will be notified in writing that the appraisal system will no longer apply and that their performance will be managed under the

Professional Capability Procedure. The employee will be invited to a formal capability meeting.

At least 10 working days' written notice will be given of the formal capability meeting. The notification will contain sufficient information about the support that has been provided to the employee, 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 a companion who may be a colleague, a trade union official, or a trade union representative who has been certified by their union as being competent. There is no right to legal representation at any stage of this policy.

The School expects that the employee and their representative will make all reasonable efforts to attend the meeting date and time. If it is not possible, the employee may propose an alternative date and/ or time. This should be within **5 working days** of the original meeting.

4. Formal capability meeting (Stage 1)

This meeting is intended to establish the facts. It will be conducted by the Chair of Governors or another nominated governor (for headteacher capability meetings) or the headteacher or senior manager (for other teachers and support staff). The meeting allows the employee, accompanied if they wish, to respond to concerns about their performance and to make any relevant representations. This may provide new information or a different context to the information / evidence already collected.

The person 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 person conducting the meeting may also adjourn the meeting for example if they decide that further investigation is needed, or that more time is needed in which to consider any additional information.

In other cases, the meeting will continue. During the meeting, the person conducting the meeting will:

- identify the professional shortcomings, 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 will normally include the setting of 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);
- provide an opportunity for the employee to respond to the concerns and make any representations;
- explain any support that will be available to help the employee 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 but in straightforward cases will normally be a minimum of six working weeks.¹; and
- warn the employee formally that failure to improve within the set period could lead to dismissal. This will normally be a first written warning but in very serious cases, a final written warning may be appropriate.

Notes will be taken of the meeting and a copy given to the member of staff within three working days of the meeting.

Where a warning is issued, the employee will be informed in writing within 10 working days of the matters covered in the bullet points above and given information about the timing and handling of the review stage and the procedure and time limits for appealing against the warning.

Capability warnings will normally follow this progression:

First Written Warning – 6 months

Final Written Warning – 12 months

5. 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. At the end of this period, the member of staff 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).

6. Formal review meeting (Stage 2)

At least 10 working days' notice will be given and the written 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 companion who may be a colleague, a trade union official, or a trade union representative who has been certified by their union as being competent.

The School expects that the employee and their representative will make all reasonable efforts to attend the meeting date and time. If it is not possible, the employee may propose an alternative date and/ or time. This should be within **5 working days** of the original meeting.

At the formal review meeting the person conducting the meeting will:

¹ It is for the person conducting the meeting to determine the set period which should be between six and ten working weeks. It should be reasonable and proportionate, but not excessively long, and should provide sufficient opportunity for an improvement to take place.

- Remind the employee of the purpose of the Professional Capability procedure;
- Review the employee's progress in achieving the improved standard of performance identified in the formal capability meeting;
- Provide the employee with an opportunity to respond to the assessment of their performance and make any representations;
- Make a decision, as follows:

EITHER

If the person conducting the meeting is satisfied that the employee has made sufficient improvement, the capability procedure will cease and the appraisal process will re-start. The employee will be informed that if there is further cause for concern within six months they will re-enter the formal capability procedure at the stage at which they left it.

OR

If some progress has been made and there is confidence that more is likely, it may be appropriate to extend the monitoring and review period and to schedule a further formal review meeting. The timetable for improvement will depend on the circumstances of the individual case and will be between six and ten working weeks.

OR

If no, or insufficient improvement has been made during the monitoring and review period, the employee will be issued with a final written warning. If a final warning is issued the period for improvement will normally be four working weeks.

The employee will be invited to a decision meeting at the end of the monitoring and review period.

Notes will be taken of the meeting and a copy given to the member of staff within three working days of the meeting.

In all cases, the outcome of the meeting will be confirmed in writing within 5 working days.

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 and given information about the handling of the monitoring and review period and the procedure and time limits for appealing against the final warning.

7. Decision meeting (Stage 3)

At least 10 working days' notice will be given and the written 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 companion who may be a colleague, a trade union official, or a trade union representative who has been certified by their union as being competent.

The School expects that the employee and their representative will make all reasonable efforts to attend the meeting date and time. If it is not possible, the employee may propose an alternative date and/ or time. This should be within **5 working days** of the original meeting.

