



Extend Learning
Academies Network

Capability Policy and Procedure

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1. Introduction

- 1.1 We are expected to provide consistently excellent education for our pupils and this can only be achieved through ensuring high standards of performance from all employees.
- 1.2 It is recognised that there will be times that employees are unable to perform to the required standard, which may be due to incapability, and the employee may require support to be able to improve.
- 1.3 For the purposes of this procedure, incapability can be defined as:

“An employee’s inadequate performance which can arise for various reasons and may be due to an employee’s lack of knowledge, skills or aptitude for the position or sometimes incapacity due to ill health to which they are appointed.”
- 1.4 The capability procedure will be applied with great care, through a supportive procedure, giving employees the opportunity to improve and recognising that it may be a difficult experience for an employee who could ultimately be dismissed if unable to meet the required standards.
- 1.5 The Capability procedure will be applied equitably, in accordance with employment law and the ELAN Equality and Equal Opportunities policy.

2. Scope

- 2.1 This procedure provides a reasonable and consistent framework for helping employees achieve and maintain a high standard of performance.
- 2.2 This procedure will not be necessary if good employment practices, such as the induction of new/newly promoted employees and appraisal are implemented well. Generally, performance should be discussed regularly as part of the employee’s regular performance management process, with under-performance identified and tackled early on. Early identification of problems through regular performance management processes will help to avoid the need to access the Capability procedure. When the Capability procedure is used to address under-performance it should not come as a surprise to the employee as conversations about these performance concerns will have already taken place in routine 1:1 meetings.
- 2.3 This procedure applies to all employees employed by ELAN who are not in their probationary period or employees who are deemed Early Career Teachers (ECTs).
- 2.4 Where there are concerns about performance because of an employee’s negligence or wilful failure to carry out their role, the matter should be addressed in accordance with the ELAN’s Disciplinary Policy and Procedure.
- 2.5 Where there are concerns regarding capability in relation to an employee’s ill-health these may be managed in accordance with the ELAN Staff Absence Management Policy and Procedure depending on which procedure is most appropriate for the circumstances.
- 2.6 Capability matters should normally be conducted within the timescales laid down in the procedure. However, if there is a valid reason to do so, timescales may be varied. Where this is necessary, the employee should be given an explanation and informed when a response or meeting can be expected.

3. Informal performance improvement (capability) management

- 3.1 Employees should receive ongoing constructive feedback on their performance as part of normal performance management processes. Generally, it will be appropriate for an employee’s manager to raise concerns regarding an employee’s performance as part of these usual 1:1 meetings in the first instance. In such circumstances, the manager should explain where the performance falls below standard, identify where possible the cause of the problem, and discuss with the employee appropriate means of support for improving performance.
- 3.2 Where there are ongoing performance concerns and/or inadequate performance persists, the manager should meet with the employee to discuss a more structured approach to supporting improved performance. An example of support may be the implementation of a Performance Improvement Plan (PIP) or Performance Support Plan (PSP), training, coaching and/or making reasonable adjustments.
- 3.3 In instances where a PIP/PSP is appropriate, it should identify the areas for development and improvement, set clear objectives, outline the informal support (for example coaching, appropriate training and development activities, additional supervision, allocating a mentor etc.) that will be

provided and specify the timescale for the expected improvement to take place. If industry standards are available e.g. DfE Teachers' Standards these may provide a helpful framework.

- 3.4 The manager must explain the consequences of continued inadequate performance to the employee, i.e. that this could lead to the formal capability procedure which may ultimately result in the employees' dismissal if they are not able to achieve the required improvement in their performance.
- 3.5 The process of informal performance improvement will **usually last no longer than four working weeks**, but timescales should be set relevant to the specific improvement(s) required and will take into account how long it will take to put in place the agreed support measures. For guidance on the appropriate timescale the line manager should discuss this with the HR team.
- 3.6 In cases of a particularly serious concern, such as where the health and safety of others is being placed at risk or the education of children is in jeopardy, the formal capability procedure can be commenced immediately without the need for referral to the informal performance improvement stage.

