



## CAPABILITY PROCEDURE

**Approved by:** Cumbria Education Trust Board

**Date:** 22 June 2016

**Review Date:** To be reviewed annually and updated as required following changes in legislation

**Owner:** Human Resources Manager, Cumbria Education Trust

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Cumbria Education Trust (the Trust) has adopted this policy. Consultation with the recognised teaching unions has been carried out by the LA on behalf of schools that adopt this policy.

### PURPOSE

This policy, which sets out the Trust's formal capability procedure, which applies only to teachers (including the Headteacher and Executive Headteacher) about whose performance there are serious concerns that the appraisal process has been unable to address

### INTRODUCTION

New arrangements for managing teacher performance were introduced by the Department of Education, effective from 1 September 2012, and this policy is compatible with those arrangements.

The Trust academies are advised to seek support and advice from the Trust's HR Manager before using this procedure.

The Trust recognises that a Headteacher/Manager may have occasion, as part of the normal day-to-day management function, to draw the attention of an employee to inadequacies in performance without having recourse to the formal procedure set out below. Such action may include the use of advice or admonition without giving rise to doubts as to the employee's capability. Good management, clear expectations and appropriate support will go a long way towards addressing weaknesses in performance. Early identification of problems through performance review will help to avoid the need for formal capability procedures. In some cases an improvement may be achieved informally with a minimum of support and attention. In others a more formal approach will be necessary.

The timescale adopted in each case will be in accordance with the seriousness of the lack of capability of the employee.

The Headteacher or another senior nominated manager should take the lead at each stage of the procedure, and reach the decision as to whether it is appropriate to proceed to the next stage. However, it may be appropriate for informal review meetings and certain aspects of support to be delegated to other senior staff in the school. The responsibility and role of any staff involved in the process, at any particular stage, should be made clear.

No formal capability action shall be taken against an employee who is a recognised trade union

official (including safety and learning representatives) until the circumstances of the case have been discussed with a full-time officer of the trade union concerned.

An employee will be afforded the opportunity to be accompanied by a trade union representative or work based colleague at any formal review meeting, hearing or appeal. 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 five working days of the day proposed for the interview, and other participants are available, the school should rearrange the event to the time proposed by the employee.

Notice of five working days must be given for all meetings and an exchange of any papers which may be referred to at such meetings should take place at least five working days before the meeting.

In the unlikely event of a fast track situation discussions need to be had with all parties to agree a suitable timescale for an exchange of any papers, commensurate with DoE regulations and ACAS codes of practice.

It is important that appropriate support and training are provided for all staff, particularly where new responsibilities or changed working practices are introduced. It is recognised that financial provision for training generally is limited. However, priority should be given in the allocation of resources where concerns about capability are identified and where training is considered to be necessary. A record of training and support offered in this respect should be kept and the impact of training should be evaluated and reviewed. Those monitoring the performance should offer feedback and instruction to help the employee's performance. If training courses or assistance from colleagues would be helpful these should be arranged as soon as possible but should not interrupt the timing of the procedure.

Within the monitoring and support programme the support mechanisms should be made clear, including how and when these will be implemented. It will be necessary to determine these depending on the circumstances. However, the following are suggested areas for inclusion, as appropriate:

- observations of best practice from other staff in the academy;
- observations/visits to other schools;
- in-service training;
- work-sharing or team teaching;
- visit from appropriate specialist advisers, e.g. specialist teachers, school improvement partners etc.

General:

- formal short courses on specified areas of concern;
- development time to improve knowledge in areas of concern;
- assigning a mentor not involved in the monitoring process;
- counselling;
- volunteering to temporarily relinquish additional responsibilities and associated payments;
- a modified workload or timetable for a specified period;
- directed self-managed study;

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.

A written note should be made of all formal interviews with the employee, and any action taken following such an interview. A copy will be given to the employee. If the employee disagrees with the content of the written records they may respond, where there concerns are not met a copy of their submission will be attached to the official record.

### **Staff who are absent through illness during the procedure**

Absence which is triggered by the capability procedure, and which management reasonably believe is likely to be long term, should be referred immediately to the Trust's Occupational Health Adviser to assess whether participation in meetings would be detrimental to health or whether they are fit for continued employment and participation in meetings.

Short absences should not delay any part of the formal stage 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 the employee's 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 to the employee confirming the decision taken.

The Executive Headteacher may call upon advice from the Trust's Occupational Health Adviser at any stage where an employee is seeking a postponement of a hearing to consider their dismissal. In addition, the employee may also arrange for medical advice to be made available to the Headteacher from her/his doctor or other medical source.

If a decision is made to convene a hearing in the absence of the employee, (there should have been at least one postponement) the employee and their representative shall be given the appropriate notice in writing, together with all relevant papers. The notification shall include an indication that the hearing will be convened whether or not the employee is able to attend, and that they may be represented at the hearing in the normal way. The panel convened to hear the case will, if the employee or their representative so request, consider whether it is reasonable, exceptionally, to proceed in the employee's absence. A representative of the employee may attend and speak at such a hearing. The procedure for the hearing would be as given at Appendix 1.

