



## **Capability Policy and Procedure**

**Policy Date:** 2 December 2013

**Version Date:** February 2017

For further advice and guidance in relation to this policy, please contact HR Direct at [hrdirect-mailbox@devon.gov.uk](mailto:hrdirect-mailbox@devon.gov.uk) or on 01392 385555.

**This policy was adopted by the Directors of Osprey Learning Trust on  
16<sup>th</sup> December 2019**

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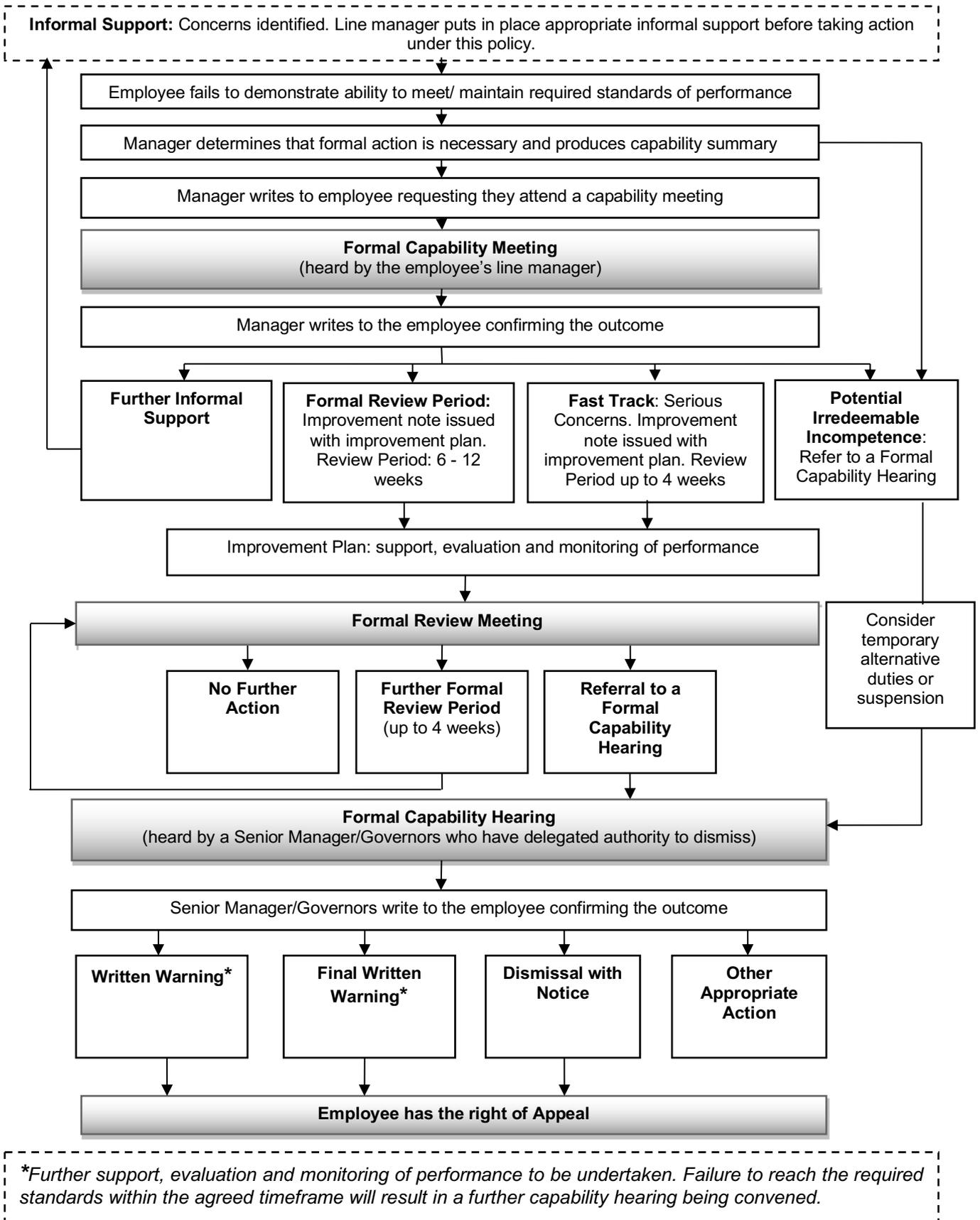
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# PROCEDURE FLOW CHART



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## **POLICY AND PRINCIPLES**

### **1. Definition**

Lack of capability is defined as an employee failing to reach or maintain the required standards of performance that their job demands.

