Performance Capability Policy and Procedure

Ffederasiwn Ysgolion **Llanidloes** Schools Federation

Teaching and Non-Teaching Staff

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1. Introduction

1.1 This document sets out the Schools' Performance Capability Policy and Procedure and provides a structured mechanism for management of an individual's work performance where it is falling below an acceptable standard.

1.2 This policy and procedure can be used in conjunction with the Schools' Performance Management Policy and Procedure and the General Teaching Council for Wales (GTCW) Code of Professional Conduct and Practice for Registered Teachers.

1.3 At Llanidloes Schools' Federation we recognise the need to ensure that all individuals are supported and developed so that they can achieve and deliver the best work they are able to.

1.4 The professional development review process is a separate process to performance capability, however aspects of both processes may overlap. Professional development review is a process to support the development of all staff, to improve teaching and learning, to support school improvement and raise standards of attainment. Professional development review helps schools by supporting and improving the work of teachers as individuals and in teams. It sets a framework for teachers and their team leaders to agree and review priorities and objectives in the context of schools' development plans. A formal review is normally undertaken once a year.

1.5 Supervision and formal annual appraisal is the professional development review process for support staff. The purpose of supervision is to assist the member of staff in fulfilling their responsibilities and duties of their post.

1.6 At any stage during the professional development review cycle, any concerns (including those not linked to professional development review objectives) should be raised with the member of staff and the performance capability procedure would commence in respect of these concerns. However, the professional development review process would continue in respect of objectives identified.

1.7 A capability matter arises when there are performance concerns about an individual member of staff who is failing to carry out responsibilities or duties to a satisfactory standard. Poor capability may result from a lack skill or aptitude, a lack of professional awareness, inability to cope with what is considered reasonable workload or being unable to meet identified standards. It may also result from an inability to prioritise work, insufficient training or difficulty in adapting to change. In all circumstances there must be facts and evidence to support concerns which clearly demonstrate that acceptable standards of performance are not being met. Examples of incompetence linked to skill or aptitude, which leads to capability procedures, could stem from low expectations of pupils, poor pupil progress, inadequate planning and preparation, classroom indiscipline.

2. Scope

2.1 The Policy and Procedure set out in this document applies to all staff managed by the Schools' Governing Body, including headteachers.

2.2 The Welsh Assembly Government guidance on induction procedures and guidelines must be followed in all cases for Newly Qualified Teachers (NQT).

2.3 Further guidance on NQTs can be sought from the School Improvement Advisers and from the GTCW website - www.gtcw.org.uk.

3. The Legislation

3.1 This policy is a requirement of the Employment Rights Act 1996, The Education Act 2002 and The Education (School Teachers' Appraisal) (Wales) Regulations 2012 and also takes into account the ACAS Code of Practice.

3.2 A dismissal by reason of performance capability will normally be considered fair if the employer has:

a) Set reasonable standards of performance.
b) Made the required standards clear to the member of staff.
c) Warned of the consequence of failing to meet the required standards.
d) Given support and training, where applicable.
e) Given reasonable time for improvement.

4. Roles and Responsibilities

4.1 The Governing Body have ultimate responsibility for monitoring the capability of all members of staff in the school, to adopt an appropriate performance capability policy, and to delegate responsibilities under this policy to the Headteacher.

4.2 In the case where the performance capability of the Headteacher is of concern, the management of the process is the responsibility of the Chair of the Governing Body.

4.3 The Governing Body will establish a Staff Disciplinary and Dismissals Committee and a Staff Disciplinary and Dismissals Appeals Committee for consideration of dismissals. Warnings can be issued by the Headteacher even in circumstances where the Headteacher has been involved in the informal capability meetings and has issued formal warnings to the member of staff previously.

4.4 School Improvement Advisers and HR Advisers will be available to advise on all Performance Capability concerns prior to any formal action being taken.

4.5 A member of the leadership team, the Business Manager, the Headteacher or the Chair of the Governing Body (in the case of performance concerns regarding the Headteacher) will:

a) Set and maintain clear and fair standards of performance at work.
b) Deal with poor performance as it arises and inform member of staff when their work is falling below standard.
c) Bring to the attention of the member of staff the Performance Capability procedure.
d) Monitor the process when the capability procedure is used in relation to any member of staff.

