

<b>Last review: November 2023</b>
<b>Review date: November 2024</b>
<b>Signed By:</b>
<b>Approval Committee: Governing Body</b>



**GILLINGHAM SCHOOL**  
**Hardings Lane, Gillingham**  
**Dorset SP8 4QP**

## **Capability Policy**

## Capability Policy - School Based Teaching Employees

### 1 Introduction

- 1.1 Capability refers to the fitness and ability of an employee to carry out satisfactorily, the job they are employed to do. Capability is assessed by reference to skills, aptitude, health or any other physical or mental quality.
- 1.2 A lack of capability can be defined as 'a situation in which an employee fails consistently to perform their duties to an acceptable standard' (ACAS). There is a need to differentiate between the issues causing the consistent failing to perform their duties – it may be incapability due to a lack of skills and need for development or incapability due to an underlying medical issue. This procedure specifically deals with incapability due to a lack of skills or aptitude. (Page 3 explains appropriate procedures to apply dependent on the nature of the case being dealt with.)
- 1.3 This policy should be applied in conjunction with the Schools' Capability Procedure for teachers and associated toolkit. The Capability procedure and toolkit aims to assist schools and their employees in situations where the capability of a teacher is unsatisfactory. The aim is to improve the achievement of staff and students and to raise standards across the school.
- 1.4 This policy and procedure shall be applied in accordance with the School's Equal Opportunities Policy. The Capability Procedure has been developed, taking into account the Employment Rights Act 1996, the Education (School Teachers' Appraisal) (England) Regulations 2012 and the ACAS Code of Practice.

### 2 Scope

- 2.1 This policy and procedure applies to teachers including Headteachers.
- 2.2 It is recommended to all school Governing Bodies for adoption. (In the case of school federations, it is recommended to the federation's Governing Body.)
- 2.3 **The Local Authority will not accept liability for any actions, claims, costs or expenses arising out of a school's decision not to follow this recommended policy and procedure, where it is found that the school's Governing Body has been negligent or has acted in an unfair or discriminatory manner.**

