



## Capability Procedure

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Appendix 1 – Flow Chart for Capability Procedure

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### 1. Purpose

- 1.1 The purpose of this procedure is to encourage employees to achieve and maintain acceptable standards of performance and is designed to ensure fairness and consistency in the management of employee under-performance.
- 1.2 Approved by The Bath & Wells Multi Academy Trust (hereafter referred to as the Trust)

### 2. Applicability

- 2.1 This procedure applies to all employees of the Trust, however concerns of absence of staff within their probationary periods will usually be dealt with under the Probation Procedure. It does not apply to agency workers, contractors or volunteers.
- 2.2 This procedure is used to manage performance that falls below the required standards because of lack of aptitude, skill and/or ability that the usual performance management process has been unable to address.
- 2.3 Where the employee's health is affecting their performance this may be dealt with under the Management of Sickness Absence Procedure
- 2.4 Where after further investigation or discussion it is found that the issue is one of incapability due to ill health or disability, or to misconduct, action under the Capability Procedure may stop and further action will be taken under another appropriate procedure if required.

### 3. Roles and Responsibilities

- 3.1 Line managers are responsible for:
  - 3.1.1 Implementing this procedure within their areas of responsibility
  - 3.1.2 Ensuring that they set realistic and measurable standards of performance
  - 3.1.3 Supporting staff to achieve the standards set
- 3.2 Employees are responsible for complying with the requirements of this procedure and for performing their duties to an acceptable standard. Where an employee is suffering from an ill health condition that is affecting their performance at work they should speak to their manager as soon as possible.
- 3.2 Where concerns arise, line managers should seek advice from HR at an early stage.
- 3.3 A written record of all meetings conducted under this procedure will be made, either by the person holding the meeting or by an additional person arranged by the Trust to take notes. The Trust processes any personal data collected during the capability procedure in accordance with its data protection policy. Any data collected is held securely and accessed by, and disclosed to, individuals only for the purposes of completing the performance improvement procedure. Inappropriate access or disclosure of employee data constitutes a data breach and should be reported in accordance with the organisation's data protection policy immediately. It may also constitute a disciplinary offence, which will be dealt with under the organisation's disciplinary procedure.

#### **4. Principles**

- 4.1 The Trust needs the effective performance of its entire staff in order to deliver its aims and vision within each school. To achieve this, the Trust aims to ensure that effective recruitment is undertaken, performance expectations and standards are defined through the performance management framework, performance is monitored and that employees are given appropriate feedback, training and support to meet required standards.
- 4.2 Employees should be provided with appropriate information, support and advice during induction and probation to achieve the required standards of performance.
- 4.3 The Trust will try to resolve issues of under-performance through the Appraisal Procedure and through informal meetings between the employee and their line manager (also see section five). However, where this approach has been tried and has not worked or the performance concerns are more serious, formal action will be considered.
- 4.4 The employee will be advised of the deficiencies in his/her performance and given the opportunity to state his/her case and present relevant information before any decisions are made.
- 4.5 The employee will normally be given at least 5 working day's notices of all formal meetings under this procedure.
- 4.6 The employee will have the right to be accompanied by a work colleague or trade union representative during all stages of the formal process.
- 4.7 If there are any disability or language issues affecting the employee or his/her representative, these will be reasonably addressed so that any formal proceedings can take place fairly.
- 4.8 Where underperformance is due to a disability the manager should contact HR in order to receive advice on reasonable adjustments in line with the Equality Act 2010.
- 4.9 Information relating to formal proceedings will be kept confidential as appropriate.
- 4.10 The time-scales within this procedure may be amended by mutual consent.

#### **5. Informal handling of capability issues**

- 5.1 Managers will normally try to resolve issues of minor incapability informally using the Appraisal Procedure. Where this approach has been tried and has not succeeded in improving performance or where concerns arise outside the appraisal period or where the underperformance is more serious, action should be taken under this procedure.
- 5.2 Employees should receive constructive feedback on their performance throughout the year, through the appraisal process and as soon as practicable after any observation has taken place or other evidence has come to light. Feedback will highlight particular areas of strength as well as any areas that need attention.

