

## EQUALITY ANALYSIS

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### Title

Teacher Performance

### Description of the policy

The aim of this policy change is to help schools in England to raise the standard of teaching through tackling teacher underperformance, and ultimately to raise standards of educational achievement and close the achievement gap between rich and poor.

The Government intends to tackle the issue of underperforming teachers by:

- streamlining arrangements for teacher appraisal and capability procedures;
- stripping away duplication and unnecessary bureaucracy;
- giving more freedom to head teachers to put in place local arrangements for teacher appraisal and capability procedures; and
- giving head teachers access to more information about the competence of applicants for teaching posts.

For further information about the policy please go to:

<http://www.education.gov.uk/schools/leadership/deployingstaff/a00201884/new-arrangements-for-teacher-appraisal-and-capability-to-be-introduced-from-september-2012>

This equality analysis looks at the available evidence in order to determine whether these changes will have a greater impact on any particular groups of pupils or teachers and if so whether that impact is justified in the light of the purpose of the policy.

### The evidence base

1. Sutton Trust report, **Improving the impact of teachers on pupil achievement in the UK – interim findings**, September 2011
2. Barber and Mourshed, 2007; Sanders and Rivers, 1996; Slater et al., 2009
3. Sammons, P. et al, **EPPE: Summary report: variations in Teacher and Pupil Behaviours in Year 5 classes**, 2006; and Cabinet Office, **Getting on, getting ahead. A discussion paper: analysing the trends and drivers of social mobility**, 2008; Higher Education Statistics Agency and School Census data.

4. Ofsted Annual Report 2010-11.
5. McKinsey (2007), **How the world's best-performing school systems come out on top**. Organisation for the Economic Co-operation and Development (2009) **Making the teaching profession more attractive: OECD insights. Informal meeting for Ministers of Education; NFER Teacher Voice Omnibus February 2010 Survey: Performance Management and Various Professional Issues**, 2010.
6. Chetty, R., Friedman, J.N., & Rockoff, J.E., (2011), **The Long-term impacts of teachers: Teacher value-added and student outcomes in adulthood**, *National Bureau of Economic Research Working Paper No. 17699*, December
7. DfE: **November 2010 figures on school workforce in England**, published in April 2011
8. NFER, 2011 (as above).
9. GTCE: **Survey of Teachers**, 2010
10. NatCen research: **"Factors contributing to the referral and non-referral of incompetence cases to the GTC"**, January 2010
11. NASUWT: **Teacher capability / competence – A review of the evidence**
12. NASUWT, **Age Discrimination: No Experience Necessary?**, 2010
13. Comments made by the NASUWT.
14. Informal discussion and consultation with professional associations and unions representing head teachers and teachers; the National Employers Organisation for School Teachers; members of the DfE's Secondary and Primary Head Teachers' Reference Groups; members of the Bureaucracy Reference Group.
15. Responses to the formal consultation on the original proposals which ran from 24 May to 16 August 2011.
16. Responses to the formal consultation on the follow-up proposal which ran from 13 January to 24 February 2012.

#### **What the evidence shows – key facts**

1. According to the **Sutton Trust**: "The difference between a very effective teacher and a poorly performing teacher is very large. For example, during 1 year with a very effective Maths and English teacher, pupils gain 40% more in their learning than they would with a poorly performing teacher.

"The effects of high quality teaching are especially significant for pupils from disadvantaged backgrounds. Over a school year, these pupils gain 1.5 years' worth of learning with very effective teachers, compared with 0.5 years with a poorly performing teacher. In other words, for poor pupils, the difference between a good teacher and a bad one is a whole year's learning. Bringing the lowest-performing 10% of teachers in the UK up to the average would hugely boost attainment."

2. In the 1990s, a **series of in-depth studies conducted by American academics** showed that the quality of an individual teacher is the single most important determinant in the school system of a child's educational progress. Those pupils taught by the most effective teachers make three times as much

progress as those taught by the least effective.

Analysis of data from England has shown that a pupil taking eight GCSEs taught by 'good' teachers will score 3.4 more GCSE points than the same pupil in the same school taught by 'poor' teachers.

