



Wootey Infant School Capability Policy and Guidance

Responsibility: Pay Committee

Reviewed by: Pay Committee

This Review: Nov 2022

Next Review Nov 2025

Cycle: 3 years

1. Purpose

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

This policy defines how the school will manage an employee if they are unable to perform to the required standards.

2. Scope

The policy and this how to guide apply to:	• Teachers including leadership, upper pay range, main pay range and unqualified teachers • Support staff
The policy and this how to guide do not apply to:	• Volunteers • Contractors • Agency workers

This policy is non contractual and does not form part of any employee's terms and conditions.

Employees that have been subject to a TUPE into the School may be excluded from this policy. In such cases, the employee should refer to their own contractual policies and procedures.

Employees with less than two years' service may be subject to a shortened procedure as detailed in [Appendix One](#).

Employees are actively encouraged to contact their professional association/ trade union representative at the earliest opportunity to obtain advice and support at any point during this procedure.

The school expects all parties to maintain confidentiality throughout the application of the policy.

3. How to use this document

Principles This Policy and How to Guide provides information about the procedure to follow when applying the Capability Policy. The document has been written in the second person to address the line manager, referred to throughout the document as 'you'.

Throughout this guide, the word 'must' is used as a 'requirement' of the policy and procedure. The word 'should' is used to indicate actions or processes that are considered to be best practice.

~~Please note that the section numbering in the policy and this How to Guide are not aligned.~~

If there are concerns about a headteacher's performance concerns, a relevant governor must consult Education Personnel Services.

How do I address my concern?

Type of concern	Refer to the...
Conduct or behaviour which is considered to be wilful, negligent or a breach of the Code of Conduct	Disciplinary Policy and How to Guide
Performance concerns that relate to a possible underlying medical condition or disability	Education Personnel Services team for advice and Occupational Health/medical practitioner. It may be more appropriate to manage the concern using the Managing Sickness Absence Policy.
Absence from work due to sickness	Managing Sickness Absence Policy and How to Guide

Annual performance review for employees	Performance Management Policy
Sickness absence whilst action under the Capability Policy has started	In some cases it may be appropriate for action under the Capability Policy to continue during a period of sickness absence. In such cases consideration must be given to any medical advice from Occupational Health/medical practitioner.
An employee's concern(s) about a decision or action taken when applying the policy	Education Personnel Services team for advice. If matters are related - use the meetings and appeals process within the policy. If matters are unrelated - run the policy and the Grievance Policy concurrently. Or, in certain cases action under the policy may pause to address the grievance.

If you are unsure which policy to use, please contact Education Personnel Services.

Contents

4. Introduction	5
5. Performance management	5
6. Managing capability	6
7. Stages of the Policy	8
8. Appeal	17
9. Gross Incompetence.....	21
10. Other policy requirements.....	26
11. Support	30
12. Toolkit	30
13. Related documents	31
14. Roles and responsibilities	31
15. How to Guide governance	32
Appendix One – Managing capability for employees with less than two years' service	33
Appendix Two - Gross incompetence.....	34

4. Introduction

This school expects excellent standards of performance and is committed to supporting employees to fulfil the requirements of their role.

The school acknowledges that there may be circumstances when an employee does not perform to the required standards. If a performance concern is identified, this should be addressed early on to help the employee to improve. The school will work with an employee to support them to achieve the required standards of performance.

Policy aims	The aims of the policy and this how to guide are to: • improve and maintain performance • manage capability positively • provide a framework for managing capability • ensure the employee is made aware of performance concerns in a timely manner • support the employee to perform successfully in their role • support a culture of high performance within the school to facilitate school improvement.
Key definitions (shown in alphabetical order)	Equality Act 2010 - a person has a disability for the purposes of the Equality Act 2010 if they have a physical or mental impairment which has a substantial and long-term adverse effect on their ability to carry out normal day-to-day activities. Suspension or alternative arrangements – are neutral and precautionary acts. They may be considered at any point during the Capability Policy once an investigation has established that the circumstances may be gross incompetence. Timescales - all references to ‘days’ in this how to guide refer to working days, regarded as Monday to Friday, excluding public holidays. Periods of notice that are specified indicate the number of clear days between (and exclusive of) the day the letter is issued and the day of the meeting/hearing.

5. Performance management

Performance management	The school will manage an employee’s day to day performance with the Performance Management Policy.
-------------------------------	--

The performance management cycle enables a manager to address any concerns promptly with the employee. It allows for appropriate support to be put into place to support an employee to improve their performance. Sometimes despite having supported the employee to improve, performance concerns can continue. In these circumstances, you should consider whether it is appropriate to commence the Capability Policy.

Annual review of performance

Every employee will have an annual review of their performance. The review process enables an employee's performance to be monitored and assessed.

Pay progression

If an employee is unable to perform to the required standards of the role, this may have an impact on their annual pay progression.

For further advice, please contact Education Personnel Services.

6. Managing capability

Considerations

You must consider whether to start the capability process if an employee does not perform the duties of their role to the required standards. This may happen because the employee does not have the necessary skills, knowledge and/or experience. The employee may not demonstrate the appropriate behaviours that are required.

There may be other reasons to explain why an employee is unable to perform to the required standards. This may happen due to a physical, cognitive, mental, sensory, emotional, or developmental disability, impairment, condition or illness which may be temporary or permanent.

There may be exceptional circumstances when you and/ or employee anticipate a long-term capability concern. This may happen due to the employee's health or a disability. In these circumstances, it is anticipated it is unlikely that the employee can achieve the required level of performance. Consideration must be given to whether reasonable adjustments are appropriate. You must seek advice from Education Personnel Services in such cases.