- 5.3 Where there are concerns about any aspects of an employee's performance, the employees line manager will meet with them to:
- Give clear feedback about the nature and seriousness of the concerns
  - Give the employee the opportunity to comment and discuss the concerns
  - Agree any support (e.g. coaching, mentoring, structured observations, training) that will be provided to help address those specific concerns
  - Make clear how, and by when, the appraiser will review progress (it may be appropriate to revise objectives, and it will be necessary to allow sufficient time for improvement. The amount of time will need to reflect the seriousness of the concerns)
  - Explain the implications and process if no, or insufficient improvement is made.
- 5.4 A written record of any discussions should be retained and kept on the employee's personal file, and a copy provided to the employee.

## 6. First Stage – Formal Capability Meeting

The formal procedure set out in this policy follows the disciplinary procedure as set out in the ACAS code of practice

- 6.1 If an employee's performance continues to be unsatisfactory or where unsatisfactory performance is sufficient to warrant moving straight to formal action, the employee should be invited to a first stage formal capability meeting to discuss the concerns.
- 6.2 The employee should be given at least 5 working days' notice of the meeting. The notification letter should include the following details:
- The time and place of the meeting
  - Outline of the concerns regarding their performance
  - The possible consequences of the meeting
  - Their right to be accompanied by either a work colleague or trade union representative
  - Copies of any written evidence that might be relied upon
- 6.3 The purpose of this meeting is to establish the facts. The employee should be given the opportunity to respond to the concerns about their performance and make any relevant representations. This may provide new information or a different context to that which has already been collected. The employee will be reminded of any informal discussions (where these have happened) and the steps that have already been taken to support an improvement in performance.
- 6.4 A decision will be taken at the meeting regarding the required action from one of the following options:
- Where there are insufficient grounds for pursuing the capability issue, the concerns will be addressed informally and therefore formal action under the formal Capability Procedure will end.
  - Where it is found that the concerns are as a result of misconduct or ill health, action under the Capability Procedure may stop and further action will be taken under another appropriate procedure if required.
  - Where further investigation proves necessary the meeting may be adjourned and then reconvened once the investigation is complete.

- Where there is evidence for the concerns, the meeting will continue and will address the points outlined in section 6.5 below.
- 6.5 Where the meeting continues, it should address the following:
- Identify the shortcomings i.e. what standards are not being met
  - Give clear guidance on the improved standard required, this may include setting objectives, identifying success criteria or the evidence that will be used to determine improved performance. Objectives set to improve performance should be SMART – specific, measurable, achievable, realistic and time specific.
  - Set out the timetable for improvement and explain how performance will be monitored and reviewed. The timetable will depend on individual circumstances and will be set by the manager. It should be reasonable and proportionate to allow the opportunity for improvement to take place but should not be excessively long. A guide for the monitoring and review period is four to ten weeks.
  - Issue a written warning that failure to improve within the set period could lead to dismissal. Where the concerns are very serious, a final written warning may be issued.
- 6.6 At the meeting consideration should be given regarding any reasonable support or training that would assist the employee in achieving a satisfactory standard of performance.
- 6.7 The manager will propose reasonable measures to assist the employee to achieve the required standards of performance. Where appropriate and reasonable the measures may include any or all of the following (provided they do not adversely affect the efficiency of the Trust or individual schools):
- Changes to working practices within the terms of the employee’s job description
  - Increased supervisory support for a specified period of time
  - Work shadowing a competent employee
  - Modified workload or tasks for a specified period of time
  - Further training in the area(s) of deficiency
  - Other reasonable relevant support
- 6.8 An important part of the support offered to a teacher would be a clearly defined amount of classroom observation with structured oral and written feedback. The amount of classroom observation will be discussed with the teacher and the representative who is supporting them in the formal process.
- 6.9 A Second Stage Formal Capability Review meeting should be held at the end of the specified monitoring and review period. Informal meetings may take place during the monitoring and review period to provide regular feedback and support.
- 6.10 The employee should be issued with a letter confirming the outcome of the meeting, including any formal warning and details of any support plan within 5 working days of the meeting. Notes of the meeting should be taken and retained on the employees personal file and a copy provided to the employee.
- 6.11 Where the employee is issued with a formal written warning, they have the right of appeal (see section 10).

