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# Farncombe CofE Infant School

## Capability Procedure Policy

Implementation Date: October 2024

Review Frequency: 2 years

Next Review Date: July 2025

Approved by: Governing Body

### *Related Documents:*

#### School Policies

*Safeguarding and Child Protection Policy*

*Appraisal Policy*

*Complaints Policy*

*Staff Code of Conduct Policy*

*Acceptable Use of ICT Policy*

*Ealy Careers Teacher Policy*

#### External Documents

*School Staffing (England) Regulations 2009 ([DfE](#))*

*Disciplinary and grievance code of practice ([Acas](#))*



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## **1 Introduction & Purpose of Procedure**

The purpose of this procedure is to provide a framework to manage unsatisfactory performance caused by an employee's lack of ability to achieve or maintain the required standards of work. This procedure applies only to employees, where there is a capability issue that the appraisal process, including any informal support arrangements, have been unable to address.

It is the Governing Body's principal aim to ensure that, where concerns about individual work performance arise, all the circumstances are appropriately investigated and the individual given support, relevant training and an opportunity to improve through the operation of informal support and a supportive performance improvement plan during performance management process before any formal sanctions are applied under this procedure.

The procedure is applicable to all members of staff employed by the school. Early Career Teachers serving a statutory induction period are provided with a support and feedback structure as part of their induction programme and will therefore be subject to capability procedures only in cases of persistent or serious underperformance. Employees on temporary or fixed-term contracts will be subject to this procedure with adjustments made, where appropriate, to reflect the likely duration of the contract.

The Governing Body is mindful of its obligations under the Equality Act 2010 and its commitment to the School's Equality, Diversity and Inclusion Policy and, with the exception of the exclusions noted above, this procedure will be applied fairly and consistently to all employees.

Any unsatisfactory performance relating to unlawful discrimination and harassment will be dealt with according to the School's Equality, Diversity and Inclusion Policy and/[the] Bullying and Harassment Policy in the first instance.

This policy will be implemented in accordance with the provisions of the ACAS Code of Practice.

## **2 Policy Statement**

The Governing Body is committed to ensuring that high levels of performance and standards of behaviour are aspired to within the school and recognises that the majority of staff members meet or exceed the standards required of them. In pursuit of this commitment, the Governing Body expects managers to lead by example, demonstrating a high level of competence, integrity and sound judgement, promoting effective working practices and supporting and encouraging school staff when difficulties arise. In return, the Governing Body expects all employees to strive for high personal standards of performance and to participate in a culture of continuous improvement by identifying and acknowledging areas for development or where training may be required and seeking guidance and support from their performance manager when necessary and at an early stage.

The Governing Body acknowledges that minor issues relating to standards of performance can, and should, be dealt with through open, constructive dialogue between manager and employee as a normal part of the performance management process. In addressing circumstances where a member of staff's performance fails to reach an acceptable level, or where there is a sudden and serious deterioration in these standards, the Governing Body will seek to ensure through the application of this procedure that a focus is placed first and foremost on support and improvement. In so doing, the Governing Body also acknowledges its duty to give high priority to the education of young people and will therefore take into account the likely impact on pupils when considering what progress must be made and in what timeframe.



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### **3 Roles & Responsibilities**

The employee's performance manager is responsible for ensuring that minor issues relating to capability are dealt with promptly and without recourse to this procedure, as part of the usual process of performance management.

Formal meetings held as part of this procedure which could result in the issuing of a formal warning will be conducted by either the Headteacher or, where the Headteacher has chosen to delegate this responsibility, by another appropriate senior manager. The employee's performance manager, if different, will continue to be central to ongoing monitoring and support.

Formal meetings which may result in a decision to dismiss will be heard by the Governing Body, as delegated to one or more of its members. If the decision relates to a teacher then the LA may need to be advised if the school affords them advisory rights. See 8.2.

In cases where the Headteacher's capability is under review, the role of the manager at stages one and two will be delegated to one or more governors, as determined by the Governing Body. The local authority will be informed (through the LEO or other appropriate officer) of any proposed investigation into the performance or behaviour of the Headteacher and of any proposed meetings to discuss this with the Headteacher.

### **4 Addressing Initial Concerns Informally**

The Governing Body recognises that, in many cases involving minor or early-stage concerns about work performance the matter is best addressed and resolved discreetly through discussion between the manager and the employee concerned. Such concerns might include, for example, minor inaccuracies in work undertaken, or an unexplained deterioration in standard of work.