4.6 The member of staff will:

a) Work with the Headteacher, Chair of the Governing Body or nominated performance lead to resolve any problems which are identified in relation to their performance.
b) Co-operate with any review meetings under the Capability Procedure.
c) Co-operate with all reasonable management instructions whilst Performance Capability concerns are being addressed.
d) Highlight any reasons performance may be affected to assist in identification of necessary support at an early stage and throughout the process.

5. Principles

5.1 The policy and procedures contained within this document are founded on the following principles:

a) To ensure that members of staff know what performance standards are expected of them.
b) To ensure that performance standards are reasonable and achievable taking into account working hours, job descriptions and contractual terms.
c) Wherever possible to support and encourage staff to improve unsatisfactory performance rather than impose sanctions.
d) To provide appropriate development, training, coaching and support to assist with improving standards.
e) To ensure that it is understood that matters dealt with by way of the capability procedure are different from instances of misconduct.
f) To ensure that a fair and structured two-way process is applied consistently and that failing performance is addressed as quickly and reasonably as possible.

6. Procedure

6.1 Prior to this procedure being used, the Headteacher or member of the leadership team or business manager shall ensure that the member of staff is aware where there are concerns regarding aspects of performance. This should be done through the professional development review and/or the appraisal process or supervision meetings, including details of what needs to be done to improve performance with target dates. The member of staff should be

informed that failure to make improvements may lead to commencement of formal Performance Capability Procedures.

6.2 Any additional matters raised between professional development reviews need to be raised and discussed in a timely manner.

6.3 Even where there is no real dispute as to the facts of a case and a member of staff is admitting incapability, there still needs to be a reasonable evaluation of the evidence and the importance of following the correct performance capability procedure cannot be overstated. The evidence used as part of this process will normally be from the professional development review, supervision or appraisal process as well as complaints documentation and pupil grades.

6.4 Informal Capability Meetings - conducted by the Headteacher, Member of the Leadership Team or Business Manager

6.4.1 Where initial informal support has been provided through the supervision process or other discussions and performance concerns continue, the headteacher or member of the leadership team or business manager should arrange to meet with the member of staff on a 1:1 basis, specifically to discuss these concerns. It is not expected that HR or trade unions will be in attendance at the meeting at this stage of the process, however this does not preclude a member of staff from discussing the matter with their professional association or trade union outside of the meeting. Advice would be available from Human Resources for members of the leadership team or line manager dealing with this issue. Discussions at the meeting should include the following:

- Explanation of the concerns, stating where and how work performance or capability is below standard (clear and specific examples must be given);
- Opportunity for the member of staff to explain and identify any reasons for their poor performance;
- Agreement on the required standards;
- Agreement of an action plan to improve performance to the required standard, including any support that might assist this (e.g. access to specific training, change of work pattern, etc) which would be signed and agreed by both parties at the discussion;
- Agreement of any timeframe for the action plan;
- Agreement of a date for a first review of performance and intervals or dates for follow-up reviews (i.e. fortnightly informal reviews and then more formal review at the end of the agreed timescale.).

6.4.2 The member of staff shall be notified in writing of this meeting, given reasons for the meeting as well as details such as time and location. Five working days' notice of the meeting should be given. A copy of the Performance Capability policy will also be sent to the member of staff at this point. If possible, reference should be made to notes of supervision meetings, lesson observations or performance appraisal where concerns have previously been highlighted and the member of staff should be provided with examples where their work has not met a satisfactory standard.

6.4.3 The manager and member of staff should agree a plan of action, a copy of which should be given to the member of staff and both manager and member of staff should sign the document as a correct record. An agreed action plan might look like this example:

Improvement Action Plan for: (name and job title of member of staff) **Agreed on: (date)**				
What are the concerns re. performance?	**What are the required standards of performance?**	**What action has been agreed to improve performance to required standard?**	**When will this action be in place?**	**When will performanc e be reviewed?**
Work is repeatedly not completed by the requested date and no prior warning is given if deadlines cannot be met.	Tasks are completed on time. Problems should be raised as soon as they are known, so that they can be overcome.	1. 1-1s to be held fortnightly for work schedule and any related problems (personal or work-related) to be discussed. 2. (name) to attend Time Management course.	1. First 1-1 next week (date). 2. By DATE	DATE and thereafter every (week, month or fortnight) as appropriate

6.4.4 It is important to establish realistic timescales for action plans so that actions can be achieved. For example, that they take into account key dates such as attendance at courses or project timescales where other peoples' work is involved.