If an employee's performance is causing concern, you must consider whether:

- appropriate training and support has been provided to the employee through the Performance Management Policy. This will normally include a period of structured managerial support, demonstrating that reasonable efforts have been made to identify performance concerns, discuss them with the employee and put in place support to facilitate improvement
- reasonable adjustments are necessary
- it is a [performance or conduct issue](#)
- the employee has an underlying medical condition and a [referral to Occupational Health/ medical practitioner](#) may be appropriate
- it is appropriate to hold a formal meeting/ hearing
- it is a [gross incompetence](#) matter.

The Capability Policy aims, through advice and support, to improve to an acceptable level, as set by the school, the performance of an employee who is causing concern. Such advice and support may be provided:

- from within the school;
- through accessing expertise in another school;
- via the local authority's advisory services;
- from other expert sources external to the school;
- through training courses or events.

How to distinguish between performance and conduct

You will need to consider whether it is appropriate to use the Capability Policy. In some circumstances it may be more appropriate to apply the Disciplinary Policy.

To help decide which policy to apply, you will need to consider the following:

- does the employee have the necessary skills?
- has the employee completed relevant training to develop the necessary skills?
- does the employee have the necessary knowledge for the role?
- has the employee previously been able to perform to the required standards?

In considering the above questions, this will help you to decide whether the employee has the necessary skills, knowledge and/ or experience. If the employee does not have the necessary skills, knowledge or experience, it would be appropriate to apply the Capability Policy.

If you consider that an employee's behaviour or conduct is deemed to be wilful or negligent, it would be appropriate to apply the Disciplinary Policy.

If you are unsure about which policy to apply, you must seek advice from Education Personnel Services.

Identifying a capability concern
Policy stages and principles

Examples of unsatisfactory performance are described in the Performance Management Resource Pack and examples of gross incompetence are included in [Appendix Two](#).

The possible stages are:

- Stage 1
- Stage 2
- Stage 3 – may result in dismissal
- appeal after each formal stage.

There is a shortened procedure for employees with less than two years' service as detailed in [Appendix One](#).

In exceptional circumstances, it may be appropriate to use the stages of the Capability Policy without a period of structured managerial support (provided under the Performance Management Policy).

The employee must be given a reasonable period of time to achieve the required improvement before moving to the next stage of the policy.

An employee may have a disability classified by the Equality Act 2010. You must refer to the Reasonable Adjustments guidance before progressing to the stages of this policy.

7. Stages of the Policy

Stages At each stage of the policy, the employee must be invited to attend a meeting/hearing.

Meeting/hearing The employee must receive in writing the invitation to the meeting/hearing.

arrangements The letter must give the employee **5 working days** notice of the meeting/ hearing. The timescales for the meeting/hearing can be varied by mutual agreement.

Meeting/hearing arrangements should ensure that:

- the date is set in consultation with the employee's representative and Education Personnel Services, where applicable
- a suitable venue is sourced
- consideration is given to access to refreshments (water)
- there are adequate break out rooms reserved for relevant parties
- reasonable adjustments are considered if applicable
- appropriate arrangements are made to enable a [formal record of the meeting/hearing](#) to be made.

Formal record of the meeting/hearing A formal record must be taken during the meeting/hearing. This may be made by audio recording the meeting/hearing or by a note taker. It is the school's responsibility to make the appropriate arrangements.

Copies of the notes or audio recordings will be provided on request. Audio recordings will not be transcribed.

If an audio recording takes place, a copy of the recording must be retained by the school. The school must comply with all relevant retention and storage requirements.

The notes/audio recording and documents shared within the formal meeting/ hearing are confidential to those present in that meeting/hearing.

In some cases, it may be necessary as is reasonable in the circumstances to circulate documents to other school employees, in connection with the matter. Any information

communicated to other school employees in connection with the matter must be treated as confidential.

For governor hearings in maintained schools, there remains a legal requirement to have a written record of the meeting of the Governor Committee.

Alternative date

The school expects that the employee and their representative will make all reasonable efforts to attend the first scheduled meeting/ hearing date and time.

If it is not possible, the employee may propose an alternative date and/or time. This should be within **5 working days** of the original meeting/hearing.

The meeting/hearing will be rescheduled.

If the employee is unable to attend or does not attend the re-arranged meeting/hearing, the chair must decide whether to proceed in their absence. Further advice should be sought from Education Personnel Services.

Sharing of information

The manager and employee are required to exchange all relevant papers and supporting evidence in advance of the meeting/hearing. The employee will be provided with a copy of the Capability Policy.

Management documents will be supplied with the invitation letter. This will include any appeal information from the previous formal stage.

A record about the situation with details of any informal discussion(s) and details of the structured managerial support provided would normally be required.

A template management report is available to help you compile relevant information in more complex cases and at Stage 3.

The employee will be provided with two copies of all documents that will be provided to the chair/panel in advance of the meeting/hearing. One copy is for their reference and the other is for their representative.

You can arrange for a copy of the management documents to be sent directly to the representative, if consent is given by the employee.

The employee or their representative must submit all relevant papers and supporting evidence to arrive with the chair at least **3 working days** before a meeting/hearing.

In exceptional circumstances, additional information may need to be submitted to the chair/panel outside of the above timescales. If this happens, the information should be shared with all parties as soon as possible.

If additional documents are submitted on the day of the meeting/hearing, time must be given to allow all parties to read the documentation.

Governors will be notified in the event that the Capability Procedure is applied to a member of staff, but will not be provided with any other detail, as this may prejudice governors' involvement in a later stage if recourse to that stage eventually becomes necessary.

Right of representation

The employee has the right to be represented/ accompanied at formal stage meetings/ hearings or appeal meetings. This can be by a professional association/ trade union representative or a work colleague.

It is the employee's responsibility to:

- arrange their own representative
- liaise with their representative to agree the formal meeting/ hearing or appeal meeting date and time
- advise management of the representative's details.

There is no right to legal representation at any stage of this policy.