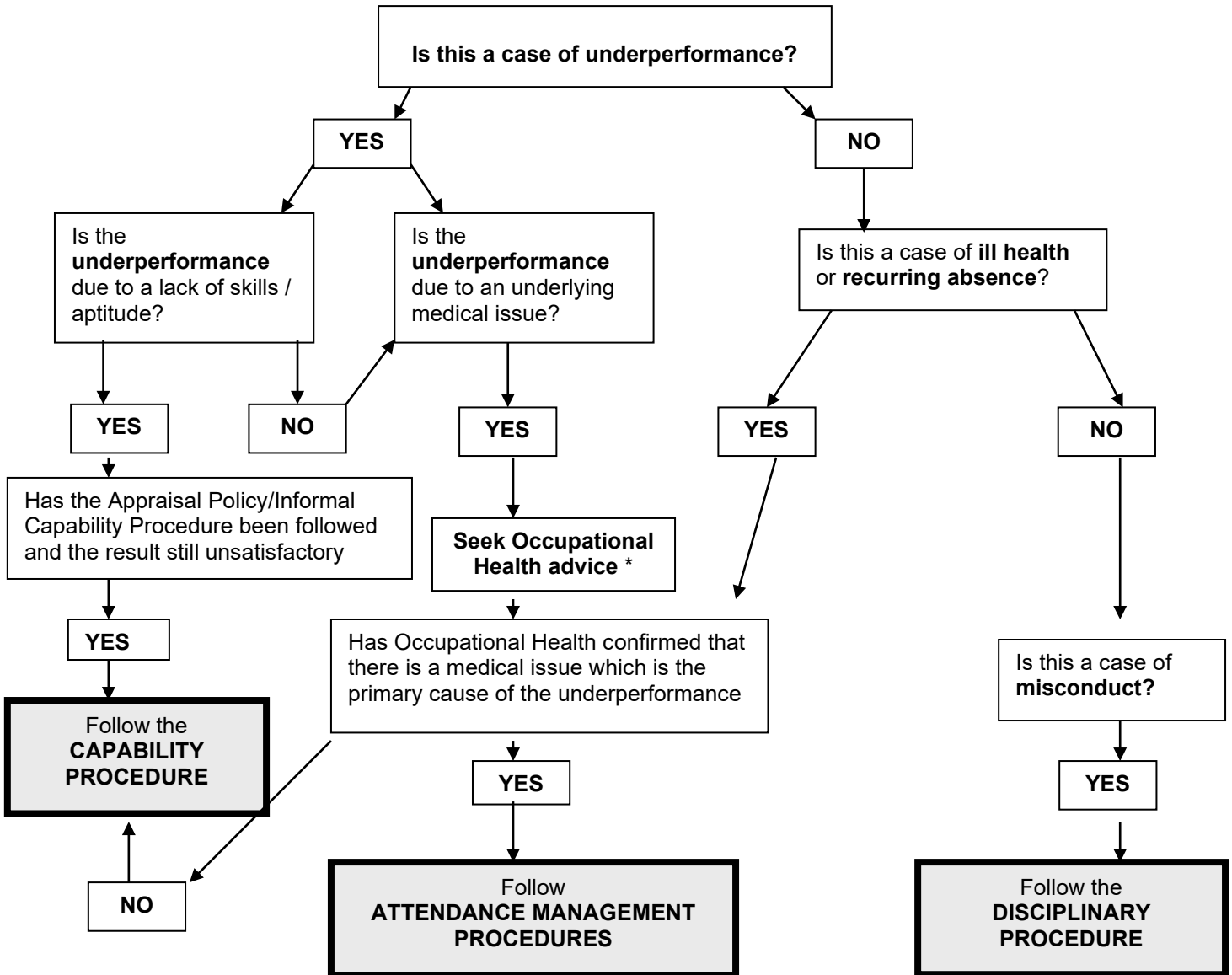
### 3 The Policy

- 3.1 The Headteacher and their Governing Body are committed to helping their employees to achieve high quality performance standards and to ensure that employees are supported in achieving those standards.
- 3.2 Gillingham School will seek to ensure that all employees are provided with appropriate induction and supervision. All employees will receive regular appraisal as set out in the School's Appraisal Policy. Performance targets will be agreed, established and regularly reviewed.
- 3.3 Initial concerns regarding the standard of work performance of the teacher should generally be discussed with the employee by the Headteacher (or delegated Manager or Deputy) as appropriate, via the normal supervisory process or via the Appraisal cycle. The Capability Procedure applies only to teachers or head teachers about whose performance there are serious concerns and provides a means whereby more serious issues may be dealt with.

- 3.4 Where identified performance issues are in respect of the Headteacher, references to the Headteacher should be replaced by Chair of Governors.
- 3.5 Action under the Capability Procedure is designed, primarily, to achieve improvement through consistent, appropriate and reasonable support mechanisms rather than to exact a penalty. When dealing with issues of capability, the approach taken will be supportive, fair and objective at all times. The emphasis shall be on facilitating improvement, as far as possible.
- 3.6 The Formal Capability Procedure should only be invoked after support and guidance has been provided to the teacher under the appraisal process or the Informal Capability Procedure. If no, or insufficient, improvement is made during this time then the formal capability process can be invoked.
- 3.7 Where capability issues are identified as part of the appraisal process, the Appraisal Policy provides for support and guidance for the employee which should be followed. Where issues are identified outside of the appraisal process, then the informal stage of the Capability Procedure should be followed initially, except in cases of gross incompetence.
- 3.8 Dismissal may arise following the exhaustion of reasonable avenues provided by the Capability Procedure.
- 3.9 The employee will be encouraged to make contact with their Trade Union representatives at the commencement of the procedure, with the employee having the right of representation at all stages of the formal procedure.
- 3.10 The Headteacher may seek advice and guidance from Learning and School Improvement (LSI) regarding appropriate educational targets and standards within action plans and advisors may be called upon for support and guidance.
- 3.11 The Capability Procedure must be followed properly, within an adequate timeframe, with adequate support, so as to facilitate improvement, as to do so otherwise may, by definition, render the action taken unfair.

