



Theale C of E Primary School

Capability policy and procedures

At Theale CE Primary School the children come first. They are central to every decision made in school. We will ensure that our children are happy and successful. They will grow to be ambitious and resilient and their talents will be nurtured so they become highly skilled. Our children will be courageous and always behave with integrity.

“And you shall love the LORD your God with all your heart, with all your soul, with all your mind, and with all your strength.’ This *is* the first commandment. And the second, like *it, is* this: ‘You shall love your neighbour as yourself.’ There is no other commandment greater than these.” *Mark 12: v 30-31*

“I have come that they may have life and that they may have it more abundantly.”
John 10:10

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1 Legal and Local Authority Requirements

It is recognised that employees may sometimes be unable to achieve or maintain required standards of performance through lack of capability or for health related reasons. The purpose of this procedure is to ensure fairness and consistency in the management of employees and to:

- tell employees what will happen if they are unable to achieve or maintain the required standards of performance,
- ensure positive and realistic support is provided to help employees overcome any difficulties that affect their performance,
- ensure that consideration is given to whether there are any latent reasons for the difficulties (e.g. health, other personal reasons, workload or the work environment) and action taken where appropriate

1.1 Protection of Children Act and Referral to the Children's Safeguarding Unit (List 99) at the DfES

There is a statutory requirement for the provision of the Protection of Children Act and List 99 scheme to be applied where employees work in the provision of care services to children.

Employees at a school who are dismissed, who resign in circumstances which may have led to dismissal or where a disciplinary transfer has occurred on grounds of misconduct which harmed or placed a child at risk of harm will be referred to the Children's Safeguarding Unit (List 99) at the DfES.

2 Our Policy

2.1 Scope

This procedure applies to all school employees **except** those in their Induction/Probationary period and GTP students for whom separate procedures apply.

West Berkshire Council is regarded as the employer for Community, Voluntary Controlled, Community Special and Maintained schools. However, the Governing body has a statutory obligation to establish procedures relating to the conduct and discipline of staff (School Staffing (England) Regulations 2003), including dealing with capability matters, and are responsible for ensuring that all employees are made aware of the procedures. The Headteacher is responsible for the internal organisation, management and control of the school. In cases of capability where the outcome is dismissal, the Governing Body or Headteacher (where responsibility has been delegated to the Headteacher) are responsible for making the decision to dismiss and for informing West Berkshire Council of their decision.

West Berkshire Council strongly recommends that Community, Voluntary Controlled, Community Special and Maintained nursery schools adopt this model procedure. Foundation and Voluntary Aided schools may also wish to adopt it.

3 Supporting Information

3.1 What is Incapability?

Incapability is performance that falls below required standards because of ability or for health related reasons.

Incapability – Performance

lack of qualification, skill or aptitude for a particular job

inability (as distinct from unwillingness) to cope with a change in the job (e.g. its technology, complexity, skill requirement or pressure level)

inability (as distinct from unwillingness) to adjust to a change in the location or environment of the job

Incapability – Health

health related (e.g. physical or mental ill health, high levels of genuine sickness absence, accident or injury)

This procedure does not apply where performance falls below required standards from misconduct (failure to perform through wilful refusal, neglect, unwillingness, carelessness, laziness or lack of commitment). Cases of misconduct will be dealt with under the School's Disciplinary Procedure.

3.2 Roles and Responsibilities

The Governing Body has the statutory authority to decide to dismiss staff. However, it may delegate that authority to:

- the Headteacher (if agreed by the Headteacher),
- one or more Governors,
- one or more Governors and the Headteacher (if agreed by the Headteacher).

If the Governing Body decide to delegate their authority to any of the above then it is recommended that this is recorded in writing in the minutes of a governor meeting.

Where the case has not been led by the Headteacher, responsibility for dealing with a Capability Hearing and deciding the outcome of the Hearing, including a decision to dismiss, may be delegated to the Headteacher (if agreed by the Headteacher).

Where the Headteacher does not have delegated powers or the case has been led by the Headteacher, West Berkshire Council recommends that responsibility for dealing with a Capability Hearing and deciding the outcome of the Hearing, including a decision to dismiss, is delegated to three governors not previously involved in the case. Where the Headteacher is not presenting the management case they may attend such a hearing for the purposes of offering advice, in front of all parties, which the Governors must consider before making a decision.

Where there is alleged incapability on the part of a Headteacher, the Chair of Governors will inform the Corporate Director for Children & Young People before any action is taken. In the case of Headteachers, considerations of lack of capability will be jointly led by the Chair of the Governing Body and the Head of Education Service (or another person external to the school agreed by the Chair of Governors and the Head of Education Service).