3.7 Transition Meeting

- 3.7.1 At the end of the informal support period there will be a **Transition Meeting** with the line manager, employee, and the headteacher (or chair of governors where the capability of the headteacher is in question).
- 3.7.2 Because the outcome of the meeting may have serious consequences, the employee should be encouraged to be accompanied by a work colleague or trade union representative.
- 3.7.3. At the transition meeting, the line manager will present the evidence gathered over the informal support period and explain the next step:
 - This may be that sufficient improvement has been achieved and the employee continues with the usual appraisal process and support ends; **or**
 - Progress towards the goals set has been made but more support time is needed before returning to the usual appraisal process; **or**
 - Insufficient progress has been made and the employee must begin formal capability proceedings. The employee will have the opportunity to explain the reasons for their level of performance as well as presenting any mitigating factors. This meeting should be used as an opportunity to explore further with the employee any reasons for their poor performance, as well as establishing appropriate training and support that will assist an improvement. At this stage, consideration will also be given to the colleague being given a different range of duties or an alternative post. By agreement, this may include transfer to a post better suited to the colleague's capabilities. If this post is at a lower salary level, the substantive lower salary would apply. The colleague will maintain their current salary for 3 months before it is reduced to the appropriate new-role salary amount.
- 3.7.4 The outcome of the Transition Meeting will be given in writing within 5 working days. If the outcome of the transition meeting is that the employee must begin formal capability proceedings, the letter will include the date set for the first formal capability meeting (giving the employee at least 5 working days to consider their options).

4. Formal procedure

4.1 Formal capability meetings

- 4.1.1 If, after the employee has been given the opportunity to improve and provided with support, performance continues to fall short of the required standard, the formal procedure will apply. The focus of the formal procedure will be to continue supporting the employee to improve their performance in a clear and structured way.
- 4.1.2 At each stage under the formal capability procedure employees should be:
 - provided with a minimum of 5 working days' notice of the meeting in writing
 - advised in writing of their right to be accompanied by a recognised trade union representative or work colleague

- allowed to submit a written statement in advance of the meeting for consideration should they choose to do so
- provided with the outcome of the meeting in writing within 5 working days
- informed of what the potential outcomes of formal meetings could be
- advised of the right to appeal against any formal sanction, up to and including dismissal (see 'Appeals' below)

4.2 Stage 1a - first formal capability review meeting

- 4.2.1 The first formal review meeting initiates the formal capability procedure. It provides an opportunity to deal with ongoing and/or more serious problems in a structured way.
- 4.2.2 The line manager will invite the employee to a meeting to discuss their performance. The invitation should be in writing, provide 5 days' notice and encourage the employee to bring a recognised trade union representative or work colleague with them. Advisors, such as HR, may be present at the meeting.
- 4.2.3 The line manager will explain where the employee's performance is falling short of the required standards and specify what the required standards are. The employee will have the opportunity to explain the reasons for their level of performance as well as presenting any mitigating factors. This meeting should be used as an opportunity to explore further with the employee any reasons for their poor performance, as well as establishing appropriate training and support that will assist an improvement.
- 4.2.4 The manager's decision should be made after all the facts and any representations from the employee have been considered. The manager may wish to adjourn the meeting briefly to take advice and/or consider the appropriate action before confirming their decision to the employee. Action can include (but is not limited to):
- a first written warning
 - in cases of particularly serious concerns, it is possible to move directly to a final written warning, however, this would be an exceptional situation
 - it may be appropriate, depending on the mitigating factors presented, to refer back to the informal stage for additional performance support.
- 4.2.5 Where further informal performance support or a formal warning is decided upon, the line manager should use the remainder of the meeting to
- identify the performance shortcomings and areas for development e.g. using a framework such as the Teachers' Standards.
 - give clear guidance on the improved standard of performance needed to be reached and maintained to end the capability procedure
 - explain the support that will be available, and how and when performance will be monitored over the following weeks
 - confirm that a first written warning or final written warning has been issued (where relevant) and the employee's right of appeal
 - employees should be made aware that while the concerns with regards to their performance are being considered by way of the capability procedure, the normal appraisal arrangements will be suspended
 - identify the timetable for improvement and agree a date for the next review meeting
 - make it clear that failure to improve may eventually lead to dismissal
- 4.2.6 A letter should be sent to the employee within 5 working days' after the first formal capability review meeting recording the performance improvement plan agreed in the meeting, the details of any warning issued, information about the next stages and possible outcomes if no improvements are forthcoming, and confirming the right of appeal.

4.3 Stage 1b - Monitoring and assessment

- 4.3.1 Throughout the timescale set for the necessary improvement, progress should be regularly reviewed and assessed ensuring the agreed support and/or training is put in place. For teaching staff, this may also involve lesson observations to enable review and feedback.
- 4.3.2 At the end of the timescale for improvement, if the employee's performance has improved to the required standard the line manager will acknowledge the improvement in writing and emphasise

the need for it to be sustained. The line manager should continue to monitor this sustained level of performance and the employee should be informed that should performance concerns reoccur within the 6 working months following that review meeting, the situation may be referred to the next formal capability procedure stage.

- 4.3.3 If the employee's performance has not improved by the end of the timescale set, the line manager should meet with the employee to explain how/why they believe this to be the case. After considering any response the employee may have, the line manager may agree to extend the timescale for improvement (if suitable mitigating reasons have affected their improvement) or inform them that the performance concerns are being referred to the next stage of the formal capability procedure.
- 4.3.4 If at any time during timescale of improvement unforeseen developments arise as part of the ongoing review and assessment which suggest a more serious problem, or there is a further decline in performance, the line manager can decide to move directly to the next stage of the formal capability procedure without waiting for the full timescale to have been met. However, this should be because of exceptional reasons which justify not waiting for the full timescale for improvement to be carried out.