## Application of the Capability Procedure

This procedure is specifically used to deal with cases of employee underperformance (previously referred to as competence). This procedure should be applied when there is a need to deal formally, with an issue of underperformance. The flow chart below clarifies the appropriate procedures to follow when managing certain employment relations issues.



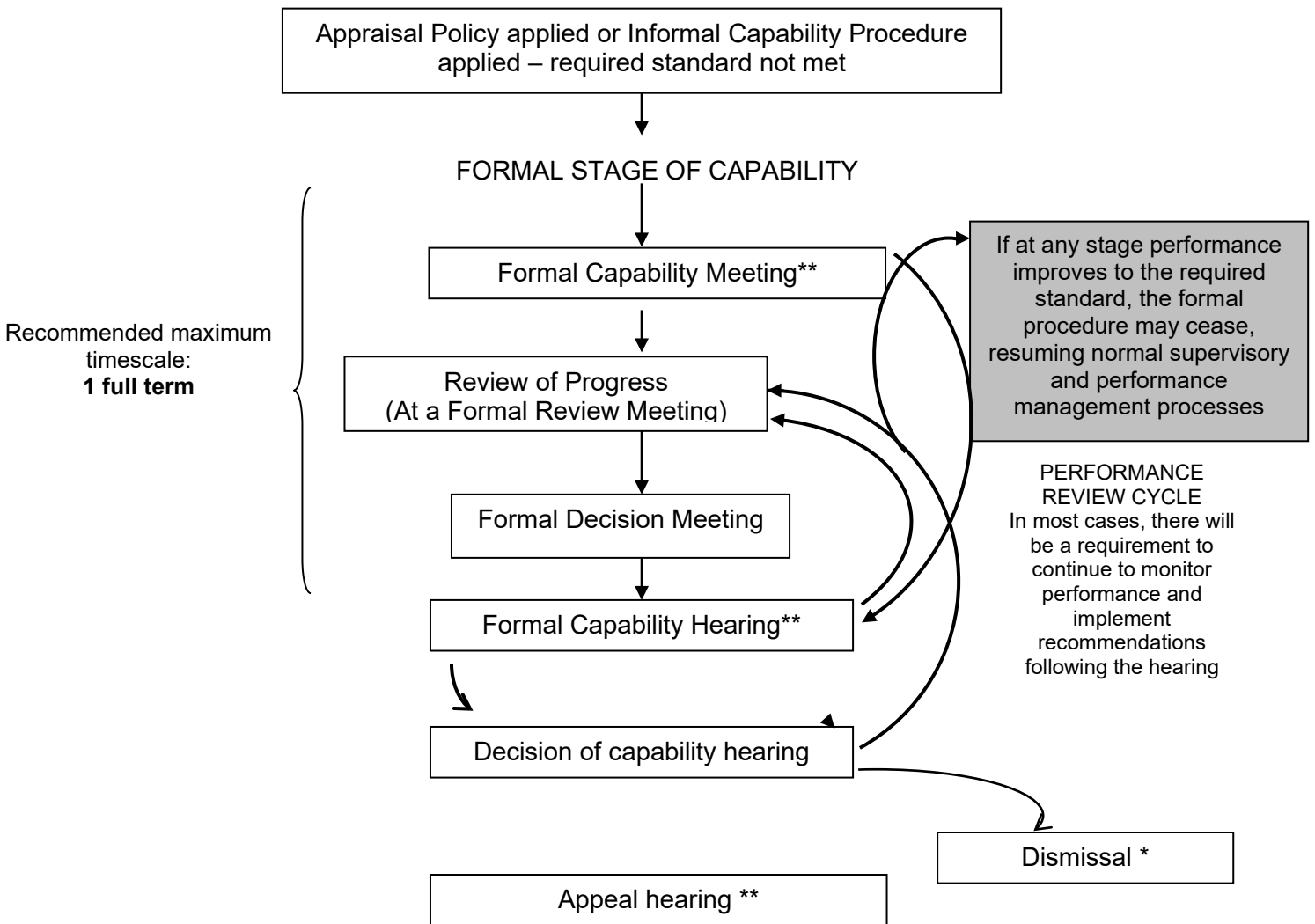
\*In cases of stress, it may be deemed more appropriate to refer to the school's **Stress Management Procedure**.