Examples of lack of capability include but are not limited to:

- Failing to meet reasonable deadlines for tasks, projects, reports, etc.
- Regularly producing work which is sub-standard, inaccurate, badly presented or poorly organised
- Failing to meet the necessary standard of spoken English in public-facing roles in line with the Fluency Duty
- Failing to carry out key areas of job responsibilities, effectively and consistently
- Failing to meet the relevant professional standards, e.g. Teachers' Standards
- Failing to provide effective leadership and management, where applicable
- Poor practice with regard to child/adult safeguarding
- Physical factors that are not disability or health related but prevent the employee from undertaking all aspects of their job.

### **2. Purpose**

This policy should be used to address poor performance in a fair, supportive, effective and consistent way. The aim of the policy is to effect sustained improvement in an employee's performance to enable them to meet their contractual obligations.

### **3. Application and Exclusions**

This policy is based on good practice to ensure a consistent and effective approach. The application of this policy will be fair, equitable, objective and will not discriminate either directly or indirectly on the grounds of an employee's gender, age, disability, gender re-assignment, marital or civil partnership status, pregnancy, maternity status, race (including colour, nationality and ethnic or national origins), religion or belief, sex and sexual orientation.

This policy:

- applies to all employees engaged under Osprey Learning Trust statement of particulars including those contracted to a school (where this policy has been adopted)
- can be adopted by Voluntary Aided/Foundation/Trust/Academy schools
- does not apply to those employed by other organisations, employed under other organisations' terms and conditions of employment which include a contractual capability policy, casual workers or volunteers.

### **4. Determining who will hear the matter**

#### **4.1 Formal Capability Meeting**

Where there are concerns about an employee's performance and action is to be taken in accordance with this policy, the employee's manager should usually deal

with the matter. In OLT it will be the Headteacher/Principal that carries out this role. Where the concerns relate to the Headteacher/Principal/ or Trust leadership the CEO will manage the matter. If the concerns relate to the CEO this will be managed by the Chair of Directors.

The manager / Headteacher/Principal / CEO/Chair of Directors will be responsible for arranging the meeting, writing to the employee and arranging for a suitable person to attend to take notes.

#### **4.2 Formal Capability Hearing**

Formal capability hearings must be conducted and chaired by those that have delegated authority to dismiss in Osprey Learning Trust. In schools, this is likely to be the First Committee of the Board of Directors to consist of at least one Director of the Trust board, and two additional Directors or governors from the local governing body of that school.

The Chair will be responsible for arranging the hearing, writing to the employee and arranging for a suitable person to attend to take notes. In schools, the Clerk to Governors will normally make these arrangements.

#### **5. Time Limits**

The time limits included in this policy may be varied by mutual agreement. The policy refers to a number of 'days' within which certain actions/events are to occur. A 'day' is defined as any Monday to Friday excluding public holidays as defined by ACAS.

#### **6. Being Accompanied**

The Employee Relations Act 1999 determines that an employee has a statutory right to request to be accompanied at any disciplinary or grievance hearing. To invoke that right an employee must make a reasonable request to the employer to be accompanied by either:

- a paid official from a recognised trade union/professional association
- an official of a trade union/professional association whom the union/association has reasonably certified in writing as having experience of, or as having received training in acting as an employee's companion at disciplinary or grievance hearings
- an appropriate work colleague.

Friends/family members are not permitted, unless they fall under the above criteria and it is agreed as appropriate. It would not normally be reasonable for an employee to be accompanied by a work colleague or trade union/professional association representative whose presence would prejudice the hearing and/or was from a remote geographical location if someone suitable and willing was available on site.

If an employee's chosen representative is not available on the day proposed for the hearing, the employee can propose an alternative date within the following five days of the original proposed date.

## **7. Non Attendance**

If an employee fails to attend a meeting or hearing through circumstances beyond their control, such as certified illness, an alternative time and date may be offered. Alternatively they may submit a written statement or nominate a representative to attend on their behalf.