Where capability proceedings are taken against a Headteacher, West Berkshire Council recommends that three governors not previously involved in the case hear the Capability Hearing and decide the outcome, including a decision to dismiss.

The Corporate Director for Children & Young People and/or an appointed representative has the right to attend a Capability Hearing or a Capability Appeal Hearing against dismissal for the purposes of providing advice to the panel. Such advice will be given to the panel only (in the same way that the employee and the management representative may each receive their own advice) and must be considered by the panel before making a decision.

A panel of governors, normally three, who were not involved in the initial decision, will consider any appeal.

The Representative may be a work colleague (i.e. another West Berkshire Council employee) or a trade union representative. A chosen representative is under no obligation to act on behalf of an employee.

The Representative should be identified to management in advance and cannot be someone whose presence would prejudice the meeting or who might have a conflict of interest

If the Representative is a work colleague they will be entitled take reasonable paid time off to prepare for and attend the hearing and to confer with the employee before and following the hearing.

The Representative may confer with the employee during the meeting, can address the hearing to put the employee's case; ask witnesses questions, sum up on the case; and can respond on the employee's behalf to any view expressed at the meeting but cannot answer questions for the employee. The only exception to this is where the Chair considers that the employee is unable to answer questions themselves, for example, because of the employee's ill health. The Representative has no right to address the hearing if the employee does not wish it.

Management does not have the right to prevent the employee from explaining their case. The employee and their representative do not have the right to prevent management from explaining their case.

3.3 Principles

The following principles apply:

- Managers will try to resolve issues of incapability informally. However, where the informal approach has been tried and has not worked, or the failure to perform at a satisfactory level is attributable to health related reasons, formal action under the capability procedure will be considered.
- No employee will be dismissed on the grounds of performance incapability or health related incapability without the application of this procedure.
- At all stages of the formal process the employee will be advised of the deficiency in their capability, given the opportunity to state their case and present relevant evidence before any decision is made.
- At all stages of the formal process the employee will have the right to be accompanied by a representative who may be a relevant trade union official or work colleague.
- No formal action will be taken against a trade union representative until, having consulted the employee concerned, the circumstances of the case have been notified to a regional officer of the trade union concerned.

If there are any disability issues affecting the employee or their companion these will be reasonably addressed so that any formal proceedings can take place adequately

If the employee has difficulty reading or if English is an additional language and they would have difficulty understanding the contents of any letter this will be explained to them orally. Where appropriate, Braille or audio versions of the letter will be provided on request

Information relating to the application of this procedure will be kept confidential

3.4 General Framework

The following general framework outline applies to all cases of incapability. In cases of performance incapability the capability meeting will be followed by a support programme. Where incapability is health related, action taken may include referral(s) to Occupational Health to inform the action required.



3.4.1 Arranging a Capability Meeting or Hearing

The employee shall be informed in writing at least 10 school working days in advance of any formal meeting or hearing:

- the date, timing, location and purpose of the meeting or hearing,
- the name of the Chair/panel of the meeting or hearing,
- specific details of the employee's performance causing concern,
- the areas to be discussed at the meeting or hearing,
- the possible outcome of the meeting or hearing,
- the employee's right to be accompanied at the meeting or hearing,
- a copy of any documentation that will be relied upon by management at the meeting or hearing.

The employee will be expected to provide the Chair of the meeting or hearing with a copy of the documents that they will be relying upon at least 5 school working days before the meeting or hearing, except in exceptional circumstances.

Both the employee and management must take all reasonable steps to attend the meeting or hearing.

If the employee's representative is unable to attend the proposed date, the employee can suggest another date so long as it is reasonable and is no more than 5 school working days after the date originally proposed. This time limit can be extended by mutual agreement.

If an employee, or their representative, is unable to attend for reasons that were unforeseeable at the time the meeting or hearing was arranged (e.g. illness) then the School will arrange another

meeting or hearing. If the employee is unable to attend a second time the meeting or hearing will normally convene, as arranged, and a decision taken in the employee's absence.

3.4.2 Informal Discussion and Action

In most cases where capability is considered to be unsatisfactory, the Headteacher or employee's line manager may decide to take an informal approach which may include discussion about the situation with the provision of additional advice, coaching, training or counselling being given. The employee must be informed:

- i) of the standards expected,
- ii) over what period performance will be reviewed, if necessary.
- iii) that informal conversations are not part of the formal capability procedure but failure to improve or maintain an improvement in performance could result in the Formal Capability Procedure being instigated. If this is the case, the conversation can be referred to when taking any formal action under the procedure.