These initial discussions, aimed at understanding any underlying causes for the concerns about performance, what corrective action might resolve the issue, and what informal support is available for the employee, will take place within the context of performance management and are therefore outside the scope of this procedure. Managers have both a right and a responsibility to bring such concerns to an employee's attention to allow the opportunity to respond and to rectify the situation with the appropriate provision of guidance, support and any relevant training.

### **5 Stage One**

Where the informal support & monitoring provided as part of performance management has failed to bring about a sufficient improvement, this procedure will be instigated in the majority of cases commencing at Stage One.

The Headteacher or other senior manager, as nominated, will arrange a formal meeting, giving at least 5 working days' notice in writing to the employee (see 'Scheduling Formal Meetings', section 10.3). This meeting is intended to establish the facts, set out the required standards which are believed to have been failed and allows the employee to respond to concerns about their performance and to make any relevant representations.

The employee has the right to be accompanied at this meeting, and any subsequent formal meetings, by a work colleague or trade union representative and should be provided with a copy of the procedure in order to understand the context of the meeting. Employees must make the request to be



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accompanied in advance of the meeting, to allow the school to prepare and to ensure the employer knows who the companion will be.

The companion can address the hearing to put and sum up the employee's case, respond on behalf of the employee to any views expressed at the hearing and confer with the employee during the hearing. 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.

The employee shall be allowed to ask questions, present their own evidence and rely on their own witnesses where appropriate and necessary, and will be permitted to respond to the evidence and ask questions.

At a formal meeting held under Stage One of the procedure, the Headteacher or manager will be able to consider a range of possible outcomes short of dismissal. Dismissal is a last resort and is only likely to be an appropriate consideration at this early stage in cases where the alleged incompetence is likely to constitute gross misconduct (see 'Gross Misconduct', section 10.1). In such cases, the Headteacher should seek HR advice before referring the matter to the Governing Body for consideration at a governors' hearing under Stage Three of the procedure. Suspension of the employee must also be considered in such circumstances (see 'Suspension', section 10.2).

At the formal meeting under Stage One, the Headteacher or manager will:

- Identify the shortcomings in performance; and in the case of teachers which of the standards expected of teachers are not being met
- Allow the employee and their companion the opportunity to state their case and respond to the concerns raised;
- Give clear guidance on the improved standard of performance required to enable the member of staff to avoid being subject to further stages of the procedure;
- Explain what support will be available to help the member of staff improve their standards of performance;
- Outline the timetable for improvement and how progress will be monitored; taking into account the individual's personal circumstances. This may include any medical conditions, working pattern, wellbeing support needs, or disabilities protected by the Equality Act 2010. The timetable will depend on the circumstances of the individual case but in straightforward cases could be (insert reasonable time period. It is for the school to fairly determine the set period. It should be reasonable and proportionate, but not excessively long, and should provide sufficient opportunity for an improvement to take place)
- Explain the consequences of a failure to improve.

The meeting will be adjourned if new facts come to light which the Headteacher or manager decide to refer for further investigation.

After the meeting, the Headteacher or manager will review the evidence and discussion which took place and decide, on balance of probability, whether the concerns are founded and what appropriate course of action to take from the following options:

- No formal action: this may be applicable where informal management action is deemed to be a more appropriate response to the concerns about performance.
- First written warning: this will be issued where there is serious concern about the standard of performance and informal management action alone is deemed to be an insufficient response.
- Final written warning: this will be appropriate in cases of very serious concern about performance where the employee's actions have had, or are liable to have by their continuation, a harmful impact on the school, such as on the education of pupils or the safety or welfare of others.

The employee will be notified of the decision as soon as possible following the meeting and, in any event, in writing within 5 working days. They will be informed, either at the same time or as soon as possible thereafter, of any arrangements for assessment and monitoring.



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Where a formal warning has been issued for capability reasons, the employee will be reminded that their pay progression (except in respect of cost-of-living increases) will be suspended until such a time as the required standard of performance has been reached. The letter to the employee will also confirm the period during which any written warning issued will remain live (see also 'Warnings', section 10.5) and the employee's right to appeal the decision in writing within 5 working days of receipt. The appeal may be heard by the Headteacher, if they are not involved in the initial decision, otherwise it will be directed to the Clerk to the Governing Body who will convene a governors' hearing for the purpose (see also 'Appeals', section 9).

Stage Two of the procedure will not be instigated unless and until a formal warning has been issued under Stage One and therefore more than one formal meeting may be held under Stage One if appropriate to the circumstances.