4.4 Stage 2a - second formal capability review meeting

- 4.4.1 If following the first capability monitoring and assessment stage, the line manager considers that there have not been the required improvements in performance, they will invite the employee to a second formal capability review meeting. The invitation should be in writing, provide 5 days' notice and encourage the employee to bring a recognised trade union representative or work colleague with them. Advisors, such as HR, may be present at the meeting. If, following the first capability monitoring, the line manager believes significant improvements have been made, the employee will be invited to a review meeting where they will be officially informed of this and the ending of the formal capability process.
- 4.4.2 The process outlined in 4.2 of this procedure should be followed for this meeting; however, the outcome would progress to a final written warning in place of the first written warning relevant at the first formal review stage.
- 4.4.3 A letter should be sent to the employee within 5 working days of the second formal capability review meeting recording the performance improvement plan agreed in the meeting, the details of any warning issued, confirm that failure to make the required improvement in performance within the timescale set may result in dismissal, and confirming the right of appeal.

4.5 Stage 2b - monitoring and assessment

- 4.5.1 Following this meeting, the steps outlined in 4.3 of this procedure should be followed. However, if the performance continues to be unsatisfactory the matter will be referred to a final formal capability hearing.

4.6 Stage 3 – final formal capability hearing

- 4.6.1 Where, following the second capability assessment stage, and despite appropriate support mechanisms having been put in place, the employee's performance remains unsatisfactory, the matter will be referred to a final formal capability hearing. If, following the second capability monitoring, the line manager believes significant improvements have been made, the employee will be invited to a review meeting where their line manager will be officially informed of this and the ending of the formal capability process.
- 4.6.2 Where the employee's performance remains unsatisfactory, a meeting will be set up with an independent manager to consider the information presented and satisfy themselves that:
- the employee's performance falls below the standard that is required according to the line manager's referral and appropriate supporting evidence
 - that performance standards are not satisfactory
 - the required improvements have not been made
 - adequate support mechanisms have been offered to the employee
- 4.6.3 The independent manager's decision should be made after all the facts and any representations from the employee have been considered. The hearing chair may wish to adjourn the meeting briefly to take advice and/or consider the appropriate action before confirming their decision to the employee. HR should always be present at a final formal capability hearing.

4.6.4 Action can include, but is not limited to:

- satisfactory performance has been achieved, and therefore no further action is required (although a monitoring period to assess sustained performance would be relevant);
- a further review period is necessary before making a final decision due to mitigating factors presented;
- the matter should be referred back to an earlier stage of the capability procedure and further support should be put in place;
- dismissal on the grounds of capability.

4.6.5 Where possible, the manager's decision will be communicated verbally to the employee at the meeting.

4.6.6 A letter should be sent to the employee within 5 working days of the capability hearing recording the main points discussed at the meeting, confirming the decision, and outlining the right of appeal.

5. Appeals

- 5.1 Employees have the right of appeal against all formal capability action. An employee must submit their intention to appeal in writing to the relevant manager specified in the capability hearing outcome letter within 10 working days of receipt of the letter confirming the outcome. Appeals received after this period will not be heard unless there are exceptional circumstances, which made it impossible for the employee to appeal within that timeframe.
- 5.2 Appeal hearings will be convened as soon as is reasonably practicable and the employee will be given 5 working days' notice of the date, time and place of the appeal hearing.
- 5.3 The appeal hearing will be conducted by a more senior manager who, where possible, was not previously involved with the case. The employee has the right to be accompanied at the meeting by a work colleague or a trade union representative. HR, should be present at the meeting.
- 5.4 Employees should make every effort to attend the appeal meeting at the specified time. If the employee or employee's companion cannot attend the hearing on the proposed date, the employee can suggest another date within 5 working days of the originally scheduled date. If an employee fails to attend an appeal meeting without reasonable explanation, or if it appears that the employee has not made sufficient attempts to attend, it may be considered that the appeal has been withdrawn. If the employee is unable to attend, as an alternative, the employee can make written submissions.
- 5.5 At the appeal hearing the employee can set out their grounds of appeal. Appeals against capability action should be in relation to one or more of the following:
 - **The PROCEDURE** – setting out how procedural irregularities prejudiced the capability decision
 - **The FACTS** – setting out how the facts do not support the decision or were misinterpreted or disregarded. Any new evidence can be presented if applicable.
 - **The DECISION** – setting out how the capability concerns did not justify the level of action taken.
- 5.6 During the appeal hearing the chair can ask questions to ensure they fully understand the grounds of appeal raised. The meeting will then adjourn in order for the chair to consider the relevant information available and reach a decision. Where appropriate this can include reviewing the capability case documentation and speaking with decision makers throughout the process to understand factors such as the process followed and how decisions were reached.
- 5.7 Where the reasonableness of the decision is being questioned the test that the appeal chair should apply for overturning a formal warning or dismissal decision is that the capability decision makers' decision was so unreasonable that it was one that no other manager, acting with proper regard for his or her responsibilities, could have chosen to take.
- 5.8 The appeal decision will usually be communicated in writing within 5 working days of the appeal meeting. This is the end of the procedure and there is no further right of appeal.
- 5.9 Appeals should not unnecessarily delay progression of the capability procedure. Whilst it will normally be considered reasonable to delay the next stage formal capability hearing pending the outcome of an appeal, any monitoring or supportive action being taken by management will continue