The length of informal support will normally be a minimum of 6 school working weeks.

A note of the discussion will be recorded on the employee's file and a note of the meeting sent to him/her.

Where the problems appear to arise from a medical condition the employee may be referred to Occupational Health.

Where informal action has not brought about an improvement in performance or concerns with performance are more serious, formal action will be taken.

3.4.3 Formal Capability Meeting

The employee will be advised in writing, and in accordance with the requirements in this document, that a formal capability meeting will take place.

At the meeting the Headteacher must:

- make clear that the formal process has been initiated,
- make clear the specific details of the employee's performance causing concern,
- give the employee the opportunity to respond to the concerns identified, to state any objection and to present any relevant evidence for the Headteacher to consider.

The Headteacher may decide that:

- Action under the procedure is not necessary. The individual will be advised in writing within 5 school working days.
- Performance improvement is required and the Capability Procedure – Performance will be followed. The meeting will then follow guidelines given here.
- The problems appear to arise from a medical condition and that the Capability Procedure – Health will be followed. The meeting will then follow guidelines given here.

3.5 Capability Procedure – Performance

3.5.1 Support Programme

At the Formal Capability Meeting discussion will take place about an appropriate support programme. The formal support programme will vary from case to case, depending on the difficulties faced by the employee, the amount of help required and the circumstances of the school

and its resources. The general aim of the programme is to provide as much support as possible initially, reducing as the programme continues so that it is possible, at the end of the review period, to assess the employee's capability undistorted by any special help provided.

The content of the support programme could include one or more of the following:

- in-service training,
- help with planning and content of work and any follow-up,
- a modified workload or timetable for a specified period,
- reorganisation of work areas, classes or rooms,
- work-sharing or team teaching with experienced persons,
- visits to other schools or workplaces,
- temporary attachment to another school or workplace,
- observation by the employee of good practice,
- observation of the employee's work by someone with appropriate experience (either from the school or outside) with the results being promptly fed back to the employee,
- counselling by appropriate persons, as requested.

The person who monitors the employee's performance will be someone with experience and responsibility e.g. the Headteacher, Deputy Headteacher or, in the case of larger schools, may be Heads of Department or Faculties. Other staff with responsibility for staff may have a key role.

Independent assessments of the employee's capabilities must be made by the Headteacher and by one other appropriate person who may be a senior staff member at the school, an external adviser to the school, a school improvement adviser or other officer from the Local Authority.

Records should be kept of all meetings, discussions and assessments with copies circulated to those directly involved.

The Headteacher will determine the length of the support programme and when a Capability Review Meeting will take place to review progress, normally at the end of the support programme.

The length of the support programme should normally be no more than the duration of 13 weeks and may straddle terms (e.g. mid term to mid term). In extreme cases of serious concern (for example, where the education of children is likely to be seriously jeopardised) the period given for improvement shall be no longer than 6 weeks but will not normally be any less than 4 weeks.

Following the meeting, the Headteacher will write to the employee within 5 school working days confirming:

- that a formal capability meeting has taken place,
- that the employee's performance must improve together with details of the required improvement in the employee's performance,
- the timescales required for improvement,
- details of the agreed support programme,
- that failure to improve within the specified timescale could lead to dismissal, and
- details of when a Capability Review Meeting will take place to formally review progress (normally at the end of the support programme).

3.5.2 Capability Review Meeting(s)

The employee will be advised in writing, and in accordance with the requirements in this document, that a Capability Review Meeting will take place under the capability procedure.

At the meeting the Headteacher must:

- make clear to the employee that the meeting is a Capability Review Meeting following identification of performance concerns and a support programme,
- make clear the specific details of the employee's performance that were causing concern, any improvements demonstrated and any specific areas of concern that continue to exist with the employee's performance,
- give the employee the opportunity to respond to the concerns identified, to state any objection and to present any relevant evidence for the Headteacher to consider.

If the Headteacher decides that satisfactory performance has been achieved and that action under the procedure is discontinued, the employee will be advised and confirmation will be given in writing within 5 school working days.

If the Headteacher decides that performance improvement has not been achieved within a reasonable period this will be explained to the employee at the meeting. The Headteacher will write to the employee within 5 school working days confirming that a Capability Hearing will be arranged and that the employee will be written to with further details.