Who chairs the meeting/hearing

For teachers and support staff

Stage	Chair/Panel	HR Adviser	Right to be represented/ accompanied
Stage 1	Line manager	If required	Yes
Stage 2	Line manager or other manager	HR adviser	Yes
Stage 3/ less than two years' service	Headteacher (where they have delegated powers of dismissal) OR a Governors' Committee	HR adviser	Yes

Who chairs the meeting/hearing

For a headteacher

Stage	Chair/Panel	HR Adviser	Right to be represented/ accompanied
Stage 1	Headteacher Performance Management Committee (HPMC)	If required	Yes
Stage 2	Headteacher Performance Management Committee	HR adviser	Yes

	(HPMC)		
Stage 3/ less than two years' service	Governors' Committee	HR adviser	Yes

The chair of the HPMC will commission an advocate from the School Improvement Service and an HR adviser from Education Personnel Services to present the management case. The chair of the HPMC will usually be called as a witness.

If required, an additional professional adviser from the School Improvement Service will be present, at any stage to provide the governors with professional advice.

Other meeting/hearing conditions

The chair/panel should not have had previous involvement in the case.

If the headteacher has heard an appeal at Stage 1 and/or Stage 2, they must not be part of the Stage 3 hearing panel.

The chair/panel must declare any conflict of interest or involvement in the matters prior to the meeting/ hearing so that an alternative chair/panel can be found.

The HR adviser to the chair does not perform a decision making role. Their function is to provide advice on legal issues, correct application of the policy and how to guide and procedural matters.

Other meeting/hearing attendees

Other meeting/hearing attendees may include:

- the manager/alternative manager with an HR adviser if required to present the case/respond to the appeal
- the chair of a meeting/hearing (at an appeal hearing only)
- a professional association/trade union representative or work colleague
- witnesses (which may include the line manager or chair of the previous meeting/hearing)
- a note taker
- an observer for training purposes with the consent of all parties.

Witnesses

Witnesses are not normally required to be involved or attend a meeting/ hearing in performance cases.

The manager and the employee can request witnesses to attend the meeting/hearing. It is the responsibility of either party to arrange their own witnesses. The chair of the meeting/hearing must be notified in advance of the meeting/hearing of the witnesses who will be called.

Witnesses should only be called if they can provide significant information regarding the case. Witnesses must be given due notice to attend the meeting/hearing by the person who

wishes to call them.

If a witness is unable or refuses to attend the meeting/hearing, then the chair can use the witness's statement contained within the management report.

A witness may find it difficult or distressing to attend a meeting/hearing. You can provide information about support that is available to the witness during the process. If the professional association/trade union representative requests a witness it is their responsibility to provide the witness with support.

Attending formal meetings/hearings

If the employee is not well enough to attend the meeting/hearing, it may be deferred until they are able to attend. Every effort should be made to make it possible for the employee to attend if they wish to do so. A meeting/ hearing will not be deferred indefinitely because the employee is unable to attend.

If the employee does not attend, the chair will need to decide whether to defer the meeting/hearing or to continue in the employee's absence.

If the employee is unable to attend, their professional association/trade union representative may attend the meeting/hearing. The professional association/trade union representative would represent the employee. Alternatively, the employee can submit a written statement.

How to manage a meeting/hearing

The meeting/hearing will be conducted in accordance with the Procedure for Headteacher and Governor Committee Hearings.

<https://www.hants.gov.uk/educationandlearning/education-personnel-services/manual/managing-staff/hearings-committees>

Outcome of a meeting/hearing

The chair of the meeting/hearing must fully consider all evidence presented and decide on an outcome.

Any outcome given will apply from the date of the meeting/hearing.

If the employee is issued with a warning, the chair must make a clear statement to the employee about the importance of improving their performance. The employee should understand that if they are unable to improve their performance, further action under the stages of the Capability Policy may be necessary. If sufficient improvement is not made within the review period or if an improvement is not sustained as follows:

- **at Stage 1** - for a 12 month period following the meeting, the employee may be required to attend a formal Stage 2 meeting
- **at Stage 2** – for at least 12 – 24 months following the meeting, the employee may be required to attend a Stage 3 hearing.

Stage	Possible outcomes
At any stage (including employees with less than two years' service)	• no formal action (in which case it may be appropriate to continue to address the concerns through the Performance Management Policy) • reaching an agreement with the employee about how to improve their performance • an action plan is issued and a review period agreed • any additional support, action plan or development/training required to help the employee • setting a realistic timescale within which an improvement needs to take place and review meetings are scheduled • whether a referral to Occupational Health/medical practitioner is appropriate • whether reasonable adjustments need to be considered and/or implemented where appropriate to do so
Stage 1	• No formal action (in which case it may be appropriate to continue to address the concerns through the Performance Management Policy) • a first written warning of 12 months • to refer the concern to a higher stage of the Policy (this would take place as a Stage 2 or Stage 3 meeting/ hearing) • in serious cases, a final warning is issued • in exceptional cases, the matter is deemed to be potential gross incompetence. This will be managed under the Gross Incompetence stage of the Capability Policy.
Stage 2	• the Stage 1 first written warning remains in force for a further specified period • a first written warning of 12 months • a final written warning of between 12 - 24 months • to progress to a Stage 3 hearing of which a potential outcome could be dismissal
Stage 3	• a first written warning of 12 months • a final written warning of between 12 – 24 months • to refer the employee back to a Stage 3 meeting

	with a final written warning and a further review period • to explore the possibility of alternative roles • to dismiss on the grounds of performance capability with contractual notice. • the employee is dismissed summarily (without notice) in gross incapability cases only – see Gross Incompetence)
Stage for an employee with less than two years' service	• No formal action (in which case it may be appropriate to continue to address the concerns through the Performance Management policy) • a final written warning is issued (with an action plan and review meetings) and is valid for between 12 – 24 months • to dismiss on the grounds of performance capability with contractual notice.

The length of the warning depends on:

- the nature of the unsatisfactory performance
- whether there is a belief that the unsatisfactory performance may reoccur
- whether a warning at the same stage has previously been issued.