- 6.12 Following this meeting during the specified time period for improvement, formal monitoring, evaluation, guidance and support will continue, the frequency of such will be determined on an individual basis.
- 6.13 A postponement may be granted if the employee or their representative is unable to attend on the proposed date. A postponement should not be for more than 5 working days after the original date proposed, however, an extension to this time limit can be made by mutual agreement. Where a meeting is rearranged, and the employee is unable to attend a second time, the meeting may convene, as arranged, and decisions taken in the employee's absence.

## 7 Second Stage – Formal Capability Review Meeting

- 7.1 A Second Stage Formal Capability Review meeting will be held at the end of the monitoring and review period in order to evaluate whether sufficient improvement in performance has occurred.
- 7.2 The employee should be given at least 5 working days' notice of the meeting. The notification letter should include the following details:
- The time and place of the meeting
  - Confirmation of the performance concerns that are to be reviewed
  - The possible consequences of the meeting
  - Their right to be accompanied by either a work colleague or trade union representative
  - Copies of any written evidence that might be relied upon
- 7.3 At the review meeting the manager and employee will discuss the monitoring and review period and any support that has been provided. The manager will assess whether the employee's performance is now of an acceptable standard. The employee will have the opportunity to comment on their performance during this period.
- 7.4 Following discussion at the meeting, the manager may decide that:

The employee has reached a satisfactory standard of performance and no further action is required under the procedure. The employee will be advised that satisfactory performance must be maintained and that if performance becomes unsatisfactory then any further action taken under the Capability Procedure may take into account action taken previously for the duration that any formal warnings remain live on the employee's file:

- That some progress has been made and there is confidence that more is likely, so the monitoring and review period may be extended. The manager will confirm the continuing areas of concern and the standards required. Consideration will be given to any further support that can be provided. A further period for monitoring and review will be given, normally of no more than four weeks. At the end of this period a further second stage formal capability review meeting will be convened.
- Where a first written warning was previously issued and there has been no, or insufficient improvement made, and performance remains unsatisfactory, a final written warning will be issued. The employee should be informed that failure to achieve an acceptable standard of performance (within the set

timescale), may result in dismissal. The manager will confirm the continuing areas of concern and the standards required. Consideration will be given to any further support that can be provided. A further monitoring and review period will be given, normally of no more than six weeks. At the end of this period a Third Stage Formal Capability Review Meeting will be convened.

- Where a final written warning has already been issued, and there is no, or insufficient improvement then a decision will be taken at the managers discretion whether to set a further period for improvement to be reviewed at a Third Stage Formal Capability Review Meeting or whether to arrange a dismissal hearing.

- 7.5 The employee will be informed of the outcome of the review meeting in writing, and of any formal warning issued normally within five working days of the meeting. Notes of the meeting will be taken, and a copy will be kept on the employees personal file and a copy provided to the employee.
- 7.6 Where the employee is issued with a formal warning, they have the right of appeal (see section 10).
- 7.7 A postponement to the second stage meeting may be granted if the employee or their representative is unable to attend on the proposed date. A postponement should not be for more than 5 working days after the original date proposed, however, an extension to this time limit can be made by mutual agreement. Where a meeting is rearranged, and the employee is unable to attend a second time, the meeting may convene, as arranged, and decisions taken in the employee's absence.