3. There is evidence to suggest that the quality of teaching is poorer in schools with higher levels of pupils eligible for free school meals. **Cabinet Office data** suggests that schools with more than 20 per cent of their pupils eligible for free school meals are more likely to be rated worse in their teaching. Recent data also showed that, of the 80,000 students in one year eligible for free school meals, just 40 went on to Oxford or Cambridge universities - fewer than some private schools manage to send by themselves.

Furthermore, **the Department's data** shows that there is a clear link between pupils eligible for free school meals and those with certain protected characteristics. Pupils with Special Educational Needs (many of whom will fall under the definition of disabled) are twice as likely as those without Special Educational Needs to be eligible for free school meals. Minority ethnic pupils are 1.6 times more likely than pupils of White British ethnicity to be eligible for free school meals and those from some particular ethnic groups are even more likely to be eligible.

Policies which help close the achievement gap between poorer pupils and others are therefore likely to have a beneficial impact on disabled and minority ethnic pupils.

4. **Ofsted's Annual Report 2010-11** states that the quality of teaching in maintained schools inspected between 1 September 2010 and 31 August 2011 was as follows:

- Outstanding – 6%
- Good – 54%
- Satisfactory – 38%
- Inadequate – 3%

The report comments that 'the quality of teaching in our schools is still too variable: too much is satisfactory and too little outstanding teaching was seen in the schools inspected this year. Satisfactory teaching does not deliver good enough progress for pupils in the most challenging circumstances.'

5. Ongoing, regular performance management is a feature of the most successful education systems. The **OECD** has found that appraisal and feedback have a strong positive impact on teachers, with teachers reporting increases in their job satisfaction, changes to their teaching practices and significant increases in their development as teachers. **McKinsey** found that the effective use of classroom formative assessment of teachers' performance in the classroom, with a short cycle of feedback into training, approximately doubles the rate of pupil progress. Findings from a **NFER** study suggest that head teachers felt performance management was a positive factor in: providing teachers with access to relevant CPD opportunities; helping to improve teaching

practices; helping to improve pupils' outcomes / progress; and helping to contribute to whole school improvement.
<p>6. <b>New American research</b> suggests that the effects of having a good teacher go beyond academic achievement and last into later life and that those pupils taught by good teachers were more likely to attend college, earn higher salaries, live in better neighbourhoods, and save more for retirement. They were also less likely to have children as teenagers.</p>
<p>7. <b>Figures from the Department's School Workforce Census for England</b> in November 2010 showed that:</p> <ul style="list-style-type: none"> <li>○ 73.0% of regular FTE teachers in publicly funded schools were female (64.9% of head teachers).</li> <li>○ 24.1% of FTE teachers in publicly funded schools were aged 50 and over (55.0% of head teachers).</li> <li>○ 6.3% of teachers in publicly funded schools were from minority ethnic groups (2.2% of head teachers).</li> <li>○ 1% of teachers in publicly funded schools were disabled (NB this figure was not published; it is not considered to be reliable as it is based on responses for only around 50% of teachers).</li> </ul> <p>The Department does not collate information on performance management and capability procedures centrally. We therefore do not know whether or not teachers of one particular gender, age, religion, belief, sexual orientation, and ethnic or disability group are more likely to be subject to capability procedures. It is schools who apply their capability procedures in practice and we would expect them to monitor whether they were used disproportionately on protected groups. We will explore how evidence of any adverse impact can be fed back to the Department – see summary and next steps.</p>
<p>8. The <b>New Professionalism Research</b> asked teachers a number of questions about performance management. The evidence does not differentiate between teachers of different genders, ethnic groups, disability group or age. However, some of the evidence is differentiated by length of service which could be used as a rough proxy for age. It indicates, for example, that those teachers with longer service are more likely than others to think that the amount of lesson observation outlined in their PM planning and review statements was proportionate to their needs; however, those with shorter service (2<sup>nd</sup> year teachers) were slightly more likely than others to think their experience of PM had contributed to helping them improve their teaching practices.</p>
<p>9. The <b>GTCE's 2010 survey of teachers</b> indicates that different groups of teachers had different views on the extent to which the PM process supported them to improve their teaching. In general: teachers were more likely to have a positive view of PM if they:</p> <ul style="list-style-type: none"> <li>○ Taught part-time</li> <li>○ Were from a BME ethnic background</li> <li>○ Taught in a school with a high proportion of SEN pupils</li> </ul>