Where an employee is persistently unable or unwilling to attend the meeting/hearing without good cause, it will proceed in their absence and a decision based on the evidence available will be made.

## **8. Informal Support**

Managers must ensure that support has been put in place to address any concerns surrounding an employee's performance, prior to using this policy. The manager must be clear with the employee what the concerns are and what they need to achieve in order to meet the required standards of performance. The informal discussions should be dated and recorded for future reference, and may be confirmed in writing. The employee should be given a reasonable timeframe to improve. Where there are concerns about an employee's performance following a reasonable period of informal support, the manager should put the concerns in writing and advise the employee that the formal stages of this policy are to be applied.

If the poor performance is thought to be health or disability related, medical advice should be sought through Occupational Health before any formal action is taken.

## **PROCEDURE**

### **9. Capability Summary**

Where an employee has failed to demonstrate that they are able to meet the required standards of performance, following a period of informal support, the manager should produce a capability summary outlining the unsatisfactory performance and the support/adjustments that have been put in place to assist the employee.

### **10. Formal Capability Meeting**

Where formal action is necessary, the manager will write to the employee advising them of the concerns and informing them that they are required to attend a formal capability meeting. The letter should confirm the details of the formal meeting (date, time, venue, who will be in attendance etc.), the possible outcomes of the meeting, the employee's right to be accompanied, the timescale for them to submit any documentation to be considered and that the meeting may take place in the employee's absence if they fail to attend without providing a satisfactory reason. A copy of the capability summary and a copy of this policy should also be sent to the employee. The employee will be given at least five days notice, in writing, of the meeting.

At the meeting, the manager must:

- tell the employee where their performance is not meeting the required standards and outline what these are

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- confirm what support has been put in place to assist the employee and explore any further options which may support them
- give the employee the opportunity to respond and advise of any issues preventing them from meeting the required standards, including any mitigating factors
- carefully consider the employee's response.

The manager should consider all the information and come to a decision regarding the most appropriate course of action. Where an Improvement Plan is required, there should be a review period set of between 6 -12 weeks. In cases where there are serious concerns, the review period can be for a fast track period of up to four weeks.

Following the meeting, the manager will write to the employee within five days to:

- confirm that further informal support is required but that this will be outside of this policy, or
- issue an improvement note to inform the employee that if they fail to meet the required standards within the review period, this may result in a referral to a capability hearing, at which a determination may be made regarding their continued employment, and
- attach a copy of the Improvement Plan and confirm a date for the review meeting, or
- in cases of potential irredeemable incompetence, confirm that the matter is being directly referred to a capability hearing, at which a decision will be made regarding their continued employment.

### **11. Fast Track Review Period**

Where there are serious concerns about an employee's performance, this should be clearly evidenced within the capability summary and consideration given to a review period not exceeding four weeks.

### **12. Improvement Plan**

Where an improvement plan is required following a capability meeting, managers should ensure that it includes clear, measurable and realistic objectives. Details of any support, guidance and training being put in place to assist the employee should also be recorded, together with relevant timescales.

### **13. Potential Irredeemable Incompetence**

In exceptional circumstances, cases may arise in which the inadequacy of the employee's performance is potentially so seriously lacking that the situation is irredeemable within a reasonable period of time. In such cases, the matter may be referred directly to a capability hearing.

### **14. Formal Capability Review Meeting**

Where a review period applies, the manager will meet with the employee to formally review their performance against the improvement plan in accordance with the agreed timeframe.

The outcomes available are:

- No Further Action required as performance has improved to the required standards and there is evidence that the employee is likely to sustain this. The employee should be informed that if similar concerns arise within the next 12 months a further capability meeting will be convened.
- a further Formal Review Period is required, up to a maximum of four weeks, (unless there are exceptional circumstances where this would not be possible) which will be followed by a further capability review meeting.
- The matter will be referred to a Capability Hearing as there has been insufficient improvement.

The manager will write to the employee within five days of the review meeting to confirm the outcome.

## 15. Formal Capability Hearing

Where an employee is required to attend a capability hearing, the senior manager / Headteacher/Principal / First Committee will notify the employee in writing giving at least five days notice of the hearing. The letter should confirm the details of the formal hearing (date, time, venue, who will be in attendance etc.), the possible outcomes of the hearing, the employee's right to request to be accompanied, the timescale for the employee to submit any documentation to be considered and that the hearing may take place in the employee's absence if they fail to attend without providing a satisfactory reason.

