

# **St Andrew's Maghull Capability Procedure**

Approved by Directors: 6<sup>th</sup> July 2021

To be reviewed: July 2023

*Jesus grew in wisdom and stature*

## **Our Trust Prayer**

We thank you, God of Love, for the gift of children,  
Bless the work of our Trust, that in all we do  
young people may grow in wisdom and stature,  
and so come  
to know you,  
to love you  
and to serve you  
as Jesus did.

We make this prayer in his name who is God  
with you and the Holy Spirit, now and forever.

Amen

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# 1. Purpose

- 1.1 The purpose of this procedure is to encourage and ensure employees of Liverpool Diocesan Schools Trust (the Trust) achieve and maintain acceptable and agreed standards of performance and perform their jobs to the best of their ability. It is designed to ensure fairness & consistency and to provide support towards improvement in employee performance.
- 1.2 Capability refers to an employee's ability to perform the work expected of them to the level required in fulfilment of agreed contractual duties. This may be assessed by reference to an employee's skill, aptitude, or ability in relation to the job that they are employed to do, and this appears to be because the employee 'cannot' (rather than 'will not') do something.
- 1.3 Very few employees choose to perform their work badly, make mistakes or fail to complete tasks. Consequently in the event that an employee is underperforming, a manager should examine the circumstances to identify underlying causes and provide additional support to the employee to help them to improve to the required standard of performance, including an agreed support programme under the Trust's Performance Management Policy.

# 2. Applicability

- 2.1 This procedure applies to all employees of the Trust with the exception of teachers in their NQT year. All employees are included, whether permanent or on a fixed term contract. It does not apply to agency workers, contractors or volunteers.
- 2.2 The procedure focuses on helping employees to improve their practice and achieve appropriate levels of work performance through training, coaching, target setting and monitoring. This procedure is used to manage under-performance which the performance management process has been unable to address.
- 2.3 Where the employee's health is affecting their performance this may be dealt with under the Supporting Attendance Policy.
- 2.4 This procedure is not intended to be used where poor performance is the result of carelessness, wilful neglect of duty, deliberate failure to carry out reasonable directions or other such actions which can be considered under the Trust's Disciplinary Procedure.
- 2.5 Where after further investigation or discussion it is found that the issue is one of incapability due to ill health or disability, or to misconduct, action under the Capability Procedure may stop and further action will be considered under another appropriate procedure if required.

# 3. Roles and Responsibilities

- 3.1 The Trust is committed to ensuring consistency of treatment and fairness and will abide by all relevant legislation.
- 3.2 The Trust and its schools will help employees' career and professional development through education, training, information and other frameworks that support performance management.
- 3.3 Managers are responsible for:
  1. ensuring that they agree achievable, realistic and measurable objectives as part of usual performance management procedures;
  2. supporting staff to achieve the objectives agreed and the required level of performance;
  3. seeking advice from HR at an early stage should concerns regarding an employee's performance arise;
  4. implementing the parts of this procedure which fall within their area of responsibility (e.g. informal handling of under-performance, referring to the Headteacher / Principals for formal action if required, supporting team members to complete a Support Plan issued

under the formal procedure);

5. Headteachers / Principals implementing this procedure in their school, and ensuring that the statutory duty to include formal capability proceedings in references for teachers (including those paid on the leadership pay scale) is met.
- 3.4 Employees will take responsibility for and be accountable for their actions, in line with their contractual duties and Trust values. They are responsible for complying with the requirements of this procedure. Where an employee is suffering from an ill health or medical condition, or other personal circumstances that are affecting their performance at work they are encouraged to speak to their manager as soon as possible.
  - 3.5 At all stages of the formal process the employee will have the right to be accompanied by a trade union representative or work colleague. The companion should be allowed to address the meeting in order to:
    1. put forward the employee's case;
    2. sum up the employee's case;
    3. respond on the employee's behalf to any view expressed at the hearing;
    4. confer with the employee during the meeting.

The companion does not, however, have the right to answer questions on the employee's behalf, address the hearing if the employee does not wish it, or prevent the employer from explaining their case.