- Were a senior teacher (including assistant head, deputy head and head teacher)
- Had been a teacher for less than five years or more than 30 years
- Had experienced a higher number of CPD activities within the last 12 months

And were more likely to have a negative view if they:

- Were male
- Defined themselves as disabled in line with the Disability Discrimination Act
- Preferred not to say what their ethnicity was
- Taught in a secondary school
- Taught in a school that experiences higher 'economic challenge' (a high proportion of pupils eligible for FSM).

10. Evidence published in January 2010 (the **NatCen research**) suggested that the current arrangements for tackling teacher incompetence did not work well. It found that a number of factors delayed or prevented the use of capability procedures. These included a perception that the capability procedures duplicated the support provided through the performance management system. The report also found that "the complexity and burden of capability procedures may act as a barrier to escalation". The report did not differentiate between different groups and so did not indicate that capability procedures had a disproportionate impact on any particular groups.

11. A **NASUWT** publication, **Teacher Capability/Competence: A Review of the Evidence**, states that between 2008 and 2010, the NASUWT provided professional casework support to 773 teachers in the UK in relation to capability and competence issues and that analysis of their casework database suggested the following:

- 46% of the cases involved teachers aged over 50 years (such teachers comprise around 32% of the UK teacher workforce and 19% of the NASUWT membership);
- 42% of the cases involved male teachers (men comprise around 34% of the UK teacher workforce and 28% of the NASUWT membership);
- 6.5% of the cases involved black and minority ethnic (BME) teachers (broadly in line with the estimated representation of BME teachers in the UK teacher workforce); and
- 9% of the cases involved disabled teachers (the estimated representation of disabled teachers in the UK teacher workforce is 0.3%).

12. The **NASUWT** carried out a large study on the experiences of older teachers (**Age Discrimination: No Experience Necessary?**). It states that they conducted an online survey of teachers and head teachers, over ten days in March 2010, attracting 3,525 responses. Of these, 73% were from respondents aged over 50. Ten per cent of all responses were from teachers aged over 60. 13% were from teachers aged 35 to 50. The study found that:

<ul style="list-style-type: none"> <li>○ Ten per cent of respondents said that they had been informed by senior managers that their age would be a barrier to their future professional progression.</li> <li>○ Thirteen per cent said that they experienced more lesson observation, monitoring and scrutiny of their work than younger colleagues.</li> <li>○ On appointment of a new head teacher, 21% indicated that they had experienced denigration or marginalisation of their professional capabilities on the specific grounds of their status as an older teacher.</li> <li>○ 36% reported that they had been made to feel that younger colleagues were more capable teachers.</li> <li>○ 29% stated that they had been subject to negative comments about their professional ability or competence on the grounds of their age.</li> </ul>
<p>13. The <b>NASUWT</b> has expressed concern that, because black and minority ethnic (BME) teachers are over-represented in schools with higher than average proportions of BME pupils and pupils eligible for FSM, and those schools are less likely to meet floor targets, BME teachers will be more likely to be under intensive scrutiny than teachers in other schools.</p>
<p>14. <b>Informal consultation</b> has identified that, although current systems do not prevent head teachers from tackling underperformance where they were determined to do so, some aspects of the systems were a disincentive to action. There is no evidence to date to suggest that where schools have had greater freedoms in relation to the arrangements for performance management (specifically in the context of academies) that this has had a negative impact.</p> <p>Comments highlighted concerns about the complexities of systems and the time and effort they involved, and the overlap between performance management and the informal stage of the capability procedure. Some comments made also identified concerns about the links between tackling under-performance and mental health issues, in particular stress (for both parties). Given these comments, we sent a copy of our consultation documents to MIND, but they did not respond.</p>
<p>15. A small number of the responses to the original <b>public consultation</b> mentioned concerns about equality issues. The NASUWT's concerns have been included above. The ATL reported that older female teachers were disproportionately affected by capability procedures, especially in primary schools and especially where the head teacher was male. The NUT commented that managers carrying out performance management should be made aware of the risk of making assumptions about the capability and productivity of older teachers and BME teachers. Other comments indicated that some respondents were not clear about their obligations under the Equality Act, in particular in relation to disability and/or staff sickness.</p>
<p>16. Of the respondees to the <b>public consultation on the amendment of the <i>School Staffing (England) Regulations 2009</i></b> only NASUWT set out</p>