If the Headteacher decides that performance improvement has taken place and that there is a good chance of the required improvement being achieved a further period for improvement may be given. Discussion will take place about the ongoing support programme. The Headteacher will determine the length of any further period for improvement (normally no more than the duration of 6 weeks) and when a further Capability Review Meeting will take place to formally review progress. The Headteacher will write to the employee within 5 school working days confirming that:

- a Capability Review Meeting has taken place under the capability procedure,
- the employee has been given a further period for performance improvement,
- details of the required performance improvement and the timescales for improvement,
- details of the agreed support programme,
- failure to improve within the specified timescale could lead to dismissal,
- details of when a further Capability Review Meeting will take place to review progress.

3.6 Capability Procedure – Health

3.6.1 Referral to Occupational Health

The employee will be asked to attend an appointment with Occupational Health.

If Occupational Health recommend early retirement on ill health grounds an application can be made to the pension scheme (Teachers Pensions or Local Government Pension Scheme) for retirement on the grounds of ill health. If the application is accepted the employee's resignation will be agreed. If the application is not accepted, a Capability Review Meeting will be arranged.

The advice from Occupational Health may include:

- cause of absence and likely duration of absence,
- recommended changes to working practices, lay-out/location/environment or workings hours to facilitate return to work and/or satisfactory performance,

- that the employee is not medically fit to undertake their role and that consideration of alternative employment options is recommended.

Following receipt of advice from Occupational Health a Capability Review Meeting will be arranged.

3.6.2 Capability Review Meeting(s)

The employee will be advised in writing, and in accordance with the requirements of this document, that a Capability Review Meeting will take place under the capability procedure. If applicable, the letter should also explain that the search for alternative employment will be discussed and considered at the meeting.

At the meeting the Headteacher must:

- explain to the employee that the meeting is a Capability Review Meeting following identification of health related attendance and/or performance concerns and referral to Occupational Health,
- explain that the purpose of the meeting is to consider the advice from Occupational Health and what action can be taken to help support the employee's return to satisfactory attendance and performance (or search for alternative employment),
- give the employee the opportunity to respond to the advice from Occupational Health, to state any objection and to present any relevant evidence for the Headteacher to consider.

The Headteacher will confirm the action to be taken to support the employee's return to satisfactory attendance and performance (or search for alternative employment). Records should be kept of all action taken.

The Headteacher, taking into consideration the advice from Occupational Health, will determine the date on which the likelihood of a return to satisfactory attendance and performance will be reviewed at a Capability Review Meeting (this may be arranged to follow an Occupational Health appointment).

Following the meeting the Headteacher will write to the employee within 5 school working days confirming:

- That a formal capability meeting has taken place to consider what action can be taken to support the employee's return to satisfactory attendance and performance (or search for alternative employment).
- Details of the action that has been agreed.
- The date that the employee's attendance and performance (or search for alternative employment) will be reviewed at a further Capability Review Meeting.
- That if satisfactory attendance and performance and alternative employment is not achieved within a reasonable period dismissal could result.
- Where a decision has been made to look for alternative employment this will be confirmed in writing. Individuals have the right to appeal against that decision and/or submit a grievance where they believe that the action amounts to unlawful discrimination or the grounds on which the employer took the action were unrelated to the grounds on which the employer asserted taking action. Appeals must be submitted in accordance with this document, and grievances must be submitted in accordance with this document.

If, following a reasonable period, the Headteacher believes that the duty to make reasonable adjustments has been met, that the employee's attendance and performance continues to be a problem and the search for alternative employment has been unsuccessful, this will be explained

to the employee at a Capability Review Meeting. If the Headteacher believes that dismissal is appropriate they will write to the employee within 5 school working days of the Capability Review Meeting confirming that a Capability Hearing will be arranged which could result in dismissal on grounds of ill-health.

3.6.3 Capability Hearing – Possible Outcome Dismissal

The employee will be advised by the Chair of the Capability Hearing Panel in writing, and in accordance with the requirements of this document, that a Capability Hearing will take place under the capability procedure. The employee will be advised that the outcome could lead to dismissal.

In addition to the requirements of this document, the employee will be advised of the names of any witnesses (employees of West Berkshire Council, except in exceptional circumstances) who will be called to give evidence and the employee must advise the Chair, within 3 school working days of the hearing, of the names of any witnesses (employees of West Berkshire Council, except in exceptional circumstances) they intend to call to provide evidence on their behalf. Alternatively the employee can submit witness statements for consideration providing they are received within 3 working days of the hearing.