whilst the appeal is being processed (and count towards any monitoring periods/timescales previously agreed).

6. Role of the companion

- 6.1 An employee who is subject to the capability policy and procedure may bring a companion to any formal capability meetings or appeal meetings. The companion may be either a trade union representative or a work colleague. The employee should inform the manager conducting the meeting of the name and status of their chosen companion before the meeting.
- 6.2 The employee is responsible for making arrangements for their chosen companion to attend the meeting and for providing them with a copy of all relevant paperwork. Acting as a companion is voluntary and colleagues are under no obligation to do so. If a colleague agrees to act as a companion, they will be allowed reasonable time off from their duties without loss of pay to act as a companion.
- 6.3 At any formal meetings or appeal meetings, a companion is there to provide support to the employee, this includes emotional support as well as asking questions to clarify points raised and summing up the employee's position. They are not permitted to answer questions on the employee's behalf or address the hearing if the employee indicates that they do not wish this to happen. The companion is also not able to use their rights in a way that prevents any other person at the hearing from contributing to it including acting unreasonably or disruptively during a hearing. If this occurs the chair will request that the companion stop acting in this way, if it continues the chair should seek HR advice on how to proceed with the meeting.
- 6.4 In some circumstances the manager conducting the meeting may, at their discretion, agree to an alternative companion who is not a trade union representatives or work colleagues attending the meeting. This will be decided case by case and must be for a specific reason such as a reasonable adjustment for a learning disability or if they have difficulty understanding English.
- 6.5 Where the chosen companion is unavailable on the day scheduled for the meeting or appeal, the meeting can be rescheduled once where the employee is able to provide an alternative date that is within 5 working days of the original date. If the chosen companion is not available within this timeframe, it is expected the meeting will go ahead on the original date. In these circumstances the employee may wish to seek an alternative companion. If the employee does not attend the meeting it may continue in their absence.

7. Special circumstances

7.1 Grievances raised during the course of the capability procedure

- 7.1.1 If an employee raises a grievance during the course of a capability process it may, depending on the concerns raised, be appropriate to suspend the capability procedure for a short period until the grievance is considered. Alternatively, it may be decided that an alternative manager should continue with the capability procedure whilst the grievance is considered. In these circumstances the employee would have to raise the grievance in accordance with the ELAN Grievance Policy and Procedure and the line manager will inform the employee what (if any) measures are being put in place in connection with the capability procedure.

7.2 Sickness absence during capability

- 7.2.1 If an employee is sick leading up to or during capability review meetings, this will not usually be a ground for abandoning the meeting because ELAN believes there are ways of adjusting the procedure to enable the employee to fully participate even when unwell. If the absence is expected to be short (a day or two), it may be possible to delay proceedings until the employee recovers, however; if this is not expected to be the case, the line manager can, at their discretion, propose adjusting the procedure to support the employee in one or more of the following ways:
 - 7.2.2 Meeting location - the line manager could consider holding the relevant meeting at an alternative venue, either to reduce the stress caused to the employee by attending the meeting in their usual work place or to accommodate any physical needs they may have.
 - 7.2.3 Alternative companion - the line manager may consider an employee's request for a companion at the meeting who is not a trade union official or work colleague where this may be offering suitable support to the employee. This does not include solicitor.

7.2.4 Alternative ways to make their representation - where it appears that the employee's illness may affect their ability to respond to questions asked or explain their case, the line manager should discuss with the employee if they could be represented in the process by a colleague or union official on their behalf. Alternatively, the employee could be invited to respond to questions or present their case in writing.

7.2.5 Timings - whilst ELAN are committed to the principle that matters should be dealt with promptly, if an employee is sick the manager may consider adjusting timings of the process if this supports the employee to participate effectively. For example, taking regular breaks during meetings or being more flexible around alternative dates proposed for meetings so long this does not unreasonably delay the process.

8. Review

8.1 This policy will be reviewed annually in consultation with the recognised trade unions

Appendix 1 – Capability Procedure Flowchart