6.4.5 If, by the time of the review meeting, the member of staff's performance improves to the agreed standard, no further action should be necessary. However, the Headteacher should inform the member of staff of the satisfactory outcome and at the review meeting the achievement should be acknowledged. The outcome should be noted and recorded by way of notes to the member of staff confirming the details of the discussion that took place.

6.4.6 Where the member of staff has made some progress with regards to the actions outlined in the action plan but there remain concerns and/or new concerns have arisen it may be appropriate to extend the informal process to allow an opportunity for improvement. Timescales for extension can be discussed at the review meeting.

6.4.7 Where performance does not improve, or where there is some improvement, but not to the standard required, consideration may be given to progressing to a formal Performance Capability Hearing for consideration of a formal warning. Such a hearing will be heard by the Headteacher (even if they have been involved in the informal stages of the process). HR advice should be sought prior to making this decision. The member of staff would be entitled to be represented by their trade union or professional association representative or by a work based colleague at any hearing (subject to the colleague not being a witness as part of the process). See 6.6 for the Performance Capability Hearing.

6.4.8 In the case of a member of staff having already received a final written warning under this procedure and where their performance continues to not improve, or where there is some improvement, but not to the standard required, the procedure as explained under 6.5 should be followed prior to progressing to a Performance Capability Hearing with the School's Staff Disciplinary and Dismissal Committee where dismissal may be an outcome.

6.5 Formal Procedure

6.5.1 The purpose of the formal performance capability procedure is to address serious cases of failing performance; where no improvements identified in the action plan have been made and/or where improvements have not been maintained following a final written warning having been issued. There may also be occasions where the concerns are significant or serious enough to warrant the formal procedure being invoked rather than progressing through the informal stages in the first instance. Discussions with the HR Team would be advisable in such cases.

6.5.2 At this stage the member of staff will have a formal interview in order to respond formally to the concerns raised. Five working days' notice of the meeting should be given. The interview will normally be carried out by the Headteacher, although in some cases, it may be appropriate for an independent person from outside the school to investigate performance concerns. This is to be determined by the Chair of the Governing Body or Headteacher. Discussions with the HR Team would be advisable in such cases.

6.5.3 Normally, the member of staff who is the subject of the alleged concern regarding performance and any witnesses will be interviewed as appropriate and requested to provide a signed statement. Notes will be taken at all meetings and a typed copy given to the party involved.

6.5.4 The member of staff must be given the opportunity to respond to the concerns and have the right to be to be accompanied by a work based colleague (subject to the colleague not being a witness as part of the process), or a representative of the member of staff's professional association or trade union at any meeting under the formal process.

6.5.5 Once this stage of the formal process has been concluded, the findings will be considered by the Headteacher (or the Chair of the Governing Body in the case of a Headteacher). This should be done as soon as practicable. The Headteacher (or Chair of the Governing Body in the case of a Headteacher) may conclude that:

- no further action is required
- matters can be dealt with under the informal procedure (refer to section 5 of this procedure)
- there appears to be sufficient information for a formal disciplinary hearing with the Headteacher or Chair of the Governing Body if the Headteacher is to be disciplined.
- the concerns are deemed to be serious or significant which have the potential to amount to dismissal and should be considered by the governing body's Staff Disciplinary and Dismissal Committee.

6.6 The Performance Capability Hearing

6.6.1 The point of the hearing is to establish the facts, decide if performance capability has fallen below the acceptable standards and to arrive at a decision on what capability sanction to impose, if any.

6.6.2 The performance capability hearing is conducted by the Headteacher and supported by HR where the concerns are not considered to result in a dismissal. In respect of concerns against a Headteacher, the Chair of the Governing Body would consider the case, supported by HR. The Headteacher or Chair of the Governing Body can issue a higher sanction for repeated failing performance, even in cases where they awarded the original or lesser sanction.

6.6.3 Ten working days' notice of the hearing must be given together with all documentation to be relied upon by the school or presenting officer. Should a member of staff or their representative not be able to attend, they must advise the HR Team with immediate effect. The hearing may be postponed and a revised date for the hearing would be set to take place no later than 10 working days from the date of the postponed hearing. A postponement will only be permitted on one occasion, unless in exceptional circumstances. If the member of staff (or their representative) requests a further postponement, or does not attend the hearing, the hearing will not be rescheduled and the hearing will proceed in the absence of the employee or their representative and will be based on the written documentation and/or with an alternative representative.