**NB: Urgent action is required if sickness absence intervenes during the capability procedure.**

If **long term absence** appears to have been triggered by the commencement the capability procedure, the case should be referred to Occupational Health to assess the employee's health and fitness for continuation with the procedure and/or employment. Occupational Health should be asked for guidance on the condition, likely prognosis and timescale for a return to work. The case shall then proceed in accordance with the resultant advice and the appropriate procedure followed thereafter.

**Short term absences** should not normally delay any part of the formal stage of the capability procedure.  
**In all cases, please seek advice from your HR Officer.**

**Summary Flowchart of Capability Procedure and timescales**



- \* Dismissal may arise following the exhaustion of reasonable avenues provided by the capability procedure.
- \*\* The employee has a right of appeal against the decision(s) made during the formal capability procedure which result in formal warnings or dismissal. If the employee wishes to exercise this right then arrangements shall be made accordingly.

**NB:** The timescales provided for in this procedure are upper limits, which may be shortened if appropriate e.g. where it is clear that an acceptable level of improvement is beyond the ability of the employee, or where there is a lack of co-operation by the employee. In exceptional cases where the education of the children is in jeopardy e.g. a teacher’s classroom control is so poor that no order can be established to enable teaching to take place, an accelerated, short procedure may be appropriate.

## CAPABILITY PROCEDURE – Informal Stage

1. Where Headteachers or managers have identified that there are performance issues with a member of staff it is important that efforts are made to resolve such issues informally first, without recourse to the formal procedure.
2. The Capability Procedure is designed to achieve an improvement rather than to exact a penalty and the informal stage is an important stage in helping an employee to achieve that improvement by means of a structured process.
3. If issues have been raised via the appraisal process, then the Appraisal Procedure states that a period of support must be provided to that employee before starting the formal stage of the Capability Procedure .
4. If performance issues have been identified by another route then the informal stage must be followed before commencing the formal stage of the Capability Procedure.
5. It is the responsibility of the school to ensure that the informal stage has been completed, either through the appraisal process or through the informal process set out here, **prior** to the commencement of the formal stage, except in cases of gross incompetence where the formal stage should be commenced immediately.
6. Where Headteachers or managers identify concerns about a teacher's performance, it may be sufficient to bring these to the teacher's attention so that the teacher can take corrective action to improve performance. However, where under-performance continues, an informal discussion should be held with the employee. The Headteacher or manager should explore possible causes of the underperformance and provide training and support where needed.
7. If the employee identifies other issues that are impacting on performance such as medical or personal issues then these should be explored sympathetically and taken into account when agreeing the next steps. A referral to Occupational Health may need to be considered, for example.
8. Support to the employee can include the following depending on the areas which are causing concern:
  - Training/support on particular areas of the curriculum
  - Assistance with assessment and its use to inform planning
  - Lesson observations and feedback (note that excessive lesson observations can be counterproductive so should be used appropriately)
  - Assistance with lesson planning
  - Regular meetings with manager/Headteacher
  - Team teaching
  - Advice on behaviour management
  - Peer observations

(This list is not exhaustive.)
9. Following the meeting, there should be a clear action plan on how the teacher will be supported to improve their performance with timescales. Employees should be advised that advice and support is available from their Trade Union.

Refer to Appendix 1 - 4 in the toolkit for further guidance.

## Procedure Summary

Headteachers subscribing to the Employee Relations SLA should read this in conjunction with the Capability toolkit.

### FORMAL STAGE

If there has not been sufficient and sustained improvement, despite support provided as set out in the Appraisal Policy or the Informal Capability Procedure, the Formal Capability Procedure should be invoked using a Formal Capability Meeting.