## **8 Third Stage – Formal Capability Review Meeting**

- 8.1 A Third Stage Formal Capability Review meeting will be held at the end of the second monitoring and review period, where this has been set, in order to evaluate whether sufficient improvement in performance has occurred.
- 8.2 The employee should be given at least 5 working days' notice of the meeting. The notification letter should include the following details:
- The time and place of the meeting
  - Confirmation of the performance concerns that are to be reviewed
  - The possible consequences of the meeting
  - Their right to be accompanied by either a work colleague or trade union representative
  - Copies of any written evidence that might be relied upon
- 8.3 At the review meeting the manager and employee will discuss the monitoring and review period and any support that has been provided. The manager will assess whether the employee's performance is now of an acceptable standard. The employee will have the opportunity to comment on their performance during this period.
- 8.4 Following discussion at the meeting, the manager may decide that:
- The employee has reached a satisfactory standard of performance and no further action is required under the procedure. The employee will be advised that satisfactory performance must be maintained and that if performance becomes unsatisfactory then any further action taken under the Capability Procedure may take into account action taken previously for the duration that

any formal warning remains live.

- That some progress has been made and there is confidence that more is likely, so the monitoring and review period may be extended. The manager will confirm the continuing areas of concern and the standards required. Consideration will be given to any further support that can be provided. A further period for monitoring and review will be given, normally of no more than four weeks. At the end of this period a further third stage formal capability review meeting will be convened.
- That there has been no, or insufficient improvement made, and performance remains unsatisfactory and a dismissal hearing will be convened.

8.5 The employee will be informed of the outcome of the review meeting in writing, normally within five working days of the meeting. Notes of the meeting will be taken and the employee provided with a copy kept on the employees personal file.

8.6 A postponement to the third stage meeting may be granted if the employee or their representative is unable to attend on the proposed date. A postponement should not be for more than 5 working days after the original date proposed, however, an extension to this time limit can be made by mutual agreement. Where a meeting is rearranged, and the employee is unable to attend a second time, the meeting may convene, as arranged, and decisions taken in the employee's absence.

## 9 Dismissal Hearing

9.1 A dismissal hearing will be arranged where the employee did not reach a satisfactory standard of performance during the specified monitoring and review period(s).

9.2 The employee will normally be given 10 working days' notice in writing of a dismissal hearing. The chair of the hearing will write to the employee to confirm:

- The deficiencies in the employee's performance and the reasons for contemplating dismissal
- The date, time and location of the hearing
- The name of the person (or panel) chairing the hearing
- The right to be accompanied and/or represented by a trade union representative or work colleague
- The requirement to provide the chair hearing the case with a copy of the documents that he/she will be relying upon and the names of any witnesses that he/she will be calling at the hearing at least 5 working days before the hearing
- That the hearing could result in his/her employment being terminated

9.3 Copies of documents that the presenting manager will refer to at the hearing, and names of any witnesses that they will call will be included with the notification.

9.4 At the hearing both the management side and the employee will be given the opportunity to state their case, call witnesses and ask questions. HR will attend the hearing to provide procedural advice.

9.5 The hearing will normally be adjourned whilst the chair/panel hearing the case reaches a decision.

9.6 The outcome of the hearing may be either dismissal on the grounds of lack of



capability or alternative action in the light of evidence presented at the hearing. Where an employee is dismissed he/she should be dismissed with appropriate notice. The employee will be notified in writing of the outcome normally within 5 working days and of their right of appeal.

9.7 Where an employee is dismissed under this procedure it would be usual practice that the employee would not attend work during their notice period.

9.8 A postponement of the dismissal hearing may be granted if the employee or their representative is unable to attend on the proposed date. A postponement should not be for more than 5 working days after the original date proposed, however, an extension to this time limit can be made by mutual agreement. Where a hearing is rearranged, and the employee is unable to attend a second time, the hearing will normally convene, as arranged, and a decision taken in the employee's absence.

## 10 Appeals

10.1 An employee is entitled to appeal against either the decision taken at stage one or two where a formal warning is issued that performance needs to improve or following the dismissal hearing.