6.6.4 If the possible outcome of the formal capability process is dismissal, the Staff Disciplinary and Dismissal Committee will need to consider the case presented.

6.6.5 The performance capability hearing offers an opportunity for an assessment of the reasons for the poor performance and gives the member of staff an opportunity to reiterate any reasons in relation to the performance concerns identified, to challenge any evidence, and to question and be questioned in respect of the specific capability concerns.

6.6.6 Copies of any documents relevant to the case and which are intended for consideration at the hearing will be submitted by the member of staff to the HR Team at least five working days in advance of the hearing.

6.6.7 The format of the hearing is:

- Introductions and confirmation of the reason for the hearing;
- Presentation of action taken to date and main performance capability concerns (by Headteacher (even when part of the panel or presenting officer), including questioning of witnesses (where appropriate);
- The member of staff's response and questioning of the member of staff by all parties;
- Summing up by all parties (member of staff going last)
- Adjournment for panel to make a decision (includes consideration of mitigating and aggravating factors);
- Reconvene to inform of the panel's decision, or decision to be conveyed in writing.

6.7 Possible outcomes of the performance capability hearing

6.7.1 **No formal action** taken. This will be confirmed in writing and may include further informal support.

6.7.2 **A Written Warning** – for cases of unsatisfactory performance the written warning will set out clearly the unacceptable performance and also the improvements that are required. The warning will also state clearly that further action will be considered if unsatisfactory performance continues. The member of staff will also be informed that the record of the warning will be retained on their personnel record, in line with the timescales identified in paragraph 6.7.8 and that an action plan for improvement and support will be agreed, with set timescales.

6.7.3 **A Final Written Warning** – if the member of staff has a current warning about their performance capability and unsatisfactory performance continues then a final written warning may be appropriate. This may also be seen as the appropriate sanction if the unsatisfactory performance is seen as sufficiently significant to have a serious or harmful effect on pupils, pupil progress or the school. The member of staff will also be informed that the record of the warning will be retained on their personnel record, in line with the timescales identified in paragraph 6.7.8, and that an action plan for improvement and support will be agreed, with set timescales (in setting the timescales for improvement, consideration should be given to the seriousness of the situation and the impact the performance is having on pupils and the school).

6.7.4 **Disciplinary Penalties Avoiding Dismissal** – where the hearing finds a member of staff's performance capability to be unacceptable to the point that dismissal is a possible outcome, it may be appropriate to consider alternative penalties to dismissal. These penalties can include demotion, which will normally include a reduction in pay and/or loss of seniority. No safeguarding of salary will take effect in these circumstances. These penalties must be explained and confirmed in writing along with any specified period which may be appropriate. Any such actions will be viewed as an alternative to dismissal.

6.7.5 **Dismissal with Notice** – where the member of staff has either failed to respond to previous warnings and their performance capability remains unacceptable, or is found to be significantly serious at a first hearing, dismissal with contractual notice may be an appropriate disciplinary penalty. Where the member of staff's presence in the workplace would cause significant difficulty a payment may be made in lieu of notice (this can only be made after any appeal and notice has been issued in line with paragraph 7.8 below and therefore it might be appropriate to suspend the member of staff on full pay pending the outcome of any appeal process). Advice must always be sought from HR in such cases.

6.7.6 **Dismissal Without Notice or Summary Dismissal** – this may be appropriate if it has been found that the member of staff's performance capability is of such a serious nature i.e. professional judgement and/or assessment of risk and where the mitigating circumstances are insufficient and/or where the member of staff's presence at work is untenable. This may include where there has been a breakdown in trust between the School and the member of staff.

6.7.7 All outcomes and sanctions will be confirmed and explained in writing within 5 working days of the hearing.

6.7.8 If a warning is awarded then the panel may specify the length of the warning to a maximum length of time up to:

Written Warning	Final Written Warning
Generally up to 3 full terms after the end of the term in which the warning was issued	Generally up to 6 full terms after the end of the term in which the warning was issued

7. Appeals

7.1 The member of staff is entitled to appeal against a formal sanction of the headteacher or Staff Disciplinary and Dismissal Committee (as appropriate). Notice of the intention to appeal needs to be lodged with the clerk to the Governing Body within ten working days from the date of the Performance Capability Hearing. The appeal notice will need to include the grounds for the appeal.