## 4. Principles

- 4.1 The Trust needs its staff to perform effectively in order to deliver the aims and vision of each school, and the Trust as a whole. To achieve this, the Trust aims to ensure that effective recruitment is undertaken and performance expectations are clearly defined through the Performance Management process for teaching and support staff (as applicable), performance is monitored and employees are given appropriate feedback, training and support.
- 4.2 Employees should be provided with appropriate information, support and advice during induction to help them achieve the level of performance expected.
- 4.3 The Trust and its schools will try to resolve issues of under-performance informally through meetings between the employee and their manager using the Performance Management Policy (also see section five). However, where this approach has been ineffective or the performance concerns are more serious, formal action under the Capability Procedure will be considered. Where formal capability is instigated the performance management process will be suspended.
- 4.4 Instigation of the capability procedure should not come as a surprise to the employee. Attempts should firstly have been made to address concerns under the Trusts Managing Employee Performance Procedure. The employee will be advised of the concerns arising from their performance and given the opportunity to respond and present relevant information. Employees will be advised to seek advice and representation by contacting their trade union.
- 4.5 The employee will normally be given at least 10 working days' notice of all formal meetings under this procedure. Wherever possible, meetings will be held at a mutually agreed time, date and venue. All parties must ensure that there are no unreasonable delays to the process.
- 4.6 The employee will have the right to be accompanied by a work colleague or trade union representative during all stages of the formal process.
- 4.7 All reasonable efforts will be made to accommodate any disability or language issues affecting the employee or their representative, these will be reasonably addressed so that proceedings can take place fairly.
- 4.8 Where there is an indication that underperformance may be due to a disability the manager should contact HR in order to receive advice in line with the Equality Act 2010.

- 4.9 The Capability Procedure will be managed with due regard to the need for individual confidentiality.

## 5. Informal handling of under-performance

- 5.1 As part of their day to day management, line managers may from time to time have discussions with employees about their performance that do not form part of the capability process. Any concerns regarding an employee's performance should be discussed with them at the earliest opportunity, and managers should try to resolve issues of minor incapability informally and in a supportive manner using the Performance Management Policy. Further guidance for managers is given in Annex 1, and some key steps under the Performance Management Policy are summarised below.
1. Set the level – the manager should bring to the attention of the employee how they are failing to meet the required level of performance and of the concerns that exist;
  2. Seek an explanation - to provide the employee with an opportunity to explain why they are not meeting the required level of performance and to discuss the acceptability of the explanation(s);
  3. Require improvement - to advise the employee what they are expected to do to bring about improvements in performance. Outline any management action and support and give a time limit within which the employee can reasonably be expected to demonstrate improvement;
  4. Warn of the consequences - of failure to improve, to meet and sustain the level of performance required, such as formal action under the Capability Procedure.
- 5.2 The main points discussed should be noted and a copy provided to the employee; for example, this could be via email or a memo. This should be agreed with the employee. Where it cannot be agreed the employee should be allowed to add a record of their concerns or perspective. A copy of these notes should not be placed on the employee's file at the informal stage.
- 5.3 Formal action should be taken by organising a Stage One Capability Meeting where this approach has been tried and has not succeeded in improving performance, or where the underperformance is more serious (see section 6 below).

## 6. Formal Stage One – Capability Meeting

- 6.1 If an employee's performance continues to be unsatisfactory or where unsatisfactory performance is sufficient to warrant moving straight to formal action, the employee should be invited to a formal meeting to discuss the concerns. The formal capability process should only be invoked where there is clear, triangulated evidence of sustained underperformance that the Performance Management process has failed to address.
- 6.2 The employee should be given at least 10 working days' notice of the meeting. The notification letter should include:
1. the time and place of the meeting;
  2. a statement of the concerns regarding their performance;
  3. the possible consequences of the meeting;
  4. their right to be accompanied by either a work colleague or trade union representative; and
  5. copies of any written evidence that might be relied upon.