An updated copy of the capability summary outlining the unsatisfactory performance and the actions taken to try and secure performance improvement must be sent to the employee with the letter.

At the hearing, the employee will be given the opportunity to respond to the performance issues outlined in the capability summary and to present their case. The senior manager / Headteacher/Principal / First Committee will then adjourn the hearing to make their decision.

The outcomes available are:

- where the employee is found to be performing unsatisfactorily, to issue a formal written warning, outlining the shortcomings in performance, the improvement required and the timescale for achievement. The employee should be informed of who will undertake the monitoring, the review date and details of any support, including training that will be provided. The employee should be informed that failure to improve within the timeframe set would normally result in convening a further capability hearing which could lead to a final written warning or dismissal. Unless specified otherwise, a formal written warning will cease to be live for further formal capability purposes after six months.
- where the employee's unsatisfactory performance is sufficiently serious, to move directly to issuing a final written warning, outlining the shortcomings in performance, the improvement required and the timescale for achievement. The employee should be informed of who will undertake the monitoring, a review date and any support, including any training that will be provided. The employee should be informed that failure to improve within the timeframe set

would normally result in convening a further capability hearing which could lead to dismissal. Unless specified otherwise, a final written warning will cease to be live for further formal capability purposes after twelve months.

- where the inadequacy of the employee's performance is so extreme to issue Dismissal with Notice as they are incapable of performing the job for which they have been employed. Where the decision is taken to dismiss the employee, the senior manager / Headteacher/Principal / First Committee should ensure that any previous warnings are not out of time.
- Other Appropriate Action to secure performance improvement.

The senior manager / Headteacher/Principal / First Committee will reconvene the hearing and confirm their decision verbally, unless valid reasons exist not to do so and will then write to the employee within five days to confirm their decision.

If the decision is to dismiss the employee, the appropriate period of notice should be issued in accordance with the employee's contract of employment. Where a warning/final written warning or dismissal is the outcome, the employee must be informed of their right of appeal.

Where dismissal is the outcome, consideration should be given to assisting the employee in seeking suitable alternative employment within the boundaries of their capabilities within Osprey Learning Trust during their notice period (see Redeployment Policy, where adopted).

## 16. Appeal

If an employee wishes to appeal against the decision from the capability hearing, they must do so in writing, stating the grounds for their appeal, within five days of receiving the written outcome.

An employee may appeal on the following grounds:

- the sanction given was too harsh given the circumstances
- the procedure was not fairly or correctly applied
- new information has come to light that would directly effect the decision made at the capability hearing.

The written appeal should be sent to the Clerk to the Trust Board (school employees). The Clerk to Directors will then arrange for the appeal to take place.

A Directors' Appeal Committee will be convened to hear the appeal. This must consist of at least one Director of the Trust Board and at least two further Directors or local Governors from any trust school, none of whom were involved in the original decision. In Osprey Learning Trust, the right of appeal against a formal written warning and final written warning will be to the Chair of Directors

The appeal should be heard without unreasonable delay. A minimum of five days notice will be given to allow for preparation.

The outcome of an appeal hearing may be:

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- to refer the matter back to the senior manager/Headteacher/Principal/First Committee if significant new information/evidence is provided, which was not available previously, and may change the original decision
- conclude a procedural irregularity occurred and determine whether this had an impact on the decision making process and outcome. If so, decide an appropriate sanction and make a recommendation to rectify the situation
- uphold the appeal and determine an alternative sanction/appropriate course of action
- reject the appeal and confirm that the original decision stands.

The decision will be given verbally to all parties at the end of the appeal hearing unless a valid reason exists not to do so, and it will be confirmed in writing to the employee within five days. An appeal is not a re-hearing of all of the facts but to determine if the original decision was reasonable given the circumstances. The process ends with the decision of the Appeal Committee (schools).