specific concerns about equality issues. The intention of the amendment on which we consulted in January 2012 is to prevent the recycling of underperforming teachers by requiring maintained schools to share, when asked, details of teachers who have been subject to capability procedures in the previous two years. The expectation is that schools will be asked to provide factual information as part of a general employment reference at the end of the recruitment process but prior to appointment.

In its response NASUWT referenced its 2011 Review of Evidence on Teacher Capability/Competence (see 11) and highlighted the evidence it holds that schools use capability procedures inappropriately to bully teachers and pressurise them into leaving the school. The NASUWT commented that black and minority ethnic teachers, older teachers and teachers with disabilities are particularly vulnerable. The union also raised concern that the Department's consultation document did not acknowledge that under-performance can result from a number of reasons other than incompetence, such as coping with disability.

In addition the NUT's response drew attention to the importance of prospective employers being clear about their statutory duties in relation to disabled teachers and the Local Government Association highlighted "asking about attendance and health issues" as important matters for inclusion in guidance.

A more general concern was that it was not clear from the consultation exercise whether our proposal extended to Academies. A number of consultees argued that not to extend the requirement to all publicly funded schools discriminates unfairly against teachers working in the maintained sector, and that there should be parity between maintained schools and Academies.

In its response the Information Commissioner's Office (ICO) commented on the importance of ensuring the new requirement complied with the *Data Protection Act*.

### **Summary of Consideration of the evidence**

In developing these policies we have carefully considered all of the evidence set out in the evidence base above.

The evidence suggests that improving the quality of teaching contributes to improving standards of educational achievement across the board and that poor quality teaching can have a negative impact on pupil outcomes. It suggests that improving the quality of teaching is likely to have a more marked effect in schools with higher levels of pupils eligible for free school meals, thus contributing to closing the achievement gap between rich and poor. Furthermore, as pupils with Special Educational Needs are twice as likely as those without Special Educational Needs to be eligible for free school meals, and minority ethnic pupils are 1.6 times more likely than pupils of White British ethnicity to be eligible for free school meals, this suggests that pupils with SEN

(many of whom are disabled) and minority ethnic pupils would particularly benefit.

The evidence also suggests that performance management can play a positive role in improving teacher quality but that in some cases the current arrangements have been found to be onerous and unclear.

Between July and December 2011 we gave particular consideration to the evidence provided by NASUWT in relation to potential impact on teachers, which is set out at 11, 12 and 13 in the evidence base. We felt that the evidence did not conclusively demonstrate that disabled teachers and older teachers were disproportionately affected by capability procedures, but that it may potentially indicate a risk. We did not consider the evidence to be conclusive because:

- The casework figures may not be representative of the teachers who are put into capability procedures nationally.
- The study on age discrimination is based on the findings of an online survey of a self-selecting sample of teachers across the UK which is unrepresentative of the age profile of teachers in England.
- The findings on age are not consistent with the GTCE's finding that those who had been teachers for over 30 years or less than 5 years were more likely to be positive about performance management than others.
- Many of the teachers covered by NASUWT's casework may not be covered by national arrangements for managing performance or capability (for example because they work outside England or in independent schools, including Academies, or in FE).
- In relation to disabled teachers, the estimated number of disabled teachers in the workforce may not accurately reflect the real number. The 0.3% figure quoted in NASUWT's evidence is for the UK workforce rather than that in England (the capability procedures cover England only). The latest figures we hold indicate that the figure for England is 1%, but this data was collected for only around 50% of teachers, so may not be an accurate or reliable representation of all teachers.