Normally the decision to continue a capability procedure or recommend dismissal should be taken by the Executive Headteacher, or by the Headteacher with the Executive Headteacher's agreement (except where the Headteacher's performance is being considered). If there is a difference of opinion, the Executive Headteacher's decision should prevail (except where the Executive Headteacher's performance is being considered).

### **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 the various elements of the capability process or the overall timetable determined as appropriate for handling any particular case.

### **Appeals**

Appeals may be heard by a panel composed of the Executive Headteacher (if the Executive Headteacher is not leading the capability process) or members of the Trust Board (if the Executive Headteacher is leading the capability process or is the subject of it). 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 trade union representative or work based colleague. The appeal decision should be confirmed in writing within five days of the appeal hearing and the employee told that there is no further appeal against the decision. Where an appeal is upheld the matter should be referred back to the Headteacher or appropriate senior manager to be reconsidered or for further appropriate action. Where monitoring would otherwise be continuing, it should not be halted while an appeal is pending.

## **Grievances**

In certain circumstances an employee may raise a grievance during the course of a capability procedure. Depending on the circumstances 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 and consideration should be given to bringing in another manager to deal with the capability case. Any records should be passed to the new manager and if appropriate the case should be continued within the same timetable.

If an employee raises a grievance, in writing, about the way in which a manager handled a capability case or conducted the investigation/monitoring before the appeal stage of the capability procedure it will be discussed and the outcome recorded at the appeal hearing.

If an employee raises a grievance relating to the capability process after the process has been completed and after any appeal arising from it has been heard, it will not be allowed, as the appeal will have served to consider whether management action and other circumstances have been properly handled.

## **THE CAPABILITY PROCEDURE**

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

The purpose of capability procedures is to raise the performance of the employee to a point where they can achieve a sustained level of performance consistent with recognised professional standards and the reasonable operational requirements of the academy. Where there are concerns regarding an employee as to their capability to carry out to the work he or she is engaged to perform to a satisfactory standard, it is important that this is drawn to their attention as soon as is reasonably possible. The Headteacher or other nominated senior manager, having reviewed and determined the perceived problem, and having consulted, where appropriate, with staff who have a line management responsibility for the employee concerned, shall raise the matter with the employee. Whilst in less serious cases this might be via normal appraisal arrangements, it is important to allow the employee as much time as reasonably possible to improve performance, and so notification of significant concern should not be delayed to a future appraisal meeting.

At least five working days' written notice will be given of the formal capability meeting. The notification will contain sufficient information about the concerns about performance and their possible consequences to enable the teacher 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 teacher 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.

### **Formal Capability meeting**

This meeting is intended to establish the facts. It will be conducted by the following:

- Chair of the Trust Board for the Executive Headteacher
- The Executive Headteacher for Headteachers
- The Headteacher or nominated Senior Manager for all other employees.

The meeting allows the teacher, accompanied by a companion 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, or any other meeting which could lead to a formal warning being issued, 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 teacher 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);
- explain the support that will be available to help the teacher 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 must not be less than 5 weeks. It should be reasonable and proportionate, but not excessively long, and should provide sufficient opportunity for an improvement to take place); and
- warn the teacher formally that failure to improve within the set period could lead to dismissal.

In very serious cases, this warning could be a final written warning.

Notes will be taken of formal meetings and a copy sent to the member of staff. Where a warning is issued; the teacher will be informed in writing 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.

## **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, unless they were issued with a final written warning, in which case they will be invited to a decision meeting (see below).

### **Formal review meeting**

As with formal capability meetings, at least five working days' written notice will be given and the notification will give details of the time and place of the meeting and will advise the teacher 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.

If the person conducting the meeting is satisfied that the teacher has made sufficient improvement, the capability procedure will cease and the appraisal process will re-start. In other cases:

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

As before, notes will be taken of formal meetings and a copy sent to the member of staff. The final written warning will mirror any previous warnings that have been issued. Where a final warning is issued, the member of staff 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 further monitoring and review period and the procedure and time limits for appealing against the final warning. The teacher will be invited to a decision meeting.

### **Decision meeting**

As with formal capability meetings and formal review meetings, at least five working days' written notice will be given and the notification will give details of the time and place of the meeting and will advise the teacher 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.

If an acceptable standard of performance has been achieved during the further monitoring and review period, the capability procedure will end and the appraisal process will re-start. If performance remains unsatisfactory, a decision, or recommendation to the Executive Headteacher, or the case of the Executive Headteacher the Trust Board, will be made that the teacher should be dismissed or required to cease working for the Trust.

### **Suspension**

In extreme cases where it is considered that the education or safety of pupils/students is in jeopardy, an employee who has failed to reach the required standard within the timescale for improvement, may be suspended by the Executive Headteacher/Chair of the Trust Board

pending the decision on any action which might be taken. Before suspension is imposed, provided no delay is caused in the process, the employee shall be entitled to be accompanied by their trade union representative or colleague. Suspension is a neutral act. During any period of suspension, the employee will be paid their full salary.