#### Formal Capability Meeting

A formal capability meeting shall take place to invoke the formal capability process and to explain what this entails. The meeting should be between the Headteacher and the employee. The employee can be accompanied by a trade union representative or colleague, but not in the capacity of a practising lawyer. The Headteacher may invite an HR Officer or LSI Adviser to attend. At the meeting, the person conducting the meeting will:

- Identify the professional shortcomings;
- Give clear guidance on the improved standard of performance;
- Explain support available to help performance improvement;
- Set out timetable for improvement and how performance will be monitored;
- Issue formal warning that failure to respond could lead to dismissal. (In serious cases, this could be a final written warning)
- Advise of right of appeal

#### NB: INVESTIGATORY STAGE

It may be necessary to gather facts prior to the formal capability meeting and in cases of gross incompetence, to conduct an investigation for the Governor hearing.

(a)

Set out action plan, support and timetable for improvement.  
  
Issue written warning

(b)

Recommend medical referral (if appropriate) and adjourn the meeting (pending consideration of medical advice)

(c)

Adjourn to gather further information or to allow time to consider any additional information

#### (d) Suspend the employee if appropriate

This will normally apply only in cases of gross incompetence, where the health and safety of pupils and or colleagues is at risk. Advice should be sought from HR prior to any decision to suspend. (See guidance on suspension in the toolkit – appendices 8 and 9).  
**(Progress to step 6 then 8.)**

### Confirm the outcome of the Formal Capability Meeting in writing

- Following the Formal Capability meeting, the decision taken and action agreed should be confirmed to the employee, in writing, within 5 working days of the meeting. **(See model letter in the toolkit – appendix 7.)**
- If further support is agreed, a formal review meeting should be scheduled, within a reasonable timeframe to consider progress, and confirmed to the employee in writing.

### Review progress at a Formal Review Meeting

- A formal review meeting shall take place to review progress. The meeting should be between the Headteacher and the employee. The employee can be accompanied by a trade union representative or colleague, but not in the capacity of a practising lawyer. The Headteacher may invite an HR Officer or LSI Adviser to attend.
- Progress shall be reviewed and one of the following outcomes agreed –
- **If performance has improved to the required standard – no further action under Capability Procedure. Re-start normal appraisal / supervision arrangements.**
- **Some progress has been made and there is confidence that more is likely, consider extending the monitoring and review period and re-arrange meeting.**
- **If no, or insufficient, improvement made during monitoring and review period, the teacher may be given a Final Written Warning and advised of their right of appeal.**

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### Confirm outcome of Formal Review Meeting

A letter must be issued within 5 working days setting out the outcome of the formal review meeting. Where a Final Written Warning is issued, member of staff to be advised, in writing, that failure to achieve acceptable standard of performance (within the set timescale) may result in dismissal. Advise timescale and standard of improvement. Where further time allowed for improvement, advise of timescale (which should be reasonable) and standard required. The employee should be advised of their right of appeal in writing.

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### Formal Decision Meeting

This meeting will take place to review the progress of a teacher who has been given a Final Written Warning. The meeting will take place at the end of the timescale set at the Formal Review Meeting.

The meeting shall be between the Headteacher and the employee. The employee can be accompanied by a trade union representative or colleague, but not a practising lawyer. The Headteacher may invite an HR Officer or LSI Adviser to attend.

Progress shall be reviewed and one of the following outcomes agreed:

- If performance has improved to required standards – no further action under the Capability Procedure. Restart normal appraisal / supervision arrangements.
- Some progress has been made and where there is confidence that more is likely, consider extending the monitoring and review period and re-arrange meeting.
- If no, or insufficient, improvement has been made a Formal Capability Hearing should be arranged and the teacher advised that this hearing will decide whether or not they will be dismissed.

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### Confirm outcome of Formal Decision Meeting

A letter must be issued within 5 working days setting out the outcome of the meeting. Where a decision is made to proceed to a formal capability hearing the employee will be advised of this and told that a formal letter will be issued setting out the specific allegations to be considered at the hearing and the date, time and place of the hearing, giving at least 10 working days' notice, and of their right of representation.