If a dismissal takes place, the school must make arrangements to complete the necessary leaver actions including:

- cancelling the employee's IT account
- obtaining the employee's identity card
- completing the other leaver requirements.

If the outcome is dismissal, any sums owing to the school from the employee will normally be deducted from their final pay.

The chair of the meeting/hearing must also explain to the employee that:

- a copy of the letter detailing the outcome will be placed on their personnel file
- they have the right of appeal.

Previous warnings

A performance concern may arise whilst a warning is still live. The chair will take the previous warning into account. This may lead to a higher sanction being imposed.

Expired warnings may be taken into consideration. This would be in circumstances where the employee has a history or pattern of the same or similar performance concern(s) over a prolonged period of time which continues to give cause for concern.

The chair must seek advice from Education Personnel Services.

Confirming the outcome

The chair will normally advise the employee verbally of the outcome at the meeting/hearing, unless agreed otherwise with the employee.

The chair must confirm the outcome in writing within **5 working days** of the meeting/hearing. The outcome letter will include details of any warning and/ or sanction issued. A template letter is available to ensure all the necessary information is included.

A copy of the outcome letter and any warning must be placed on the employee's personnel file.

How to develop an action plan

An action plan is a tool for you and the employee to use to assist with improving performance. The aim of an action plan is to identify and record any activity that will enable the employee to demonstrate their ability to meet and maintain the expected standards of performance.

The action plan can be used to record key outcomes from a formal meeting/ hearing including any associated timescales.

The action plan should include:

- the expected standard(s) of performance and timescale in which this should be achieved
- the action/ support that will be put in place
- the associated action(s) to be taken
- who is responsible for arranging or providing any relevant support, training or guidance as appropriate
- dates of review meetings.

You should develop an action plan jointly with the employee. Working with the employee, you should seek to agree the action plan if possible. You must ensure that the employee has the tools/support that they need to improve their performance.

You must share the action plan with the employee and keep a copy for your records.

Review meetings

Following a meeting/hearing, you must hold scheduled review meetings with the employee. These must be followed by a final review meeting before the end of a warning period.

You should agree a series of dates and times to meet with the employee throughout the duration of the length of the warning issued.

The school recommends that review meetings should be held every 4 weeks. Once the employee is sustaining an improvement in performance, together you can agree to decrease the frequency of the meetings.

The purpose of the meetings is to provide an opportunity to:

- review the employee's performance
- review any action plan as appropriate
- discuss any other support that may be relevant
- establish whether there is a need to progress to the formal stages of the policy.

A record must be made of each discussion. You should:

- seek to agree the record with the employee if possible
- share the record with the employee
- keep a copy on the employee's personnel file.

The principles of the right of representation will apply.

Improvement in performance

If the employee's performance improves as required, the headteacher/senior manager/HPMC will meet the employee to tell them this. This will be confirmed in writing to the employee and the letter will be placed on the employee's file. The Capability Procedure will cease at this point and Performance Management will re-start. If the employee was at Stage 1 of the Capability Procedure, their improvement in performance will need to be sustained for at least 12 months, at Stage 2 the improvement would need to be sustained for at least 24 months. If the employee's performance declines during this period of time, the headteacher/senior manager/HPMC will have the option to re-enter the procedure at the appropriate point.

Progression through the stages

The employee must be given a reasonable period of time to achieve the required standard of performance at each of the formal stages.

If you have any concerns about the employee's performance, you should discuss these as soon as possible. There is no need to wait until a scheduled review meeting.

Progression through the stages normally occurs where performance continues to be a concern whilst a written warning remains active. If there are concerns, you should speak to the employee at the earliest opportunity. You do not have to wait until a scheduled review meeting, the end of the review period or warning.

There may be circumstances when an employee has a history and pattern of performance concerns over a prolonged period of time which causes concern, despite there not being an active warning. A history of performance concerns may be identified by a record of previous written warnings and/ or where there are examples to show that the employee has been unable to sustain the required standard of performance.

You can progress to the next stage and re-enter at the appropriate point if:

- the employee does not achieve the required improvement
- there are further performance concerns which may be for a different reason
- if an improvement is not sustained for a 12 month period following a Stage 1

- meeting
- if an improvement is not sustained for a 12 - 24 month period following a Stage 2 meeting
- the employee has not been successfully redeployed and/or has refused a reasonable offer of alternative employment.

You must contact Education Personnel Services for advice prior to commencing any formal stage.

How to manage anticipated long term performance concerns

In exceptional circumstances the employee's personal situation or health may change. This may mean they are no longer able to perform the duties of their role. In these circumstances it is anticipated that this will become a long term or permanent performance concern.

You must consider whether there is any support and/or reasonable adjustments that could be put into place to help the employee.

In these circumstances, the employee is unable to perform to the required standards. The following options may apply:

- to complete an [Occupational Health/ medical practitioner referral](#)
- to consider reasonable adjustments
- to explore medical redeployment
- to explore ill health retirement
- to initiate the Managing Sickness Absence policy.

Please contact Education Personnel Services for further advice and to discuss the above options before progressing.

8. Appeal

Appeal stage The employee has the right to appeal against the outcome of a meeting/ hearing.

Right of appeal The employee must submit their appeal in writing within **10 working days** following receipt of the written outcome of the formal meeting/hearing. This must include the full reasons for the appeal.

The employee must send their appeal letter as follows:

Stage of the original meeting/ hearing	Appeal letter sent to
Stage 1	Chair of the original meeting
Stage 2	Chair of the original meeting
Stage 3	Clerk to Governors

The appeal is not a repeat of the original meeting/ hearing. It seeks to address the specific issues raised by the employee in their appeal letter.

The grounds for appeal are (this is not an exhaustive list):

- finding/ outcome was unreasonable
- emergence of new evidence which could have a material effect on the outcome
- terms of a warning are unreasonable (duration or conditions imposed with the warning)
- unfair/incorrect application/breach of the policy which could have had a material effect on the outcome.