- 6.3. The purpose of this meeting is to establish the facts. The employee should be given the opportunity to respond to the concerns about their performance and make any relevant representations. This may provide new information or a different context to that which has already been collected. The employee will be reminded of any informal discussions (where these have happened) and the steps taken to support an improvement in performance that have already been taken. Specific reference will be given to the performance management procedure along with the agreed objectives and any support agreed to meet those objectives.
- 6.4. Every effort should be made to reach agreement, however if the employee disagrees that they should be in the Capability Procedure or at a particular stage within the Procedure, the Trust has the right to impose it. The points raised by the employee should be documented as part of the Stage One process.
- 6.5. A decision will be taken at the meeting regarding the required action from one of the following options where:
- there are insufficient grounds for pursuing the capability issue, the concerns will be addressed informally and therefore formal action under the Capability Procedure will not proceed. In this instance, a note should be sent to confirm that the employee has not entered formal proceedings;
  - it is found that the concerns are as a result of misconduct or ill health, action under the Capability Procedure may stop and further action will be taken under another appropriate procedure if required;
  - further investigation proves necessary, the meeting may be adjourned and then reconvened once the investigation is complete.
  - there is evidence for the concerns, the meeting will continue and will address the points outlined in section 6.5 below.
- 6.6. Where the meeting continues, it should address the following.
- Identify the areas of concern regarding performance.
  - Confirm the suspension of the usual Performance Management Policy.
  - Give clear guidance on the improved standard required, this must include setting objectives, identifying success criteria and advising on the evidence that will be used to determine improved performance. Support/training should be clearly identified and agreed, wherever possible. A record of this should be made.
  - Set out the timetable for improvement and explain how performance will be monitored and reviewed. The timetable will depend on individual circumstances and should be agreed by both parties wherever possible. It should be reasonable and proportionate to allow the opportunity for improvement to take place but should not be excessively long. A guide for the monitoring and review period should be no less than 13 weeks other than in serious cases where it can be demonstrated that the education of students and/or the efficient and effective running of the Trust or an academy is *being jeopardized*.
  - Issue a Support Plan (Annex 2), setting out the concerns, the agreed actions and timescales, the support that will be provided, and making clear the consequences of a failure to improve within the set period.
- 6.7. At the meeting consideration should be given regarding any reasonable support or training that would assist the employee in achieving a satisfactory standard of performance.
- 6.8. Reasonable measures to assist the employee to meet agreed objectives and perform at the level expected should be discussed and documented. The measures may include any or all of the following (provided they are available and do not adversely affect the academy and its pupils/students):
- Changes to working practices within the terms of the employee's job description;
  - Increased supervisory support for a specified period of time;
  - Work shadowing a proficient colleague;
  - Modified workload or tasks for a specified period of time;
  - Further training;
  - Other reasonable relevant support.

- 6.9 An important part of the support offered to a teacher would be a clearly defined amount of classroom observation with structured oral and written feedback. The amount of classroom observation should be discussed with the teacher and their trade union representative.
- 6.10 The employee will receive a letter confirming the outcome of the meeting, including details of the Support Plan if issued, within 5 working days of the meeting.
- 6.11 Following this meeting during the specified time period for improvement, monitoring, evaluation, guidance and support will continue, the frequency of such will be determined on an individual basis by mutual agreement.
- 6.12 A formal review meeting should be held at the end of the specified monitoring and review period (see section 7).

## 7. Formal Stage Two – Formal Review Meeting

- 7.1 A formal review meeting will be held at the end of the monitoring and review period in order to evaluate whether sufficient improvement in performance has been made.
- 7.2 The employee should be given 10 working days' written notice of the meeting which must include:
  - 1. the time and place of the meeting;
  - 2. confirmation of the performance concerns that are to be reviewed;
  - 3. the possible consequences of the meeting;
  - 4. their right to be accompanied by either a work colleague or trade union representative; and
  - 5. copies of any written evidence that might be relied upon
- 7.3 At the review meeting the person(s) chairing the meeting and employee will discuss the monitoring and review period and any support provided. The person(s) chairing the meeting will assess whether the employee's performance has improved sufficiently. The employee will have the opportunity to comment on their performance during this period.
- 7.4 Following discussion at the meeting, the person(s) chairing the meeting may decide that:
  - a) the employee's performance has improved sufficiently and no further action is required under the procedure. The employee will be advised that satisfactory performance must be maintained and that if performance becomes unsatisfactory again under the performance management policy further action may be taken under the Capability Procedure. If this occurs within 12 months, it may take into account action taken previously; or
  - b) some progress has been made and there is confidence that more is likely, so the monitoring and review period may be extended. The person(s) chairing the meeting will confirm the continuing areas of concern and the improvement required. Consideration will be given to any further support that can be provided. A further period for monitoring and review will be given, normally of no more than four weeks. At the end of this period a further review meeting will be convened; or
  - c) there has been no, or insufficient improvement made and performance remains unsatisfactory so a second Support Plan will be issued. The employee should be informed that failure to improve sufficiently within the set timescale, may result in dismissal. The person(s) chairing the meeting will confirm the continuing areas of concern and the improvement required. Consideration will be given to any further support that can be provided. A further monitoring and review period will be given, normally of no more than six weeks. At the end of this period a further review meeting will be convened.
- 7.5 The employee will be informed of the outcome of the review meeting in writing, including details of the Support Plan if issued, normally within five working days of the meeting.
- 7.6 Where a second Support Plan is issued (7.4 c), a further review meeting will take place at the end of the second monitoring and review period, where the following