## **ADDITIONAL INFORMATION**

### **17. HR Advice**

HR Direct can provide advice and support to any manager or governor involved in the application of this policy at any stage. This includes attendance at meetings/hearings where required. A representative of DCC should be present to give advice at any hearing where dismissal may be considered. Reporting Obligations

#### **18.1 Professional Bodies**

Where there are performance concerns about an employee which could potentially call into question their professional registration, e.g. a Social Worker registered with the Health and Care Professions Council (HCPC), managers should ensure that they follow the appropriate procedure for reporting concerns to the relevant Registered Body. This will ensure that the body can investigate the individual's ability to carry out their professional duties or take other appropriate action in the circumstances. Further information on making a referral can generally be found on the professional body's website. Where a referral is necessary, this should be made at the start of the formal process.

In addition, e.g. for employees registered with the Care Quality Commission (CQC) or HCPC, employees are responsible for ensuring that they adhere to the individual reporting requirements of their professional body, where they are subject to formal capability procedures.

#### **18.2 Disclosure and Barring Service (DBS) (previously the ISA)**

The primary role of the Disclosure and Barring Service (DBS) is to help employers make safer recruitment decisions and prevent unsuitable people from working with vulnerable groups, including children.

The Safeguarding Vulnerable Groups Act (SVGA) 2006 places a duty on employers of people working with children or vulnerable adults to make a

referral to the DBS where an employer has dismissed or removed a person from working with children or vulnerable adults (or would or may have if the person had not left or resigned etc) because the person has:

- been cautioned or convicted for a relevant offence; or
- engaged in relevant conduct in relation to children and/or vulnerable adults, i.e. an action or inaction (neglect) that has harmed a child or vulnerable adult or put them at risk of harm; or
- satisfied the Harm Test in relation to children and/or vulnerable adults i.e. there has been no relevant conduct (i.e. no action or inaction) but a risk of harm to a child or vulnerable adult still exists.

The referral will enable the DBS to consider whether or not the individual should be barred from working with children and/or vulnerable adults and should be made as soon as possible after an employee has been dismissed or removed from working with children or vulnerable adults (or would have been if they had not resigned). Further information about making a referral can be found at

[http://staff.devon.gov.uk/dbs\\_referral\\_process\\_and\\_guidance.doc](http://staff.devon.gov.uk/dbs_referral_process_and_guidance.doc)

## **18. Suspension and Other Alternative Arrangements**

In cases of serious or irredeemable incompetence, the manager will determine whether it is necessary to temporarily remove some of the employee's duties, or whether an individual with delegated authority to dismiss (or in some cases within schools, authority to suspend) should consider if suspension from duty is necessary. This may be necessary where there is a potential risk to children or vulnerable adults; to the political, financial and/or legal reputation of the service; to the service provision, and/or because of a need to protect all parties, including the employee.

Suspension will be on normal pay, should be as brief as possible and kept under review. The reasons for the suspension must be stated clearly to the employee and confirmed in writing. Where an employee has been suspended, this can only be retracted by a senior manager (with delegated authority to dismiss), or in a school, by the full Governing Body.

In certain circumstances, where an appropriate senior manager is not available to make a decision regarding suspension, or where it is necessary to gather further information regarding an employee's performance, it may be necessary for the immediate line manager to send an employee home. In such circumstances a decision about whether or not to suspend should then be made by an appropriate senior manager as soon as possible.

## **19. Management Responsibilities**

Managers are required to ensure that each employee is aware of this policy, understands the performance standards that are required of them and the consequences of not meeting these. Action should be taken consistently to identify concerns and reinforce performance standards before it becomes necessary to take formal action. Managers are required to manage the process effectively, fairly and reasonably.

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## **20. Employee Responsibilities**

Employees have a contractual responsibility to carry out the requirements of their job to a satisfactory standard and in line with any standards set by their appropriate professional body. Employees have a responsibility, where necessary, to take any steps required to improve their performance. Employees must take all reasonable steps to attend meetings as required and adhere to this policy.

## **21. Professional Standards**

In this policy where there is reference to “relevant professional standards” this refers to any standards applicable to the post(s) and the career stage of the post holder (e.g. the Teachers Standards 2012 are applicable to all teachers, including the Headteacher/Principal).

## **22. Formal Action against Trade Union/Professional Association Representative**

Although the usual performance standards must apply to trade union/professional association representatives, no formal action within this policy will be taken against an employee who is an accredited representative, nor will suspension normally be applied, until the circumstances of the case have been discussed with a paid official nominated for such purposes by the trade union/professional association concerned.