A complete re-hearing is only permitted in exceptional circumstances where the chair determines that the submitted grounds of appeal identify:

- there was a defect in the procedure
- new evidence has come to light since the meeting/hearing which may have an impact on the decision
- there is a dispute about evidence given by one or more witnesses at the original meeting/hearing. In these cases, it may be necessary to rehear the witness's evidence at the appeal.

Following an appeal of a Stage 3 hearing, there is no further right of internal appeal.

Appeal meeting

The employee must be invited to attend a meeting.

Meeting arrangements

The employee must receive in writing the invitation to the meeting.

The letter must give the employee **7 working days'** notice of the meeting. The timescales for the meeting can be varied by mutual agreement.

Meeting arrangements should ensure that:

- the date is set in consultation with the employee's representative and Education Personnel Services, where applicable
- a suitable venue is sourced
- consideration is given to access to refreshments (water)
- there are adequate break out rooms reserved for relevant parties
- reasonable adjustments are considered if applicable
appropriate arrangements are made to enable a [formal record of the meeting](#) to be made.

Formal record of the

The principles of a [formal record of the meeting/ hearing](#) will apply.

meeting

Alternative date The principles of an [alternative date](#) will apply.

Sharing of information You and the employee are required to exchange details of any additional papers and supporting evidence in advance of the appeal meeting. The original papers will normally be sent with the invitation letter. Education Personnel Services will advise you on the collation and distribution of papers.

The principles of [sharing of information](#) will apply.

Right of representation The principles of the formal stage [right of representation](#) will apply.

Who chairs the appeal meeting **For Teachers and Support Staff**

Stage	Chair/ panel members	HR adviser	Right to be represented/ accompanied
Appeal against a formal warning	Headteacher/ Governors' Committee	If required	Yes
Appeal against dismissal	Governors' Committee	HR adviser	Yes

For a Headteacher

Stage	Chair/ panel members	HR adviser	Right to be represented/ accompanied
Appeal against a formal warning	Governors' Committee	If required	Yes
Appeal against dismissal	Governors' Committee	HR adviser	Yes

Other appeal meeting conditions If a first or final written warning has been issued by a senior manager the appeal may be heard by the headteacher. If the headteacher issued a first or final written warning, the appeal will be heard by a Governors' Committee.

The principles of [other meeting/ hearing conditions](#) will apply.

Other appeal meeting attendees

The principles of [other meeting/ hearing attendees](#) will apply.

Witnesses

The principles of [witnesses](#) will apply.

How to manage an appeal meeting

The meeting/hearing will be conducted in accordance with the Procedure for Headteacher and Governor Committee Hearings.

<https://www.hants.gov.uk/educationandlearning/education-personnel-services/manual/managing-staff/hearings-committees>

Outcome of the appeal meeting

The chair must fully consider all evidence presented and decide on an outcome.

The possible outcomes are:

- the appeal is not upheld and the previous decision remains. The chair must be able to justify that there is insufficient evidence to overturn the decision of the original meeting/ hearing
- the appeal is upheld. This is likely to occur when:
 - new evidence has been presented
 - a review of the process has uncovered flaws in how the Capability Policy was applied
 - there are flaws in how the formal stage meeting/ hearing was conducted
 - if mitigating circumstances have been uncovered which were not previously taken into account
- to impose a different outcome in place of the original decision
- to reinstate the employee. The employee's service remains continuous and any loss of pay between dismissal and reinstatement will be paid. The school is responsible for contacting their payroll provider to make the arrangements to ensure the employee receives their pay. The school must also make the necessary arrangements for the employee to have their IT account reinstated.

The outcome cannot impose a higher sanction than issued at the formal meeting/ hearing although a lower sanction can be applied.

There is no further internal right of appeal.

Confirming the outcome

The chair will normally advise the employee verbally of the outcome at the meeting, unless agreed otherwise with the employee.

The chair must confirm the outcome in writing within **5 working days** of the meeting. A template letter is available to ensure all the necessary information is included.

A copy of the outcome letter must be placed on the employee's personnel file.

9. Gross Incompetence

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

Gross incompetence only applies in exceptional circumstances. You must seek advice from Education Personnel Services in such cases. Some examples are given in [Appendix Two](#).

Policy stages The possible stages are:

- Stage 3 hearing - may result in dismissal
- appeal.

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

Suspension or alternative arrangements are neutral and precautionary acts. They may be considered at any point during the Capability Policy once an investigation has established that the circumstances may be gross incompetence.

If the potential gross incompetence investigation establishes that the employee entering the workplace places them, or the school, at risk, alternative arrangements must be put in place to reduce or remove that risk. This must be a considered response to the specific issues/risks in the investigation.

Issues/risks may be identified at the start of an investigation, or new evidence may mean that alternative arrangements become appropriate part way through the case.

The risks may arise from:

- the seriousness of the potential issues, in that they could amount to gross incompetence
- interference with the investigation which may impact on the fairness of the investigation
- a health and safety risk to the employee or others in the workplace.

The alternative arrangements that could be made include:

- temporary placement into another role, or
- amended duties in the employee's current role, or
- temporary placement in an alternative location
- another action identified which would reduce or remove the risk

- suspension.

Alternative arrangements to suspension are only appropriate where the new duties or role are not linked in any way to the alleged gross incompetence.

The appropriate manager must refer the case to the headteacher or the Chair of the Governing Body to make a decision as to whether alternative arrangements or suspension are appropriate. The Governing Body should be informed as soon as possible of any cases of suspension. The information must be limited so as not to prevent the governors from involvement in a future hearing, if this is necessary.

The decision regarding whether alternative arrangements or suspension is necessary, and the rationale, must be recorded in writing. The appropriate manager must also seek advice from Education Personnel Services before communicating the outcome to the employee.

If a headteacher is to be suspended, Education Personnel Services will support the Chair of the Governing Body in making the necessary arrangements. For maintained schools this will involve the School Improvement Manager or County Education Manager as necessary.