In relation to the concerns set out at paragraph 13 of the evidence base, we concluded that as the proposed arrangements for appraisal and capability procedures apply to all teachers who are covered by the relevant legislation in the same way – any greater scrutiny of particular teachers in particular protected groups in individual schools would arise as a consequence of action taken to improve the performance of the schools concerned rather than as a consequence of these changes. Schools are aware of the need to act lawfully and are reminded of that in the model policy.

Overall, the Department's view, when the evidence base was initially considered prior to January 2012 and following a further consideration of the evidence, is that the evidence does not conclusively identify any particular groups of teachers as having a particularly positive, or negative, experience or perception of the current performance management or capability procedures, but that it may potentially indicate a risk for disabled and older teachers. It was the



Department's view prior to January 2012 and it remains the view now, that there is no evidence to suggest that the proposals being introduced here would make it any more likely that a particular group would be disadvantaged or discriminated against. **However, it is considered that the model policy could usefully include additional guidance reminding managers of the need to make reasonable adjustments for disabled teachers.**

In order to judge better the likelihood of risk that disabled or older teachers are disproportionately affected by capability procedures we will explore with the unions, employers and others how this could be monitored at local level (as the Department does not collect this information centrally), and would encourage them to provide us with any further evidence in this regard as the policy is implemented.

When considering the requirement for governing bodies to share information with prospective employers about teachers and head teachers who have been under capability procedures we again considered all of the evidence set out in the evidence base above. We published proposals to amend the *School Staffing (England) Regulations 2009* (see 16) in January 2012 and have subsequently revisited the evidence base and given careful consideration to the issues and evidence presented in the consultation responses.

In framing the proposal we gave consideration to whether the requirement to provide information about previous capability was compliant with section 60 of the Equality Act 2010. Our conclusions in relation to the Equality Act requirements are that it is not unreasonable or unlawful for employers to ask for this information of any candidate before making an appointment. How governing bodies choose to act in relation to the information provided in response to a request is a matter for them, although we acknowledge that providing the additional information may create risks for schools if they do not act in accordance with anti-discrimination legislation (the Equality Act) once in receipt of the information.

The material provided during consultation did not add substantively to the evidence before the Department at the time the consultation paper was published. The responses did not provide a body of evidence that convinced us that the proposal should be withdrawn. We did nonetheless carefully examine the issues and evidence highlighted during consultation, particularly by NASUWT, and we reconsidered how by supporting implementation we could avoid discrimination of the sort the union is understandably concerned about.

As we have already indicated in this analysis, in order to judge better the likelihood of risk that disabled or older teachers are disproportionately affected by capability procedures we will explore with stakeholders how this aspect of the policy impacts on these groups. We will also extend this collaboration to embrace any evidence that is provided where capability procedures are used to bully individuals and encourage stakeholders to provide us with relevant evidence.

We recognise that some teachers are subject to capability procedures for

reasons that are external to the workplace, such as coping with bereavement or illness, which may or may not be associated with having a disability. We have considered the implications of the proposed amendment on teachers falling into these categories and as a result ensured that the regulatory amendment includes a requirement on employers to provide details of duration and an explanation of the outcome in order to help safeguard the position of potentially vulnerable teachers.

We similarly gave careful consideration to issues associated with the compatibility between maintained schools and Academies. We recognise that these new requirements will be most beneficial if they have effect across all state funded schools.

We have amended *the School Staffing (England) Regulations 2009* to require the governing body of a maintained school to provide the relevant information about a teacher's capability when asked to do so by the governing body of a maintained school or proprietor of an Academy School. Accordingly the governing bodies of maintained schools and Academy School proprietors will both be able to ask for relevant information about a teacher's capability. *The Regulations* cannot be used to put a requirement on Academies to provide this information because they do not apply to Academies. Instead, Academies are regulated through their Funding Agreement, and we are planning to include this requirement in future Academy Funding Agreements.

We have also reviewed our proposal in the light of the consultation response from the Information Commissioner's Office (ICO). In response we have discussed the intention of the regulation with ICO to ensure that it is: compliant with data protection legislation; fair to teachers; and proportionate to the Department's objective.