decisions can be made:

1. The employee has reached a satisfactory standard of performance and no further action is required under the procedure (see 7.4 a).
2. There has been no, or insufficient improvement made and performance remains unsatisfactory the person(s) chairing the meeting will arrange a dismissal hearing under stage three.

## 8. Formal Stage Three - dismissal hearing

- 8.1 A dismissal hearing will be arranged where the employee did not make a sufficient improvement in performance or meet agreed objectives during the specified monitoring and review period(s). Further details on who should Chair the hearing is given in section 10, and details of the procedure for the hearing at Annex 3.
- 8.2 The employee will normally be given 10 working days' notice in writing of a dismissal hearing. The Chair of the hearing will confirm arrangements to the employee in writing, including:
  1. the concerns about the employee's performance and the reasons for contemplating dismissal;
  2. the date, time and location of the hearing. If the date / time is not convenient for any party an alternative date will be agreed, this will not normally be more than 5 working days after the date originally proposed by the Chair;
  3. the name of the person (or panel) chairing the hearing;
  4. the right to be accompanied and/or represented by a trade union representative or work colleague;
  5. the requirement to provide the Chair with a copy of the documents that they will be relying upon and the names of any witnesses that they will be calling at the hearing at least 5 working days before the hearing;
  6. advice to the employee that the hearing could result in dismissal; and
  7. copies of documents that the manager presenting the case will refer to at the hearing, and names of any witnesses that they will call.
- 8.3 At the hearing the person(s) chairing Stage Two will be given the opportunity to put forward their case for dismissal, and the employee will be given the opportunity to present their case against the dismissal. Both parties may call witnesses and ask questions. The Trust's designated HR Officer will attend the hearing to provide procedural advice.
- 8.4 The hearing will normally be adjourned whilst the person(s) hearing the matter (see section 10) consider the evidence put forward and reach a decision.
- 8.5 The outcome of the hearing may be either dismissal on the grounds of lack of capability or alternative action in the light of evidence presented at the hearing (see 8.7). Where an employee is dismissed they should be dismissed with appropriate notice. The employee will be notified in writing of the outcome normally within 5 working days and of their right of appeal.
- 8.6 A postponement may be granted if the employee or their representative is unable to attend on the proposed date. A postponement should not be for more than 5 working days after the original date proposed, however, an extension to this time limit can be made by mutual agreement. Where a hearing is rearranged and the employee is unable to attend a second time, the hearing will normally convene, as arranged, and a decision taken in the employee's absence.
- 8.7 Alternative actions might include:
  1. a further period of monitoring and review. If the required level of performance is not achieved and this leads to a further dismissal hearing it should be heard, if possible, by the same person / panel.
  2. redeployment to a different post within the school if a vacant existing post is available as an alternative to dismissal; if the post is on a lower grade there will be no entitlement to protection of salary.
  3. reduction of responsibility; this may be linked to the redeployment option or could apply

to the post currently held by the employee – again salary protection will not apply in such circumstances.