Suspension – this requires the employee to stay away from the workplace whilst on full contractual pay. Suspension is a neutral act and does not imply guilt or innocence. Advice must be sought from Education Personnel Services when considering whether suspension is necessary. Suspension must be a last resort after other alternatives have been considered.

Documenting and reviewing alternative arrangements/ suspension

The reason for any alternative arrangements must be documented. In the case of suspension, the reason why other alternatives were not appropriate must be documented.

Arrangements must be regularly reviewed to determine whether they are still appropriate. This will be undertaken by the headteacher. If the headteacher has been suspended, then the arrangements must be regularly reviewed by the Governing Body (who may delegate the responsibility to a Committee or identified member).

In reviewing the suspension arrangements, a decision may be made that suspension is no longer required and the employee can return to work. In maintained schools a decision to lift suspension can only be reached by the Governing Body.

In an Academy, the Academy's scheme of delegation should describe who has the authority to decide whether suspension arrangements are no longer required.

If the arrangements are to continue, or change, the reason for this must be documented and communicated to the employee.

Communicating alternative arrangements/ suspension

Once confirmation that suspension or alternative arrangements are approved, the

headteacher or Chair of the Governing Body must meet face to face (where possible) with the employee immediately to inform them of the decision.

The employee has no statutory right to be accompanied. However, this will normally be accommodated where it does not cause any unnecessary delay. This meeting should be handled sensitively and acknowledge this is likely to be a difficult time for the employee.

The alternative arrangements/suspension must be confirmed to the employee in writing.

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

Support during suspension

The terms of the suspension often involve the employee being instructed not to contact colleagues during the suspension. Colleagues can still remain friends, but the employee must refrain from discussing the investigation with colleagues.

It is important to identify one or more people they are able to communicate with, in order to ensure that contact can be maintained. Ideally this should be agreed with the employee and their representative.

The contact person should usually be a member of staff from the school. It must not be a member of the school's Governing Body. It is essential that the contact shall have no part whatsoever to play in any subsequent investigation, nor any other connection with, or vested interest in, the outcome of the case.

The nomination of a contact will need to be dealt with sensitively as it is not intended to replace the role of the employee's representative or line manager but rather to reinforce the support/contact available for the employee concerned.

The employee can also seek support from their professional association/ trade union representative.

The principles of support for the employee will apply.

For cases of suspension only - during suspension the employee must:

- remain away from the workplace for a period of time with the purpose of enabling the investigation to take place and protecting both the school and the employee
- continue to receive full pay and all allowances applicable to their role unless they become sick in which case their pay will be in accordance with the sick pay scheme
- fulfil the requirements of their suspension. If the employee fails to maintain contact, their whereabouts are unknown, or they breach the terms and conditions of the suspension, their pay and any allowances may be suspended
- be available for hearings

- be provided with the details of the contact that will be assigned to them during the suspension or alternative arrangements
- follow normal reporting procedures such as sickness absence and annual leave. Sickness absence and annual leave must be requested and recorded in line with required protocols.

The headteacher or Chair of Governors must decide how to inform other colleagues to explain the situation. It is important that all parties maintain confidentiality. It is important for the Headteacher or Chair of Governors to carefully consider how workplace messages will be managed during any period of suspension or alternative duties.

Stage 3 hearing	The employee must be invited to attend a formal stage hearing.
Stage 3 hearing arrangements	The principles of meeting/ hearing arrangements will apply.
Formal record of the hearing	The principles of a formal record of the meeting/ hearing will apply.
Alternative date	The principles of an alternative date will apply.
Sharing of information	The principles of sharing of information will apply.
Right of representation	The principles of right of representation will apply.

Who chairs the Stage 3 hearing

For teachers and support staff

Stage	Chair	HR adviser	Right to be represented/ accompanied
Stage 3	Headteacher (where they have delegated powers of dismissal) OR Governors' Committee	HR adviser	Yes

For a headteacher

Stage	Chair	HR adviser	Right to be represented/ accompanied
Stage 3	Governors' Committee	HR adviser	Yes

--	--	--	--

Other hearing conditions

The principles of [other meeting/ hearing conditions](#) will apply.

Other hearing attendees

The principles of [other meeting/ hearing attendees](#) will apply.

Witnesses

The principles of [witnesses](#) will apply.

Attending the Stage 3 hearing

The principles of [attending formal meetings/ hearings](#) will apply.

How to manage a Stage 3 hearing

The principles of [how to manage a formal meeting/ hearing](#) will apply.

Outcomes of a Stage 3 hearing

The chair of the formal stage hearing must fully consider all evidence presented and decide on an outcome.

Any outcome given will apply from the date of the hearing.

The chair/panel must decide whether:

- there is no further action
- to manage the concern under the Performance Management Policy
- to reach an agreement with the employee about how to improve their performance
- an action plan is issued and a review period agreed including scheduling review meetings
- any additional support, action plan or development/ training required to help the employee
- setting a realistic timescale within which an improvement needs to take place and review meetings are scheduled
- a referral to Occupational Health/medical practitioner is appropriate
- reasonable adjustments need to be considered and/ or implemented where appropriate to do so
- alternative roles/opportunities will be explored
- a first written warning is issued (if the panel consider that there has been unsatisfactory performance and not gross incompetence) and is valid for 12 months
- a final written warning is issued (if the panel consider that there has been unsatisfactory performance and not gross incompetence) and is valid for between 12 - 24 months
- to dismiss on the grounds of performance capability with immediate effect.

If the outcome is not dismissal, the chair must make it clear to the employee that if they are unable to make and maintain an improvement, further action under the Capability Policy may be taken.

The length of the warning depends on:

- the nature of the unsatisfactory performance
- whether there is a belief that the unsatisfactory performance may reoccur
- whether a warning at the same stage has previously been issued.