10.2 The following grounds are examples of when an appeal may be successful:

- The procedure - a failure to follow procedure had a material effect on the decision
- The decision - the evidence did not support the conclusion reached
- The penalty - was too severe given the circumstances of the case
- New evidence - which has genuinely come to light since the first hearing

10.3 The appeal must be made in writing, addressed to the Clerk to Governors, stating the grounds for the appeal, within five working days of being notified of the decision to issue a formal warning or to dismiss. For Headteachers, Senior Management and Centrally employed staff the appeal should be addressed to the Clerk to the Board of Trustees.

10.4 The appeal will be heard as soon as possible and not normally later than six weeks after being received.

10.5 The employee will normally be given 10 working days' notice, in writing, of the date of the appeal hearing. This notification will give the name of the person chairing the hearing (and the names of panel members where appropriate). It will remind the employee of his/her right to be accompanied at the hearing by either a trade union representative or work colleague. HR will attend the hearing to provide procedural advice.

10.6 Both parties must indicate at least 5 working days in advance of the appeal hearing which, if any, witnesses they wish to call and provide copies of any documentation that will be relied upon at the hearing. In exceptional circumstances an alternative time-scale may be agreed.

10.7 In the case of an appeal against the decision taken at a dismissal hearing, the chair of the dismissal hearing will attend the appeal to present the management case.

- 10.8 The employee will be able to present evidence that is directly relevant to the grounds of the appeal. Management will have the opportunity to respond.
- 10.9 The appeal hearing may confirm or overturn the decision or may recommend some alternative action.
- 10.10 The employee will be informed of the appeal decision in writing, normally within 5 working days. The decision of the appeal hearing is final.



**11 Authority to act under the Capability Procedure**

Performance Incapability Concerning	First, second and third stage meetings	Hear the appeal at first and second stages	Dismissal Hearing	Hear the appeal following a dismissal hearing
All school based employees except those listed below	Either the Headteacher or an employee authorised by them of at least line management level	Headteacher if not previously involved or a Panel of three from the Local Governing Board	Panel of three usually consisting of two from the Local Governing Board and one Trust Trustee	Panel of three usually consisting of two from the Local Governing Body and one Trust Trustee who have not previously been involved.
Headteacher	Trust Trustee or a Governor from the Local Governing Board	Panel of three consisting of Trust Trustees and members from the local Governing Board not previously involved. Must include at least one Trust Trustee	Panel of three, made up of either members of the Local Governing Board and/or Trust Trustees. Must include at least one Trust Trustee	Panel of three Trust Trustees who have not previously been involved
Employees within the Central Team, except those listed below	Either an Executive Trustee or an employee authorised by them of at least line management level	CEO if not previously involved or a panel of three Trust Trustees who have not previously been involved	Panel of three consisting of Trust Trustees	Panel of three Trust Trustees who have not previously been involved
Executive Trustee	Either the CEO or a nominated Non-Executive Trustee	CEO if previously not involved or a panel of three Non-Executive Trustees	Panel of three Non-Executive Trustees	Panel of three Non-Executive Trustees not previously involved
CEO	Chair of the Board of Trustees or a nominated Non-Executive Trustee	Panel of three Non-Executive Trustees who have not previously been involved	Panel of three Non-Executive Trustees	Panel of three Non-Executive Trustees not previously involved

**Where felt appropriate or there is a cause for concern, Trust Trustees reserve the right to intervene with decisions and processes at all levels outlined in the above table, and may put alternative arrangements in place where felt necessary.**

**12      Sickness**

- 12.1    If long term sickness appears to have been triggered by the commencement of monitoring or the formal Capability Procedure, the case may be dealt with in accordance with the Management of Sickness Absence Procedure. In some cases, it may be appropriate for monitoring and/or formal procedures to continue during a period of sickness absence.

**13      Review**

- 13.1    This procedure will be reviewed to respond to any changes in the employment legislation at least every three years.



## Appendix 1 – Flow Chart for Capability Procedure

The diagram below shows the process for where performance concerns are identified.