## 9. Formal Stage Four - Appeal

- 9.1 An employee is entitled to appeal against the decision to dismiss due to capability.
- 9.2 The appeal should be on the basis of one of the following grounds:
  1. The procedure - a failure to follow procedure had a material effect on the decision;
  2. The decision - the evidence did not support the conclusion reached;
  3. The penalty - was too severe given the circumstances of the case;
  4. New evidence - which has genuinely come to light since the dismissal hearing.
- 9.3 The appeal must be made in writing, stating the grounds for the appeal, within five working days of receiving written notification of the decision to dismiss.
- 9.4 The appeal will be heard as soon as possible and not normally later than six weeks after being received.
- 9.5 The employee will normally be given 10 working days' notice, in writing, of the date of the appeal hearing. This notification will give the name of the person chairing the appeal hearing (and the names of panel members - see section 10). It will remind the employee of their right to be accompanied at the hearing by either a trade union representative or work colleague. An HR representative will attend the hearing to provide procedural advice.
- 9.6 Both parties must indicate at least 5 working days in advance of the appeal hearing which, if any, witnesses they wish to call and provide copies of any documentation that will be relied upon at the hearing. In exceptional circumstances an alternative time-scale may be agreed.
- 9.7 The appeal hearing should consider the evidence presented in relation to the grounds for appeal put forward by the employee; it is not expected that the appeal will constitute a full re-hearing.
- 9.8 The Chair of the Stage Three hearing will attend the appeal to present the management case in relation to the grounds of the appeal, and may be accompanied by the person who acted at stages 1 and 2 in the procedure. The Trust's designated HR Officer will attend the hearing to provide procedural advice.
- 9.9 The employee will be able to present evidence that is directly relevant to the grounds of the appeal. Management will have the opportunity to respond.
- 9.10 The appeal hearing may:
  1. confirm the decision of the dismissal hearing;
  2. overturn the decision of the dismissal hearing, and specify an additional period of time within which performance must improve;
  3. may recommend alternative action (for example, redeployment).
- 9.11 The employee will be informed of the appeal decision in writing, normally within 5 working days. The decision of the appeal hearing is final.

## 10. Authority to act under the Capability Procedure

These levels of authority are in line with the Trust's Scheme of Delegation. LGB refers to Local Governing Body. At stages 3 and 4 there is an expectation that persons have not previously been involved.

<b>Group of employee being managed under this Procedure</b>	<b>Responsible for Stage 1 &amp; 2 Meetings</b>	<b>Stage 3 Hearing</b>	<b>Stage 4 Appeal</b>
Director of the Trust	Chair of the Board, or nominated delegate	Panel of three from the Trust Board	Panel of three from Trust Board
Headteacher / Principal	Chair of LGB and/or Chief Executive Officer or other designated senior Trust Officer, or a Director of the Trust.	Panel of three which may include the Chief Executive Officer and members of the Trust Board of Directors, Local Governing Body, and/or other senior colleagues invited by the Trust Board of Directors.	Panel of three from the Local Governing Body and Trust Board of Directors.
All other school based employees	Headteacher / Principal  With the approval of the LGB Chair, a nominated delegate may be given authority to act (e.g. <i>An SLT member with no line management involvement</i> )	Panel of three made up from two members of the LGB and one representative from the Trust.	Panel of three made up from two members of the LGB and one representative from the Trust.
All other central team employees	Relevant Trust Officer	Designated senior Trust Officer or member of Trust Board	Panel of three from Trust Board

## 11. Sickness

11.1 If long term sickness appears to have been triggered by the commencement of monitoring or the formal Capability Procedure, the case will be dealt with in accordance with the Managing Attendance Procedure and monitoring and/or formal procedures resumed on return to work.

## 12. Review

12.1 This procedure will be reviewed to respond to any changes in employment legislation, and in any event at least every two years.

## Manager guidance on managing under-performance

This guidance is intended to help support managers who are managing concerns around an employee's performance under the Trust's Performance Management Policy. If subsequently taking action under the Capability Procedure it is important that the Manager can evidence the steps previously taken to try and support the required improvement.

Any concerns regarding an employee's performance should be discussed at the earliest opportunity, and Managers should try to resolve issues of incapability informally and in a supportive manner.

Employees should receive constructive feedback on their performance throughout the year, as part of the Performance Management process, and as soon as practicable after agreed lesson observation has taken place. Feedback should highlight particular areas of strength as well as any areas that require support.

Appropriate action should be taken promptly as soon as it is noticed that an employee is not performing certain aspects of their job satisfactorily. Delaying or doing nothing may cause the performance problem to escalate and cause delay in providing the necessary support.