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### Arrange the Formal Capability Hearing

- The Headteacher (or their delegated representative) shall advise the employee in writing of specific allegations to be considered at the hearing and list the possible outcomes as detailed under **step 10**, giving at least 10 working days written notice of the date, time and place of the hearing. (See model letter **appendix 11** in the toolkit.)
- The employee should also be advised that:
  - The case will be heard by a panel of 3 Governors, chaired by the nominated school Governor, advised by an HR Officer.
  - The employee can be accompanied by a trade union representative or colleague but not a practising lawyer.
  - The Headteacher (or their delegated representative) will be asked to present their case, call witnesses (where required) and give evidence.
  - The employee (or their representative) will be asked to present their case, call witnesses (where required) and give evidence.
- Both parties shall provide any papers / evidence they may refer to at the Formal Capability Hearing, at least 5 working days before the hearing is due to take place, for circulation to the Governors.





### Conduct of the Formal Capability Hearing (see conduct of a Governor Hearing in the toolkit)

- The hearing will be conducted by a panel of 3 Governors, Chaired by a nominated Governor and advised by an HR Officer.
- The nominated school Governor will be responsible for the conduct of the hearing, in accordance with the capability policy, supported by / advised by an HR Officer as appropriate.
- The presenting officer (usually the Headteacher or their delegated representative) shall present the capability case against the employee, calling any witnesses / presenting witness statements as appropriate.
- The employee and his / her representative shall have the opportunity to question the presenting officer and any witnesses, as appropriate.
- The employee (or their representative) shall put forward their case, calling any witnesses / presenting witness statements as appropriate.
- The presenting officer shall have the opportunity to question the employee, his/ her representative and his / her witnesses, as appropriate.
- The Panel and HR Officer may question either party and their witnesses at any stage
- Both parties may summarise their case but not introduce any new evidence at this stage.
- All parties will withdraw, leaving the panel to consider the matter in consultation with an HR Officer.
- A suitably detailed note of the hearing proceedings should be taken (see Step 11) and retained for at least 12 months.



### Decision of the Formal Capability Hearing

- The outcome / decision may be any of the following:
  - **Recommend a medical referral (if appropriate) and adjourn the hearing (pending consideration of the medical advice)** (see guidance on medical incapability appendix 13 and example letter (appendix 12).
  - **Recommend additional training or support and / or set targets for improvement with timescales and adjourn the hearing.**
  - **Issue a further final written warning.**
  - **Offer alternative employment if appropriate / viable as an agreed outcome or as an alternative to dismissal, subject to a trial period** (Model letter on redeployment – appendix 14).
  - **Dismiss (NB: An employee SHALL NOT be dismissed prior to being issued a final written warning, except in cases of gross incompetence)** In the case of Foundation and Voluntary Aided Schools this letter shall be issued by the Governing Body, within 10 working days of the decision being taken. In the case of Community and Voluntary Controlled schools this letter shall be issued by the Local Authority within 10 working days of the decision being taken. Dismissal will be with notice.
- The employee will have a right of appeal against the outcome of the hearing.
- The outcome will normally be announced at the end of the hearing (or, if not possible, by the end of the next working day) and communicated in writing to the employee no more than 5 working days after the date of the hearing. **(See appropriate model letter in the toolkit – appendices 12-16.)** The employee shall be advised of their right of appeal.