At the Decision meeting the person conducting the meeting will:

- Remind the employee of the purpose of the Professional Capability procedure;
- Review the support and guidance provided to the employee since the start of the procedure.
- Review the employee's progress in achieving the improved standard of performance identified in the formal capability and/or formal review meeting;
- Provide the employee with an opportunity to respond to the assessment of their performance and make any representations;
- In cases of alleged gross negligence, consider all the evidence and the employee's response, along with any mitigation. The matter may be required to be considered under the Disciplinary policy and procedure.
- Make a decision, as follows:

EITHER

If an acceptable standard of performance has been achieved during the monitoring and review period, the capability procedure will end and the appraisal process will re-start. The employee will be informed that if there is further cause for concern within six month's they will normally re-enter the formal capability procedure at the stage at which they left it.

OR

If performance remains unsatisfactory and the appropriate level of support has been provided to the employee, a recommendation will be made to the Governing Body that the employee should be dismissed or required to cease working at the school.^{2 3}

OR

² *In Foundation Schools, Voluntary Aided Schools and Foundation Special Schools, the governing body is the employer but the power to dismiss can be delegated to the headteacher, to one or more governors, or to one or more governors acting with the headteacher. In Community, Voluntary Controlled, Community Special, and Maintained Nursery schools, the power to determine that the member of staff should no longer work at the school can be delegated in the same way as above but it is the local authority (as the employer) that actually dismisses staff (or – for those who work in more than one school – requires them to cease to work at the school).*

³ *Where there is insufficient evidence of the support and guidance that has been provided to the employee, extend the monitoring and review period and schedule a further formal review meeting.*

In cases of gross negligence, having investigated the allegations as set out in the Disciplinary policy, considered all the evidence and representations, if the employee should be dismissed or if a final written warning should be issued. Notes will be taken of the meeting and a copy given to the member of staff within three working days of the meeting.

In all cases, the outcome of the meeting will be confirmed in writing within 5 working days.

If it is decided to recommend that the employee is dismissed, they will be notified in writing that the recommendation to dismiss will be referred to a panel of governors in accordance with the school's formal Disciplinary procedure. The employee will be given a copy of the Disciplinary procedure.

8. Gross incompetence

Gross incompetence - occurs where an investigation identifies that an employee has failed, either by a single error or series of errors, to perform the duties of their role. The outcome is that this causes or has caused serious harm or puts others (colleagues, general public or service users) or the School's reputation and performance at serious risk.

Gross incompetence only applies in exceptional circumstances. The manager must seek advice from their HR provider in such cases.

The possible stages are:

- Decision Meeting (Stage 3) hearing - may result in dismissal
- Appeal.

Before making a decision about suspension or alternative arrangements, the appropriate manager must seek advice from Education Personnel Services.

Suspension or alternative arrangements are neutral and precautionary acts. They may be considered at any point during this policy once it is established that the circumstances may be gross incompetence.

The appropriate governance arrangements must be adhered to in deciding whether suspension or alternative arrangements are appropriate.

During suspension or alternative arrangements the employee must adhere to all relevant requirements.

Written confirmation of the decision regarding suspension must be provided to the employee.

Suspension or alternative arrangements must be regularly reviewed.

There is no right of appeal against the decision to apply alternative arrangements or suspension.

9. Decision to dismiss

IMPORTANT NOTE: Although governing bodies have the power to delegate dismissal decisions, they are strongly recommended not to delegate such decisions to one person acting alone.

Either: The power to decide that members of staff should no longer work at this school rests with the Governing Body.

Or: The power to decide that members of staff should no longer work at this school has been delegated to *the headteacher / to one or more governors / to one or more governors acting with the headteacher.*
(delete as appropriate).

10. Dismissal procedure (Stage 4)

A formal decision meeting will be arranged between the employee and the Governing Body's Staff Dismissal Panel, the headteacher or the person who has conducted the Professional Capability Procedure will present the recommendation to the panel.

Once the Governing Body (*or insert details of person or people to whom the power has been delegated*) has decided that the employee should no longer work at the school, it will notify the Local Authority of its decision and the reasons for it. Where teachers work solely at this school, the Local Authority must dismiss them within fourteen days of the date of the notification. Where they work in more than one school, the local authority must require them to cease to work at this school.