## **6 Assessment & Monitoring Period**

An assessment and monitoring period will follow a formal meeting held at any stage of the procedure at which the employee's level of performance has been discussed and after which a decision was made either to take informal management action or to issue a written warning. The length of this stage will depend on the circumstances of the individual case but, in straightforward cases, it will last for between four and six weeks. Monitoring, evaluation, guidance and support will continue during this stage. In more complex cases, for example where specific additional training or support is needed or where particular knowledge must be acquired, a longer period of monitoring appropriate to the circumstances will be considered.

At, or towards, the end of the assessment period, the manager tasked with monitoring the employee during this period will be expected to reach a judgement on the level of progress made:

- Performance Reaches Required Standard: Where performance has reached the required standard by the end of the assessment period, a meeting will be convened at which the employee is informed that the formal procedure is now ending and confirming any ongoing arrangements for informal monitoring and support. Pay progression, where previously suspended, will be reinstated at this stage, to be effective from the date of the meeting terminating the procedure.
- Performance Fails to Reach Required Standard: Where acceptable progress has not been made by the end of the assessment period, or at any time during the assessment period if there is a serious deterioration in performance, the member of staff will be invited to another formal meeting in accordance with the next appropriate stage of the procedure.

## **7 Stage Two**

If, following the Stage One meeting and any resulting assessment and monitoring period:

- a) the required standard of performance has not been reached,
- b) the standard of performance has deteriorated further,

another formal meeting will be convened, giving the employee at least 5 working days' notice in writing. If dismissal is a potential outcome, either as a result of a final written warning being issued at Stage One or because of the seriousness of the concerns, the matter should instead be referred directly to Stage Three for consideration by governors.

The meeting will usually be conducted by the same person (Headteacher or manager) responsible for conducting the formal meeting(s) held under Stage One of the procedure and the substance of the meeting will be similar, whilst recognising the increased level of concern and the implications for the employee of a failure to improve.



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After the meeting, the Headteacher or manager will review the evidence and discussion which took place and decide, on balance of probability, whether the concerns are founded and what appropriate course of action to take from the following options:

- No formal action: this may be applicable where allegations are determined to be unfounded or unsubstantiated or where some concerns remain but there has been sufficient improvement in standards of performance that informal management action is now deemed to be a more appropriate response.
- Final written warning: this will be appropriate where serious concerns about the standard of performance remain, in spite of any further support or guidance provided.

The employee will be notified of the decision as soon as possible following the meeting and, in any event, in writing within 5 working days. They will be informed, either at the same time or as soon as possible thereafter, of any arrangements in place for assessment and monitoring. The letter to the employee will also confirm the period during which any written warning issued will remain live (see also 'Warnings', section 10.5) and the employee's right to appeal the decision in writing within 5 working days of receipt. The appeal may be heard by the Headteacher, if they were not involved in the initial decision, otherwise it will be directed to the Clerk to the Governing Body who will convene a governors' hearing for the purpose (see also 'Appeals', section 9).

More than one formal meeting may be held under Stage Two if appropriate to the circumstances.

## **8 Stage Three**

If, following the Stage Two meeting and any resulting assessment and monitoring period:

- a) the required standard of performance has still not been reached,
- b) the standard of performance has deteriorated further, or

or at any stage where the matter has been referred for consideration by the Governing Body, the Clerk to the Governing Body will convene a governors' hearing, providing at least 10 working days' notice in writing to the employee (see 'Scheduling Formal Meetings', section 10.3). Consideration should be given at this stage as to whether suspension of the employee is appropriate (see 'Suspension', section 10.2).

An officer of the Local Authority will attend any proceedings in community or voluntary controlled schools where a possible outcome is dismissal. The School's HR Consultant will be contacted to provide advice about this.

The meeting may be adjourned if, in the view of the chairperson of the hearing, the meeting cannot continue until either new evidence is investigated or a witness who is absent is called.

As with all formal meetings held in accordance with the procedure, the employee will be entitled to be accompanied by a trade union representative or workplace colleague and will have the opportunity to challenge evidence, question relevant witnesses and state their case.

After the meeting, the governor(s) will consider all the evidence presented to them and reach a decision. As part of the decision-making process the governor(s) will determine whether, on the balance of probabilities, the concerns about the individual's performance are justified and, if so, what outcome is most appropriate in all the circumstances of the case.

Where dismissal is being considered, the governor(s) will first discount options which could be put forward as an alternative to dismissal, such as demotion or transfer to another post which more closely matches the employee's capabilities.