Whilst we have concluded that there is no evidence that the amendment of the *School Staffing Regulations* would make it any more likely that a particular group of teachers would be disadvantaged or discriminated against, we recognise that helping schools manage the introduction of this new requirement would help mitigate the potential for negative impact on those teachers we have identified as vulnerable in this analysis. Accordingly, we will ensure that the requirements of equality and employment legislation are made clear to employers in the accompanying guidance we intend to provide.

### **Challenges and opportunities**

Under the Government's proposals, individual head teachers and governing bodies will have greater freedom to design their own appraisal and capability policies, tailoring them to meet their particular circumstances. The new model policy is optional, but schools will need to ensure that they handle any capability issues in a manner that is consistent with employment law and the ACAS Code of Practice on Disciplinary and Grievance Procedures.

In designing and applying their policy or policies, schools must also continue to comply with relevant discrimination and equality legislation, which from October 2010 includes the Equality Act 2010 (which provides consolidated discrimination law and supersedes the Race Relations Act, the Disability Discrimination Act, and the Sex Discrimination Act). The new optional model policy makes clear that a general principle underlying the policy is the need to ensure consistency of treatment and fairness, and to abide by all relevant equality legislation. **It also reminds schools that they need to make reasonable adjustments for teachers with disabilities.**

The obligation to comply with relevant legislation and the need to be consistent with the ACAS Code are not new. There is no reason to suspect that school leaders will be less likely to meet existing legal obligations just because they are being given more freedom in other respects, but we will look at how we could monitor this as the policy is implemented.

### **Equality impact assessment**

The public sector equality duty (section 149 of the Equality Act 2010) requires a public authority, in the exercise of its functions, to have due regard to the need to—

- (a) eliminate discrimination, harassment, victimisation and any other conduct that is prohibited by or under the Act;
- (b) advance equality of opportunity between persons who share a relevant protected characteristic and persons who do not share it;
- (c) foster good relations between persons who share a relevant protected characteristic and persons who do not share it.

The Department has considered carefully the impact of these reforms on each of the above.

The aim of these policy proposals is to help schools in England to raise the standard of teaching through tackling teacher underperformance, and ultimately to raise standards of educational achievement of pupils and to narrow the gap between rich and poor.

We have concluded that adverse impact on pupils is unlikely, but positive impact in relation to advancing equality of opportunity could occur if the proposals have the intended effect of improving the quality of teaching and raising pupils' achievement.

We have concluded that adverse impact on teachers is unlikely but positive impact is also unlikely.

The model capability policy and the Staffing Guidance that will support the new

requirement to share information about capability with prospective employers contain reminders about employers' legal obligations in respect of equality, **in particular with regard to disability**, which should help to advance equality of opportunity, especially as the current capability procedures make no mention of equalities issues.

However, it is important to note that the operation of recruitment, appraisal and capability procedures is a matter for individual schools and other employers and ultimately it is their responsibility to ensure that they are aware of and complying with their legal obligations (such as the duty to make reasonable adjustments for disabled persons).

These reforms are not considered an appropriate vehicle through which to foster good relations.

### **Next steps**

The new appraisal regulations will come into force in September 2012. At the same time, the model policy on appraisal and capability arrangements will supersede the existing performance management and capability model policies, but this is optional and schools can choose to design their own policies. In doing so, they may wish to consult available guidance on performance management and capability, eg from ACAS and others.

Similarly the new requirement to share information about the competence of applicants for teaching jobs is due to come into force in September 2012. Our intention is to update the guidance we currently provide covering teacher appointments to coincide with the new requirement.

We are currently working with the National College as they redesign the National Professional Qualification for Headship (NPQH), to ensure that prospective head teachers taking the qualification are aware of their responsibilities in this whole area.

We will be seeking to gather information about how the new appraisal and capability arrangements are being implemented by schools and local authorities in the first year of operation (2012/13). We will also develop longer term evaluation plans, and will be looking at how we can assess impact on particular groups of teachers, engaging with the unions and others.