11. Appeals

If an employee believes that a decision to dismiss them, or other action taken against them (formal warning or dismissal), is wrong or unjust, they may appeal in writing against the decision within 10 working days of the decision, setting out at the same time the grounds for appeal. Appeals will be heard without unreasonable delay and, where possible, at an agreed time and place. The same arrangements for

notification and right to be accompanied by a companion will apply as with formal capability and review meetings and, as with other formal meetings, notes will be taken and a copy sent to the employee.

The appeal will be dealt with impartially and, wherever possible, by managers or governors (3 members) who have not previously been involved in the case. Appeals against formal warnings before the Decision to Dismiss stage may be heard by a senior manager or an individual governor who has not been previously involved with the case. An appeal against a dismissal should be heard by 3 Governors.

Appeals should normally be restricted to considering the reasonableness of the decision made, any relevant new evidence or any procedural irregularities. Where the reasonableness of the decision is being questioned, the test should be that the decision was perverse, in that it was so unreasonable that no other headteacher or manager, acting with proper regard to their responsibilities, could have chosen to take it. Where an appeal is upheld the matter should be referred back to the headteacher or person conducting the procedure to be reconsidered or for further appropriate action. Where monitoring would otherwise be continuing, it should not be halted while an appeal is pending.

The employee will be informed in writing of the results of the appeal hearing within three working days of the date of the hearing.

12. Referral to Occupational Health

It may be necessary to refer the employee to Occupational Health/ medical practitioner to obtain medical advice and information. If an employee does not co-operate with the referral, any assessment or decision taken will be based on the information available.

13. Provision of information about teacher or headteacher capability

Where a teacher or headteacher applies for a teaching post at another school, the governing body must, on request, advise in writing whether the teacher or headteacher has, in the preceding two years, been subject to capability procedures. If this is the case, they must provide written details of the concerns which gave rise to capability procedures, the duration of the proceedings and their outcome.

14. Safeguarding concern (relating to vulnerable adults, children and young people)

The School may take action under the Capability policy for reasons that relate to a safeguarding concern. Such cases must be dealt with in accordance with Oxfordshire's Child Protection procedures. This ensures that a child, young person or vulnerable adult is not at risk or that a police or social care investigation is

prejudiced.

Advice must be sought from the Schools' HR Advisor.

15. Referral to relevant bodies

In the following circumstances it may be necessary to make a referral to the relevant body:

- if a dismissal takes place
- in circumstances where a f process regarding a capability concern has not concluded and the potential outcome may have resulted in dismissal.

Where there is a requirement to make a referral to a relevant body, the employee must be notified in writing that a referral has taken place.

Advice must be sought from the Schools' HR Advisor.

Representation from the Local Authority

A representative of the Local Authority has a right to attend the dismissal stage of this procedure in maintained schools, to give advice to the panel.

VARIATION OF PROCEDURES

This procedure is not contractual, and it may be varied by the Council from time to time. Examples of variation include the need to comply with new legislation or best practice guidance. Should the Council decide not to apply the procedure, either in its entirety or in part, that will not amount to a breach of contract. Changes to the procedure will be made in line with the relevant consultation process and through raising employee awareness.

VERSION CONTROL

Date approved and published: September 2022 (Version 1.0)

Date to review policy: September 2025 (unless subject to legislative change)

Other relevant policies and procedures

[Appraisal Policy for Teachers and Headteachers](#)

[Teacher Standards](#)

[Appraisal Policy for Support Staff](#)

[School Disciplinary Procedure](#)

[Keeping children safe in education 2022](#)

Frequently Asked Questions

What happens if an employee raises a grievance during the capability procedure?

The employee will not normally be permitted to raise a grievance related to any action taken, or contemplated, under this procedure. Such grievances will normally be managed within the hearing and appeal process.

What happens if an employee is absent for an extended period during the capability procedure?

If long term sickness absence appears to have been triggered by the commencement of monitoring or a formal capability procedure, the case will be dealt with in accordance with the school's absence policy and will normally be referred immediately to the Occupational Health Service to assess the member of staff's health and fitness for continued employment and the appropriateness or otherwise of continuing with monitoring or formal procedures. If the employee is not well enough to attend the meeting/ hearing, it may be deferred until they are able to attend. A meeting/ hearing will not be deferred indefinitely because the employee is unable to attend.

Monitoring and assessment under the procedure needs to be based on evidence of performance at work. However, in some cases it may be appropriate for formal procedures to continue during a period of sickness absence for example, if the procedure has reached a stage where the absence of the employee would not significantly affect the outcome.