## **Dismissal**

The employee shall be called to a hearing with the Executive Headteacher.

The employee shall be given not less than ten working days' notice in writing of the date, time and place of the hearing, the nature of the complaint and informed that they have the right to be accompanied at the hearing by a representative of their trade union or colleague. At the hearing the complaint against the employee shall be formally presented and the employee and their representative shall be given the opportunity to ask questions relative to the complaint, to state their case and to call witnesses. The procedure to be adopted at the hearing is set out in Appendix 1.

A representative of the Trust's HR Provider shall normally be present, for the purpose of giving advice, at all stages when a dismissal is being considered. The Executive Headteacher shall consider such advice before coming to a decision on the matter.

The outcome of the hearing must be confirmed in writing to the employee concerned within three working days, stating the reasons for the decision and in the case of dismissal, the right to lodge an appeal within ten working days.

## **Appeal**

If a teacher feels a decision to dismiss them or other action taken against them is wrong or unjust, they may appeal. The appeal shall be made by the employee or their trade union representative or colleague, in writing, to the Clerk to the Trust Board within five working days of receipt of the written confirmation of the warning/dismissal, stating the grounds of appeal. The appeal shall be heard as soon as possible thereafter, and neither the Executive Headteacher or other manager issuing the original sanction (in the case of another employee) nor the Chair of Trust Board (in the case of the Executive Headteacher) shall take part in the appeal other than to present the case or act as a witness.

An Appeal Committee of the Trust Board shall be constituted from those Trust Board members who are not otherwise disqualified from hearing the appeal, by virtue of their membership of other panels in the process, or their involvement in the case as a witness, or in any material sense. At any meeting of the Appeal Panel which is to hear an appeal against dismissal, a representative of the Trust HR Provider shall normally be present, throughout the appeal hearing for the purpose of giving advice. The Appeal Panel shall consider such advice before coming to a decision on the matter.

The employee shall be given not less than five working days' notice in writing by the Clerk to the Trust Board of the date, time and place of the appeal hearing and informed of his or her right to be accompanied by a trade union representative or work based colleague. The procedure to be adopted at the hearing is set out in Appendix 1 of this document. The decision on the appeal shall be confirmed to the employee in writing.

With regard to an earlier decision to dismiss an employee, if the decision of the Appeals Panel is that the employee concerned should not cease to work for the Trust, the Trust or its HR provider will issue a letter rescinding the earlier letter of dismissal to the employee.

The teacher will be informed in writing of the results of the appeal hearing as soon as possible.

## Appendix 1.

### PROCEDURE AT CAPABILITY HEARINGS AND APPEAL HEARINGS

Capability hearings or appeal hearings will be heard in accordance with the decision made by the Trust Board with regard to delegation of its powers in such matters.

The procedure at capability hearings and appeals panels of the Trust Board will be as follows:

1. The Executive Headteacher/Panel of the Trust Board and their HR representative, along with the employee and their representative will be present at the commencement of the Hearing. (Any period set aside for the panel members only to familiarise themselves with documentation is not part of the Hearing)
2. The person chairing the meeting will introduce those present, giving names, job titles and roles (whether advisory or decision-making) and advising that notes will be taken of the proceedings for the record and to assist in the reaching of a conclusion.
3. The chair of meeting will explain the purpose of the Capability Hearing/Appeals Panel, and the procedure which will be followed in accordance with this Appendix. Witnesses shall be present only whilst they are being examined and must not be allowed to confer. Witnesses may be accompanied but not represented at the Hearing. Any questions of procedure not explicitly covered by this document shall be determined by the panel hearing the case.
4. The presenter will confirm the allegations, report the outcome of the procedure, call witnesses and introduce other documentary evidence to the panel.
5. The employee and/or representative will be invited to ask questions on the case as presented, or directly to re-examine the evidence given by any witnesses.
6. The Executive Headteacher/Panel will have the opportunity to ask questions or clarify any issues raised during this presentation, or to re-examine witnesses.
7. The employee and/or representative will be invited to present evidence in their case, including making a full statement and introducing any witnesses or documentary evidence.
8. The presenter will be invited to ask questions on the case as presented, or directly to re-examine the evidence given by any witnesses.
9. The Executive Headteacher/panel will have the opportunity to ask questions or clarify any issues raised during this presentation, or to re-examine witnesses.
10. Both parties will be invited to make their closing statements, with the employee/employee representative making the final statement.
11. All parties will be asked to withdraw excepting HR Representative attending to advise or the person taking notes of the proceedings.  
The presenter, employee and their representative may be recalled to clarify any points

of uncertainty on evidence already given. If recall is necessary, both parties will return, irrespective of the point of clarification sought.

12. The Executive Headteacher/panel will decide whether the proposal to dismiss is upheld or whether or not an appeal should be upheld.
13. The panel's decision will be communicated in writing to the employee concerned within three working days setting out the decision of the panel and the reasons for the conclusion.