## **23. Raising a Grievance during the Application of this Policy**

If an employee is currently being managed under this policy and has a complaint related to either the person applying it and/or its application, the employee will raise a complaint under this policy which will be investigated. It may be necessary to suspend the application of the policy while the complaint is being looked into. Any delay to the application of this policy to deal with an employee’s complaint should not exceed 10 days.

If an employee has an unrelated concern, problem or complaint, then the employee should use the Grievance Policy. As the matter is unrelated, there will be no need to put any process currently being applied on hold as the complaint can be dealt with in parallel.

## **24. Confidentiality**

Any parties affected by, or involved in the application of this policy will be expected to maintain an appropriate level of confidentiality. Breaches of confidentiality will be taken seriously, especially if they hinder the application of the policy. Failure to maintain confidentiality may result in action being taken under the Disciplinary Policy.

Disclosure of information may also be a breach of the Data Protection Act (1998) and may lead to action being taken under the provisions of that Act, in addition to actions being taken under the Disciplinary Policy.

## **25. Recording of Information**

A written record must be made of all meetings held during the application of this policy. Those involved in each meeting will be provided with a copy of any records made.

The manager will ensure there is a record of the process which should include all statements, records and evidence. All records will be retained confidentially, securely and in accordance with the Data Protection Act (1998).

## **26. Support for Employees**

Employees are encouraged to seek support from their trade union/professional association in the first instance. Procedural guidance relating to this policy is available from HR Direct at [hrdirect-mailbox@devon.gov.uk](mailto:hrdirect-mailbox@devon.gov.uk) or by telephoning 01392 385555.

Where a referral to Occupational Health is necessary, this should be made by the employee's line manager.

## **INFORMATION FOR SCHOOLS ONLY**

### **27. Adopt the Policy**

This policy was adopted by the Board of Directors on 16<sup>th</sup> December 2019

### **28. Consultation**

This policy is provided following consultation with trade unions/professional associations and will apply to all employees as well as those contracted to a school, where this policy has been adopted. Should the Governing Body wish to make changes to this model policy, the required consultation must be undertaken with the County Officers of the recognised trade unions/professional associations.

This policy supersedes all previous capability policies.

### **29. Delegated Responsibilities**

In line with School Staffing (England) Regulations 2009, the Governing Body must determine who has delegated responsibility for Hearings, which may lead to dismissal, as part of this policy:

Hearings will be delegated to:

The Headteacher/Principal	No
The First Committee of Governors	Yes

Appeal Hearings will be heard by the Directors' Appeal Committee regardless of the delegation above.

### **30. Issuing/Retracting Notice of Dismissal**

Where a decision to dismiss an employee is taken under this policy the Chair of Governors will issue notice of dismissal.

Where an appeal against dismissal is upheld, the notice issued to the employee will be retracted and the employee will be reinstated the Chair of Directors will retract the notice.

### 31. Ofsted Assessment of a Teacher's Performance

The assessment of a teacher's performance as a result of an Ofsted inspection cannot be used exclusively to invoke this policy. Such information may be used as evidence alongside other evidence the Headteacher/Principal (or Chair of Governors, where this relates to the Headteacher/Principal) has about an employee's performance.

### 32. Employment References

Where a teacher leaves employment within two years of being managed under this policy, managers providing references to prospective employers must communicate the duration in which the teacher was managed under formal capability and the outcome.

## POLICY HISTORY

Policy Date	Summary of change	Contact	Version/ Implementation Date	Review Date
27 November 2013	New Policy Date of consultation with recognised Trade Unions – November 2012 and September 2013	HR ONE	27 November 2013	
22.01.16	Review of policy to update references to W@W due to new occupational health provider.	HR Direct	01.04.16	
27.06.16	Amendment to reference to Chief Officers and Heads of Service in section 3.	HR Direct	27.06.16	
06.11.16	Amendment to section 1 to include fluency duty in definition.	HR Direct	02.11.16	
28.03.17	Removal of manager referral to EAP	HR Direct	29.03.17	
September 2019	Osprey Learning trust v1	JN	17 <sup>th</sup> September 2019	