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The employee will be notified of the decision as soon as possible and, in any event, in writing within 5 working days. The letter will include confirmation of whether the governor(s) found there to be capability issues and, what, if any, formal action is being taken.

Where the outcome is not dismissal but where there are still concerns, the letter will outline what actions and improvements are needed to obviate the need for a further formal meeting and the employee will subsequently be notified of any further arrangements for assessment and monitoring. The letter to the employee will also confirm the period during which any written warning issued will remain live (see also 'Warnings', section 10.5) and the employee's right to appeal the decision in writing within 5 working days of receipt. An appeal against a decision made by governors will be referred to the Clerk to the Governing Body who will convene a hearing by different governors, uninvolved in the previous decision (see also 'Appeals', section 9).

The decision to dismiss will be communicated to the local authority which, as the employer of staff, will issue confirmation of the termination of employment within 14 days of notification. Where they work in more than one school as a teacher, the local authority must require them to cease to work at this school. As a general rule, the employee will not be expected to attend work during the notice period. In cases of gross misconduct, the employee may be summarily dismissed (without notice).

## **9 Appeals**

There shall be a right of appeal against any decision to impose a written warning or other formal sanction as a result of action taken by the employee's manager, the Headteacher or by governors. In exercising this right, the employee must confirm the grounds on which he/she is making the appeal. The process of assessing and reviewing capability in accordance with this procedure will continue pending the outcome of any appeal.

Appeals against warnings issued during Stage One or Stage Two will be heard by the Headteacher or one or more governors, in accordance with the scheme of delegation in place and bearing in mind the need to secure impartiality at every stage of the process. No person will hear an appeal against their own decision. Appeals against dismissal, or against formal warnings or sanctions determined by governors, will always be heard by one or more governors with delegated powers. References to the Appeals Panel hereafter may therefore be interpreted accordingly, although the 'panel' could in some cases consist of one person.

An officer of the Local Authority will attend an appeal hearing against a decision to dismiss in a community or voluntary controlled school. The School's HR Consultant will be contacted to provide advice about this.

The appeal hearing will be arranged to take place as soon as is reasonably practicable, allowing the employee at least 5 working days' notice of the date (or 10 working days where the appeal is against a dismissal decision).

The purpose of the meeting is for the Appeals Panel to consider the grounds for appeal and to review the fairness of the outcome of the original meeting. New evidence may be considered at the appeals stage but no additional grounds for action against the employee may be introduced.

Within 5 working days of the appeal hearing taking place, the employee will be notified in writing of the outcome and any actions which have been determined. There is no further right of appeal.

In community and voluntary controlled schools the local authority is responsible for confirming the termination of contract with the employee. The local authority must, therefore, be kept informed about the outcomes of appeals against dismissal.





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If a dismissed employee is reinstated on appeal, their salary will be back paid to the date of the original termination, minus any monies already paid in respect of notice.

## **10 Procedural Points & Specific Circumstances**

### **10.1 Gross Misconduct**

Gross misconduct will also include circumstances where a failure of work performance is so serious that summary dismissal is justified. Such serious instances are rare but may occur where the evidence points to the occurrence of damaging or dangerous errors, omissions or negligence which, even where the result was unintentional, have the effect of seriously undermining trust and confidence in the individual.

### **10.2 Suspension**

There may be instances where suspension on full pay is necessary while investigations into concerns about competence are carried out. Suspension is not an assumption of wrongdoing and is not considered to be a formal sanction. It is most likely to be deemed appropriate when:

- The allegation relates to a matter of gross misconduct;
- Where the alleged incompetence has, or is liable to, put other parties or property at risk;
- Where there are reasonable grounds for a belief that the investigation of capability issues may be compromised by the individual's ongoing presence (e.g., through tampering with evidence or influencing witnesses);
- Where relationships have severely broken down.

A decision to suspend will not be made until alternative courses of action have been considered, such as transfer to an alternative post or temporary allocation of other duties.

In accordance with current school staffing regulations, either the Headteacher or Governing Body may impose a suspension but only the Governing Body may lift it. The Governing Body may delegate its functions in this regard to the chair of governors.

A decision to suspend will be communicated at the earliest opportunity to the employee, in person where circumstances permit and, in any event, confirmed in writing within 2 working days.

Where suspension lasts longer than 4 weeks it will be reviewed thereafter at regular intervals and the employee kept informed about progress. Where an investigation can find no case to answer, the suspension will be lifted, and the employee supported to reintegrate into work as soon as possible.