7.2 The grounds of appeal will be restricted to the reasonableness of the original decision, any relevant new evidence, and any procedure irregularity.

7.3 The reasons for the appeal must be fully explained and all supporting documentation must be submitted to the HR Team. Subject to mutual agreement, an appeal hearing will be convened within a reasonable timescale.

7.4 Ten working days' notice of the appeal hearing must be given together with all documentation to be relied upon by the school or presenting officer. Should a member of staff or their representative not be able to attend, they must advise the HR Team with immediate effect. The appeal hearing may be postponed and a revised date for the appeal hearing would be set to take place no later than ten working days from the date of the postponed appeal hearing. A postponement will only be permitted on one occasion, unless in exceptional circumstances. If the member of staff (or their representative) requests a further postponement, or does not attend the appeal hearing, the appeal hearing will not be rescheduled and will proceed in the absence of the employee or their representative and will be based on the written documentation and/or with an alternative representative.

7.5 Copies of any documents relevant to the case including documents which were not previously considered and which are intended for consideration at the appeal hearing will be submitted by the member of staff to the HR Team at least five school days in advance of the hearing.

7.6 The Staff Disciplinary and Dismissal Appeals Committee (consists of Governors who did not hear the original case) will review the outcome of the Staff Disciplinary and Dismissal Committee's decision based on the grounds of the appeal as set out by the appellant. If the panel finds, at any stage during the

appeal process, that the proceedings were flawed, for example if procedures had not been followed, it can conduct a full re-hearing of the case so as to overcome those flaws. In such cases, other witnesses may be called to the appeal hearing.

7.7 The Staff Disciplinary and Dismissal Appeals Committee may, after considering all the facts presented to it, including any new evidence, come to one of three conclusions:

- uphold the decision of the Staff Disciplinary and Dismissal Committee or Headteacher
- impose a lesser penalty
- conclude that no formal action should be taken.

7.8 The Staff Disciplinary and Dismissal Appeals Committee cannot impose a more severe penalty than that imposed by the Headteacher (in lesser cases) or the Staff Disciplinary and Dismissal Committee (in more serious cases).

7.9 The decision of the Staff Disciplinary and Dismissal Appeals Committee will be final and the staff member will be informed in writing within five working days of the hearing.

7.10 If, as the result of an appeal, formal action is withdrawn all details thereof will be expunged from the member of staff's personal file and they will be informed accordingly. Documentation referring to informal action taken will remain on file.

7.11 If the decision is to uphold a Staff Disciplinary and Dismissal Committee's recommendation for dismissal, the Local Authority will be informed. For community and community special schools, the Local Authority will issue the notice of dismissal within fourteen working days of the Authority being informed. For voluntary aided, voluntary controlled and foundation schools, the governing body will issue the notice of dismissal and any appropriate period of notice and inform Employment Services.

7.12 Any dismissals relating to teachers or support staff will not take effect until after the appeal hearing. The Governing Body would issue notice for Foundation, Voluntary Aided and Foundation Special Schools and the Local Authority would issue notice for Community, Voluntary Controlled, Community Special and Maintained Nursery Schools.

7.13 For any dismissals of a Teacher, the matter should be referred to the General Teaching Council for Wales.

8. Other relevant considerations

8.1 Where poor performance arises from perceived negligence or lack of care by the member of staff, then the application of disciplinary procedures is appropriate without first going through capability procedures. Wilful disregard of professional standards of performance or refusal to cooperate with measures

designed to improve performance may be considered as misconduct and in extreme cases as gross misconduct. In these circumstances it must be made clear to the member of staff that an outcome could possibly be a disciplinary matter to be dealt with through a disciplinary hearing.

8.2 Consideration will be given to whether poor performance may be related to disability or another protected characteristic under the Equality Act 2010 (for example, age or pregnancy and maternity). In any such case, the matter should be discussed with HR. In the case of disability, particular consideration needs to be given to whether reasonable adjustments can be made to working arrangements to enable the member of staff to improve their performance. Further guidance and advice from Occupational Health should also be sought in these cases.

8.3 Although normal capability standards apply to trade union officials who are members of staff no action under the formal procedure identified above shall be taken against such officials until the circumstances of the case have been discussed with HR and a full time official of the union concerned has been informed.

8.4 It may be the case that it is a member of staff's misconduct alone which is impacting on their performance and in those circumstances the Disciplinary Policy will apply.