If a dismissal takes place the school must make arrangements to complete the necessary leaver actions including:

- cancelling the employee's IT account
- obtaining the employee's identity card
- completing the other leaver requirements.

Any sums owing to the school from the employee will normally be deducted from their final pay.

The chair of the hearing must also explain to the employee:

- the outcome
- the reasons for the decision
- that a copy of the letter detailing the outcome will be placed on their personnel file
- that they have the right of appeal.

Confirming the outcome

The principles of [confirming the outcome](#) will apply.

Right of appeal

The principles of the [appeal stage](#) will apply.

10. Other policy requirements

Confidentiality

It is expected that all parties involved in the capability process will maintain confidentiality as appropriate. This is both within and outside of the school (including social media). If any party does not maintain confidentiality action may be taken under the Disciplinary Policy.

Right of representation

Employees are actively encouraged to contact their professional association/trade union representative at the earliest opportunity to obtain advice and support at any point during this procedure.

The employee has the right to be represented/accompanied at a formal stage meeting/

hearing or appeal meeting. This can be by a professional association/ trade union representative or a work colleague.

It is the employee's responsibility to:

- arrange their own representative
- liaise with their representative to agree the formal meeting/ hearing or appeal meeting date and time
- advise management of the representative's details.

There is no right to legal representation at any stage of this policy.

Referral to Occupational Health/ medical practitioner

It may be necessary to refer the employee to Occupational Health/ medical practitioner to obtain medical advice and information. This will help you to understand:

- the health issues
- the possible impact on the employee's performance
- whether any reasonable adjustments are required.

You should meet with the employee to discuss the reasons for the referral and the process. You can use the template letter to confirm the arrangements for making a referral if appropriate.

The school can expect the employee to attend any medical appointments and to co-operate with the referral.

You must explain to the employee that:

- it is important for them to attend the medical appointment(s) so relevant information relating to their health can be shared with you and any needs at work can be supported
- they must tell you as soon as possible if there is any reason that prevents them from attending an appointment, so you can discuss ways to resolve any issues
- they must contact Occupational Health/medical practitioner immediately if they wish to rearrange an appointment for an alternative date/time
- they must inform you of a change of date/time.

You should contact the employee 2 days before any medical appointment to remind them about the appointment.

If an employee does not co-operate with the referral, any assessment or decision taken will be based on the information available.

If the employee provides consent, you can attend at the end of the medical appointment. The purpose would be to enable you to be part of the discussions about possible outcomes and next steps.

Once you are in receipt of the referral advice from Occupational Health/ medical practitioner, you must make arrangements to discuss this with the employee.

Depending on the circumstances, it may be appropriate to write to the employee advising them that the information has been received. You should invite them to discuss the referral advice with you. You can use the template letter to ensure all the relevant information is included.

Once you have discussed the referral advice with the employee, you should confirm the outcome of your discussions in writing.

Alternative roles

Reasonable support to find an alternative role can be offered to an employee as a means of helping them to find alternative employment, either within the school, Hampshire County Council or externally. Typically, it may involve help with searching for vacancies, applications/CVs and interview techniques. There is no right to redeployment or priority status and individuals will be treated as with any other individual applying for roles and must demonstrate their suitability.

Requirement for the school to pass on information about a teacher's capability to a new employer

A Headteacher or teacher may apply for a job with an alternative employer. The employee may have been subject to the Capability Policy within two years prior to starting a job with a new employer. In such cases, the school must notify the new employer.

An employee may have been invited to a Stage 1 meeting. The outcome may be that no formal action is required. In such cases, as the performance concern(s) will be managed through the Performance Management Policy, the Capability Policy does not apply. As the employee has not been issued with a formal warning, this does not have to be passed onto a new employer.

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

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

In the case of safeguarding allegations, it is only appropriate to use the Capability Policy once there is written confirmation from the Local Authority Designated Officer (LADO), or their representative, that the school may proceed with an internal investigation.

Advice must be sought from Education Personnel Services.

Referral to relevant bodies

Some professions are required to be registered with a professional body in order to practice. During, or upon completion of the Capability process, in the following circumstances it may be necessary to make a referral to the relevant body:

- if a dismissal takes place
- where there are concerns about the employee's fitness or competence to practice

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

If a referral is necessary, the school is responsible for initiating and completing it. The school must work in conjunction with Education Personnel Services and the Local Authority Designated Officer (LADO)/ Adult Services safeguarding team where appropriate.

If the capability concern(s) relate to a safeguarding matter, the employer is required to make a referral to the Disclosure and Barring Service (DBS). Further guidance is available on the [Disclosure and Barring Service](#) website. The DBS may take action under their statutory powers. Alternatively, the DBS may refer the case to the Teaching Regulation Agency (TRA) for consideration where the matter concerns a teacher.

If the capability concerns relate to a teacher, the employer may make a referral to the Teaching Regulation Agency (TRA). The TRA may take action under their statutory powers. Where there is a requirement to make a referral to a relevant body, the employee must be notified in writing that a referral has taken place.

Further guidance is available on the relevant professional body websites.
For further advice please contact Education Personnel Services.

Mutual agreement

As an alternative to a formal stage meeting/ hearing, the school and the employee may discuss a mutual agreement. The contract of employment may be ended by mutual agreement between the employee and the school.

The school must respect the employee's decision as it has to be agreed by both parties. If the employee does not wish to enter into a mutual agreement, then it is likely a formal stage meeting/hearing will be arranged.

A mutual agreement is an alternative approach for the employee rather than attending a formal stage meeting/hearing. This can help the employee to avoid the stress and pressure of a formal meeting/hearing. This can be particularly helpful if the employee is unable to achieve the required standards of performance.

A mutual agreement is neither a dismissal nor a resignation. It is a letter setting out an agreed end date of employment, and other related arrangements. It is signed by both parties.

There is no right to appeal a mutual agreement as it is entered into with the consent of both parties.

The employee is encouraged to seek advice from their professional association/trade union representative before entering into any discussions.