The hearing will be conducted as follows:

1. Introduction by Chair

- Presentation of management case by the most appropriate person, including the calling of witnesses. Witnesses will only be present for the purposes of giving evidence. Questions may be asked of witnesses (first by management, then by the employee and finally by the Chair/Panel).
- Upon completion of the above, the employee and the Chair/Panel may ask relevant questions about the management's case.
- The employee presents their case, including the calling of witnesses. Witnesses will only be present for the purposes of giving evidence. Questions may be asked of witnesses (first by the employee, then by management and finally by the Chair/Panel).
- Upon completion of the above, the management representative and the Chair/Panel may ask relevant questions about the employee's case.
- The Chair, Management or Employee has the ability to recall witnesses if required.
- Each Party will then sum up their case (management first followed by employee).
- Both Parties will leave the hearing, and the Chair/Panel will make a decision.

The Chair/Panel shall determine as follows:

- No action to be taken, or
- The matter to be referred back to the Headteacher for further action which in the case of ill health capability may include the search for alternative employment as a reasonable adjustment if panel members believe this has not already been reasonably considered, or
- The employee to be dismissed (subject to the normal contractual notice period).

The decision shall be confirmed in writing within 7 school working days.

If the decision is to dismiss, the written confirmation shall include:

- the decision and reasons for the decision,
- the date on which employment is terminate,

- the right to appeal.

If the decision is to refer the matter back to the Headteacher for further actions, the written confirmation shall include:

- the decision and reasons for the decision,
- the date and arrangements for review.

If the decision is that no action is to be taken, the written confirmation shall include:

- the decision and reasons for the decision.

3.7 Capability Appeal and Grievance

An employee is entitled to appeal against the Headteacher's decision to look for alternative employment or a decision to dismiss taken by the Capability Hearing. The appeal must be in writing addressed to the Clerk to the Governors within 10 school working days of being advised of the decision. The written intention to appeal must indicate the grounds for the appeal. The Capability Appeal will be heard as soon as possible and not normally later than four school working weeks after being received, unless a later date is agreed.

The Chair of the Appeal Panel will write to the employee giving 5 school working days notice, in writing, of the date of the Capability Appeal Hearing and the Chair of the Hearing. The Hearing will review the earlier decision, taking account of the grounds of appeal. The employee can be accompanied at the Hearing by a relevant trade union official or work colleague. The appeal can overturn the earlier decision, confirm it or refer the case back to the Headteacher for a further period of improvement.

Both parties must indicate at least 3 school working days in advance of the Capability Appeal Hearing which, if any, witnesses they wish to call.

The employee will be able to present evidence which is directly relevant to the grounds of appeal. Management will have the opportunity to respond. Facts found at the earlier stage will be accepted as such unless the employee states otherwise and presents evidence which is directly relevant to the grounds of appeal.

The employee will be informed of the Capability Appeal decision in writing within 5 school working days. If the employee is reinstated to the same post, pay equivalent to that received when on annual leave will be paid from the date of dismissal to return to work. In cases of reengagement to another post, payment will be made at the rate of pay of the new job from the date of dismissal to return to work.

Where the Headteacher has made a decision to look for alternative employment, the employee is entitled to submit a grievance relating to the capability procedure on the following grounds:

1. that the capability action amounts to unlawful discrimination, or
2. that the true reason for the action is not the reason given by the school.

If the employee wishes to raise a grievance under any of the above grounds they must do so in writing in accordance with the grievance procedure. If the grievance is submitted before the capability appeal hearing, it will normally be dealt with at the Capability Appeal Hearing and the rest of the Grievance Procedure does not have to be followed.

There is a separate procedure for employees who wish to raise grievances about their employment. If a grievance is raised during the capability process, the capability process may be suspended, where appropriate, for a short period until the grievance can be considered.

3.8 Written Records

Record of any formal proceedings will be made and will include:

- the complaint/problem against the employee,
- the employee's views/defence,
- any grievances raised during the capability process,
- findings made and actions taken,
- the reason for actions taken,
- whether an appeal was lodged,
- the outcome of the appeal,
- subsequent relevant developments.

Records will be treated as confidential and be kept in accordance with the Data Protection Act 1998 so that an employee has the right to request and have access to relevant information but, in certain circumstances (for example to protect a witness) the School and/or West Berkshire Council may consider it appropriate to withhold some information. In such circumstances the employee will be told in writing the nature of what has been withheld, e.g. one witness statement.

3.9 Equal Opportunities

The Capability Procedure will be applied fairly and consistently to all staff employed at the school regardless of gender, race, colour, marital status, national or ethnic origin, nationality, disability, sexuality, sexual orientation, age, religion, trade union membership/non membership, trade union activities, status or number of hours worked.