Capability Policy and Procedure

This policy will be reviewed on an annual basis

Statement of intent

To ensure all staff work at the same expected high standard of work. Delivering high quality childcare and education.

Aim

To address poor performance in a supportive manner which is fair, consistent and effective. To ensure sustained effective improvement of an employee's performance enabling them to fully implement their job description.

Methods

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 completion of paperwork tasks, projects, reports, etc.
- Regularly producing work which is sub-standard, inaccurate, badly presented or poorly organised
- Where communication standards form a necessary part of the role, for example to ensure clarity and safety when dealing with parents or colleagues, the employee must be able to meet these requirements
- Failing to carry out key areas of job responsibilities, effectively and consistently
- Failing to meet the relevant professional standards, e.g. EYFS statutory framework
- 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.

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 and implement their job description.

Application and Exclusions

This policy will not discriminate on the grounds of age, disability, gender reassignment, marriage or civil partnership, pregnancy and maternity, race (including colour, nationality and ethnic or national origins), religion or belief, sex or sexual orientation

Determining who will hear the matter

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. Where the concerns relate to the manager, the Chair of the Trustee Directors will manage the matter.

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

Formal Capability Hearing

Formal capability hearings must be conducted by the opposite panel from the investigation panel, in accordance with their delegated responsibilities. The Chair will be responsible for arranging the hearing, writing to the employee and arranging for a suitable person to attend to take notes.

Being Accompanied

In line with the Employment Relations Act 1999, an employee has the statutory right to be accompanied at any formal meeting or hearing. This can be a trade union representative or a workplace colleague. Friends or family members are not normally permitted unless otherwise agreed. 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

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.

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.

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 time-frame 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
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.

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 issues and a copy of this policy will 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
- 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 quicker 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.

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.

Quicker Review Period

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

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.

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.

Formal Capability Hearing

Where an employee is required to attend a capability hearing, the manager/ Panel 1 Trustee Directors 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 issue 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. Manager / Panel 1 Trustee Directors 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 management team and Chair of Trustee Directors should ensure that any previous warnings are not out of time.
- Other Appropriate Action to secure performance improvement. The managerment team and Panel 1 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.

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 affect the decision made at the capability hearing.

The written appeal should be sent to the Chair of Trustee Directors who will then arrange for the appeal to take place.

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:

- to refer the matter back to the management team or Panel 1 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 if 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 Chair of Trustee Directors or the Appeals panel 2.

ADDITIONAL INFORMATION

HR Advice

HR Direct can provide advice and support to any manager or trustee director involved in the application of this policy at any stage. For further advice and guidance in relation to this policy, please contact HR Direct at hrdirect-mailbox@devon.gov.uk or on 01392 385555.

Reporting Obligations

Professional Bodies

Where there are performance concerns about an employee which could potentially call into question their professional registration, manager must ensure that they follow the appropriate procedure for reporting concerns to the relevant Registered Body - OFSTED. 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.

Disclosure and Barring Service (DBS)

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

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 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 the manager and Chair of the Trustee Directors (with delegated authority to dismiss).

In certain circumstances, where an appropriate 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 deputy manager to send an employee home. In such circumstances a decision about whether or not to suspend should then be made by the manager as soon as possible.

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.

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.

Professional Standards
In this policy where there is reference to "relevant professional standards" this refers to any EYFS standards and job descriptions.

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.

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.

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.

Documenting and Recording of Information

All records will be retained confidentially, securely and in accordance with UK Data Protection legislation, including the Data Protection Act 2018

Employees support

Employees are encouraged to seek support from their trade union/professional association in the first instance or from HR Direct at hrdirect-mailbox@devon.gov.uk or by telephoning
01392 385555. Where a referral to Occupational Health is necessary, this should be made by the Manager.

Appeal Hearings will be heard by the Trustee Directors Appeal Panel regardless of the delegation above. If delegation is given to the Manager, Panel 1 will hear the matter if the Management team has undertaken the investigation.

Issuing/Retracting Notice of Dismissal

Where a decision to dismiss an employee is taken under this policy, the Chair must formally notify all the registered Trustee Directors direct in writing within five days of the hearing, giving the reasons for the determination. The Manager will then issue notice of dismissal on behalf of Pippins within 10 days of receipt of the notification.

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

Employment References

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

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

This policy was adopted at a meeting of Pippins Pre-school and Nursery

Held on Wednesday 30th September 2026

Signed on behalf of the Management Trustee Directors

Role of signatory (e.g. chair etc.) Chair

Commenced 16.10.18 revised 30.09.2026