### **10.3 Scheduling Formal Meetings**

Meetings should be held during the employee's usual working day. Other arrangements can be made by mutual agreement. School closure periods will generally result in a temporary suspension of the procedure.

The employee is expected to make every effort to attend meetings at the required time. The school will, where reasonably practicable, seek to liaise with the employee regarding the availability of their chosen work colleague or trade union representative to ensure that postponements are not necessary. If the employee's work colleague or trade union representative is unable to attend, an alternative date may be suggested by the employee. This will not be unreasonably declined provided it can be accommodated by those conducting the hearing and does not result in an unacceptable delay. As a general rule, a delay of up to 5 working days will be acceptable but the school will consider each request on its own merits. Any subsequent postponements, or a failure



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of the employee to turn up to a scheduled meeting without good reason, is likely to result in the formal meeting proceeding as planned and being decided on the basis of other available evidence.

#### **10.4 Formal Action Against Trade Union Representatives**

Where a formal investigation or formal meeting is being arranged in accordance with this procedure in relation to a trade union representative employed by the school, the case must first be discussed with a full-time official from the appropriate union after obtaining the employee's agreement.

#### **10.5 Warnings**

The period during which a warning will remain 'live' for the purposes of this procedure is not definitive and may be varied according to the circumstances of the case. As a general rule, written warnings will remain live for a period of 12 months after which point, they will be disregarded. A longer warning period may be appropriate in certain cases, for example where there has been a history of variable performance, or where a longer warning period was determined as an alternative to dismissal.

The Headteacher may exercise discretion to disregard the warning prior to its documented expiry date in circumstances where the employee has reached and maintained an acceptable standard, confirming this in writing to the employee. Where governors have issued a warning as a result of a formal meeting held during Stage Three, the Governing Body will usually delegate the discretion to review the warning to the Headteacher.

#### **10.6 Ill-Health Absence**

The ill-health absence of an employee during the procedure will not result in any delay to convening meetings or hearings beyond what is reasonable in the circumstances. One attempt to reschedule a meeting will be made where ill-health absence intervenes, and it should be explained to the employee that if they are still unable to attend on the rescheduled date the meeting will proceed in their absence.

The employee will be offered the alternative options of making a written submission and/or asking his/her companion to attend the rescheduled meeting to make oral submissions and to question witnesses on his/her behalf before a final decision is reached.

Absence which appears to have been triggered by the instigation of the procedure or which occurs during an assessment and monitoring period will usually be referred immediately to the school's occupational health provider to obtain advice. If the absence becomes long term, then this will be dealt with in accordance with the school's Attendance Management Policy.

#### **10.7 Grievances**

Grievances which relate directly to the instigation or operation of this procedure will be addressed in accordance with the existing rights under this procedure to state a case and to appeal against any formal action taken. Grievances which are not directly related to capability or disciplinary proceedings will be dealt with separately, without delay to the progress of this procedure.

#### **10.8 Overlapping Conduct & Capability Issues**

On occasion, an employee may not be meeting the required standards of work either in terms of their performance or conduct. In such cases, issues of conduct may be considered alongside performance issues in a joint formal meeting.

#### **10.9 Data Protection**



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Farncombe Infants processes personal data collected during the investigation stage and any subsequent stages of disciplinary action in accordance with its data protection policy. In particular, data collected as part of the investigation stage and any subsequent stages of disciplinary action is held securely and accessed by, and disclosed to, individuals only for the purposes of completing the disciplinary procedure. Inappropriate access or disclosure of employee data constitutes a data breach and should be reported in accordance with the data protection policy immediately. It may also constitute a disciplinary offence, which will be dealt with under this disciplinary procedure.

#### **10.10 Reference Requests**

**Teachers:** where a request for a reference is received from a potential employer which is either a maintained school or an academy, the school will be under a legal obligation – if asked to do so – to provide information as to whether an employee has been the subject of formal capability proceedings in the past two years. The school will also be required to provide written details of:

- The concerns which gave rise to capability proceedings
- The duration of the proceedings; and the outcome.

**Support Staff:** Where a request for a reference is received from a potential new employer, the school will only provide information – if asked to do so – about formal capability proceedings and will not include any information regarding the use of any support plan during that period under the Capability Policy.

### **11. Status of Policy and Review**

The content and operation of this policy is reviewed as and when deemed necessary by the Governing Body. This will include ensuring that the arrangements minimise the impact on workload for all parties involved. The policy is discretionary and does not confer any contractual rights.