The employee should be advised to seek professional advice from their trade union representative; the Trust acknowledges that this may help to expedite resolution. However, there is no right to be accompanied to meetings taking place as part of the usual performance management process.

It should be recognised that capability problems may be related to issues outside the employee's direct control and may be symptomatic of underlying work problems or other personal issues. Particular care should be taken when disability or health issues are involved and advice should be sought from HR / Occupational Health Service as appropriate.

Where there are concerns about any aspects of an employee's performance, the manager should meet with them to:

1. give clear feedback about the nature and seriousness of the concerns;
2. give the employee the opportunity to comment and discuss the concerns and provide information on any issues impacting on the situation;
3. agree any support (e.g. coaching, mentoring, structured observations, training, professional courses) that will be provided to help address those specific concerns;
4. make clear how, and by when, progress will be reviewed (it may be appropriate to revise objectives and/or agree other appropriate & clear targets, and it will be necessary to allow sufficient time for improvement. The amount of time will need to reflect the seriousness of the concerns);
5. explain the implications and process if no, or insufficient, improvement is made (i.e. entry in to the formal capability procedure).

It is recommended that a note of the discussion is confirmed in writing (e.g. by email with receipt acknowledged by the employee, or in Performance Management documentation).

If the discussion outlined above results in the required improvement, it would be helpful to 'draw a line under it' by confirming that the issue(s) have been addressed and the performance management process will continue as normal providing the improved performance is maintained.

Where this informal approach has been tried and has not succeeded in improving performance, or where the underperformance is more serious, formal action should be taken by organising a Stage One Capability Meeting.

# Support Plan

Employee name:	
Date of meeting:	

Concern / Area of performance for review	Level of improvement required*	Support to be provided (nature of support, who should make arrangements)	Timescales for improvement / review date(s)

*\*Actions agreed under this improvement note / support plan should be "SMART": specific, measurable, achievable, relevant, time- related, in other words it should be very clear what is required, by whom and by when, and clear how this will be evaluated and reviewed.*

I understand that the consequence of my performance not improving to the required level within the agreed time period will be the continuation of the Capability Procedure, which could include my dismissal.

Signed:  
**Employee**

Date:

Signed:  
**Manager**

Date:

# Order of proceedings for Capability Procedure Stage Three Hearing

## Introduction

- Introduce those present, and explain why they are there. Someone who is not directly involved in - the hearing should be appointed to take notes on the proceedings and HR may be present throughout the hearing.
- Explain the purpose of the meeting i.e. to establish as fully as possible the facts, and to consider the case for dismissal in accordance with the Trust's Capability Procedure.
- Explain how the meeting will be conducted

## Statement of capability issue

- The manager presenting the case for dismissal should state precisely what the capability issue is and outline the case for dismissal by going through the evidence that has been gathered.
- Ensure that the employee and his/her companion are allowed to see any statements made by witnesses and to raise questions.

## Employee's reply

- Give the employee the opportunity to state their case against dismissal, and to respond to the evidence that has been put forward. They should be able to ask questions, present their own evidence and call witnesses. The employee and their companion should be given the opportunity to confer privately if necessary.

## General questioning and discussion

- The person(s) hearing the matter should:
  - use this stage to establish all the facts;
  - ask the employee if there are any special circumstances to be taken into account;
  - keep the approach formal and polite, and encourage the employee to speak freely; it should be a two-way process.
  - use questions to clarify the issues and check that what has been said is understood.
- If new facts emerge, it may be necessary to adjourn the hearing to investigate.

## Summing up

- Summarise the main points of the discussion after questioning is completed, to remind all parties of the nature of the capability issue, the arguments and evidence put forward, and to ensure nothing is missed.
- Ask the employee if they have anything further to say.

## Adjournment before decision

- Adjourn before a decision is taken about whether dismissal is appropriate, to allow reflection and proper consideration. It also allows for further checking of any matters raised, particularly if there is a dispute over facts.

## Giving the decision

- Unless a mutual agreement has been reached otherwise, the meeting will be reconvened and the employee be informed of the outcome of the hearing.
- The decision will be communicated in writing within 5 working days.