You must contact Education Personnel Services for further advice.

Fast track procedure In very serious cases, a final warning may be issued at a Stage 1 meeting. In such cases, if the necessary improvement in performance is not achieved during the review period, you can proceed to a Stage 3 hearing.

Further advice must be sought from Education Personnel Services.

Action concerning a professional association/trade union representative Where there are concerns involving a professional association/trade union representative, you must notify and seek advice from Education Personnel Services before taking action.

The professional association/trade union representative is encouraged to seek advice from their professional association or trade union branch.

11. Support

Support for the employee Employees:
A professional association or trade union representative can offer information and workplace support as well as signposting to useful support organisations. Support is also available from Employee Support if the school subscribes to this service
<https://extra.hants.gov.uk/employee/policy-guidance/occupational-health/employee-support>

Support for the manager Any queries can be directed to Education Personnel Services on 02380 383500 or eps.consultants@hants.gov.uk.

For schools which subscribe to Hampshire County Council's Occupational Health service, the manager can access the Occupational Health Advice Line
<https://extra.hants.gov.uk/employee/policy-guidance/occupational-health> The Advice Line can support with any health related query prior to making a referral or during management of a case.

12. Toolkit

A number of template documents are provided in the Manual of Personnel Practice
<https://www.hants.gov.uk/educationandlearning/education-personnel-services/manual/managing-staff/performance-management>

- action plan
- record of review meetings
- invite letters to meetings under the procedure

- outcome letters of formal meetings under the procedure
- management report

13. Related documents

To help with the application of this document it may be useful to read the following:

- Managing Sickness Absence policy and How to Guide
- Performance Management Policy
- Performance Management Resource Pack

14. Roles and responsibilities

Everybody

- Adopting a pro-active approach to induction, general development and continuing professional development
- Applying and complying with the Performance Management cycle and policy
- Applying the Capability Policy accurately
- Maintaining confidentiality.

The headteacher/ manager

- Setting clear and achievable standards that the employee can work to within their role
- Identifying concerns and deciding on appropriate action within a timely manner
- Tracking and progressing cases through case management
- Informing Education Personnel Services of all performance concerns that may potentially be managed under this policy if there has not been previous involvement in the case
- Seeking advice from Education Personnel Services about gross incompetence concerns
- Considering adjustments and deciding whether to implement them where reasonable to do so
- Arranging meeting/hearings as necessary
- Drafting and issuing of letters, reports and documentation with Education Personnel Services support as necessary
- Ensuring the school completes the e-leaver form and completing the other leaver requirements if a dismissal takes place or the employee resigns during the process.

All employees

- Seeking to improve their performance
- Identifying support that is helpful to their particular development needs
- Engaging and co-operating with the Occupational Health/medical

practitioner referral process, including attending all medical appointments

- Arranging their own professional association/trade union representative or work colleague if desired and advising management of this.

The Education Personnel Services caseworker

- Advising on policy application and best practice
- Supporting with case management
- Advising on the completion of letters, reports and relevant documentation
- Attending meetings where appropriate in an advisory capacity.
The Education Personnel Services HR adviser does not perform a decision making role.

Occupational Health/medical practitioner

- Receiving referrals from management and reviewing employees as appropriate
- Requesting medical information
- Making recommendations in line with the needs of the school.

The professional association, trade union representative or work colleague

- Advising/supporting their member/colleague/manager
- Attending arranged meetings/hearings and/or appeal meetings. If this is not possible, then arrangements should be made so that meetings/hearings and/or appeal meetings are covered by an alternative representative and are not delayed
- Making representations, advocating and mitigating on behalf of the employee, submitting papers if appropriate, asking questions and addressing a meeting/hearing on behalf of the employee.
- They may not answer questions on behalf of the employee.

15. How to Guide governance

SharePoint ID	HRDOCID-561776108-89112
Version	V1 – 23 April 2019 V1.0.1 – 06 August 2019 V2 – September 2021 V2.1 March 2022
Owner	Education Personnel Services

Appendix One – Managing capability for employees with less than two years’ service

This procedure will be used for managing capability if the employee has less than 2 years’ continuous service.

Managing capability

Policy stages

The possible stages are:

- formal meeting – may result in dismissal
- appeal only against a dismissal.

As a general principle the manager will seek to provide structured managerial support under the Performance Management Policy, before using the Capability Policy.

In exceptional circumstances, it may be appropriate to move into the Capability Policy without having provided a period of structured managerial support. The manager must seek advice from Education Personnel Services in such cases.

The employee must be given a reasonable period of time to achieve the required improvement before moving to the next stage of the policy.

Formal meeting

The principles of the [stages of the policy](#) will apply.

Appeal stage

The principles of the [appeal stage](#) will apply. An employee only has the right of appeal against a dismissal decision. There is no right of appeal against a warning.

Gross incompetence

Gross incompetence

The principles of the [gross incompetence](#) stage will apply.

Appeal

The principles of the [appeal stage](#) will apply. An employee only has the right of appeal against a dismissal decision. There is no right of appeal against a warning.

Appendix Two - Gross incompetence

Definition

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

Gross incompetence only applies in exceptional circumstances. You must seek advice from Education Personnel Services in such cases.

Examples

The following list provides some examples of when a performance concern may need to be managed under the gross incompetence section of the Capability Policy. This list is not exhaustive and other examples can be managed under this section of the Capability Policy. Some examples on the list may also be more appropriately dealt with under the Disciplinary Policy, depending on the circumstances.

The employee has:

- been using equipment in a dangerous or unsafe manner
- a complete lack of knowledge and professional expertise
- a complete lack of understanding of the health and safety aspects relevant to the role
- a complete lack of understanding of the professional standards required within the role
- a complete lack of knowledge of school policies or procedures
- been unable to perform in all of their role, therefore making the improvement required too great
- failed to obtain a qualification that is an essential criteria of their role
- misadvised in a professional capacity which may have a direct implication on the school's reputation.