### APPEAL HEARING





### Conduct of the Appeal Hearing

- The employee has a right of appeal against the decision of a Formal Capability Hearing. They should make their appeal in writing to the Chair of Governors within 10 working days of receipt of confirmation of the outcome of the hearing.
- The Chair of Governors shall convene and advise the employee in writing of the arrangements for an appeal hearing, giving 10 working days written notice of the date, time and place of the hearing and their right of representation. **(See model letter in the toolkit - appendix 17.)**
- The Appellant will submit an outline statement of their case, in writing, 5 working days before the date of the hearing for circulation to all parties. The employee, School Governor who chaired the original hearing, Headteacher and HR Adviser will be in attendance at the appeal hearing. The employee will have the right to be accompanied by a Trade Union representative / work colleague.
- At the appeal hearing, a panel chaired by a nominated school governor will consider the decision of the panel that originally heard the case, against the employee's appeal. The panel should comprise Governors who have no prior knowledge of the case. The appeal panel will be advised by an HR Officer
- The panel may allow the appeal, dismiss the appeal or impose an alternative remedy.
- Where the employee appeals on the grounds that there was a procedural error or omission during any stage of the Capability procedure, the appeal panel will determine, as a preliminary question whether a full new hearing should take place on a date to be arranged.
- Employee and/or his/her representative shall present their case for appeal. The procedure to be followed shall be the same as a Capability hearing as outlined in step 9. However the employee will present their appeal case first. The School Governor who chaired the Capability hearing will respond and outline a summary of the reason for their decision. All parties will have the right to ask questions. Both parties will summarise their case, ending with the employee's summary, and all parties will then withdraw leaving the Panel to consider the matter in consultation with the HR Officer. The employee will be notified of the outcome of the appeal (see model letter – **appendix 18**).
- The outcome of the appeal will be communicated in writing to the employee no more than 5 working days after the date of the hearing. **(See model letter in the toolkit – appendix 18.)**

## **Further reference documents**

- **Capability Policy and toolkit for Teachers**
  - This provides detailed policy guidance in regards to Capability. There is further guidance on conducting hearings and appeal hearings as well as presenting cases at hearings. Also provided in the toolkit are model letters for use at specific stages of the procedure.
- **Management of Attendance Policy and Toolkit for School Based Employees**
  - This provides detailed policy guidance with regards to Management of Attendance. It would be appropriate to refer to this policy when dealing with cases of medical incapability.
- **Disciplinary Policy and Toolkit for School Based Employees**
  - This provides detailed policy guidance with regards to conduct. It would be appropriate to refer to this policy to distinguish between capability and conduct.
- **Guidelines for referrals to Occupational Health**
  - These guidelines should be referred to when referring cases of medical incapability to Occupational Health.
- **Stress Management Policy for School Based Employees**
  - This policy should be referred to when dealing with cases of stress.
- **Equal Opportunities in Employment**
  - This policy can be referred to in order to ensure adherence to Equal Opportunities throughout the capability procedure.

## **Legal Context**

**The Employment Rights Act 1996** states that a dismissal is fair if it:

'relates to the capability or qualifications of the employee for performing work of the kind which he was employed by the employment to do' S.98(2)

'Capability' in relation to an employee, means his capability assessed by reference to skill, aptitude, health or any other physical or mental quality S.98(3)(a)

'Qualifications', in relation to an employee, means any degree, diploma or other academic, technical or professional qualification relevant to the position which he held. S.98(3)(b)

The determination of the question whether the dismissal is fair or unfair (having regard to the reason shown by the employer) - S.98(4)

- a) depends on whether in the circumstances (including the size and administrative resources of the employer's undertaking) the employer acted reasonably or unreasonably in treating it as a sufficient reason for dismissing the employee; and
- b) shall be determined in accordance with equity and the substantial merits of the case.

**The ACAS, Code of Practice - 'Discipline at Work'** sets out some key points regarding under performance:

- Careful recruitment, selection and training will minimise the risk of poor performance.
- When employment begins, the standards of work required, the consequences of failure to meet them and conditions attaching to any probationary period should be fully explained.
- Where warnings are in operation, an employee should be given both time to improve and, where appropriate, training.
- The availability of suitable alternative work should be considered before dismissal action is taken.

## **Other legal considerations**

**The Education Act 2002**

**School Staffing (England) Regulations**

**Teachers' Standards 2012**

**Should further guidance be required, please contact your Human Resources Officer.**

## Capability Policy – Support Staff

### 1 Introduction

2.1 Capability refers to the fitness and ability of an employee to carry out satisfactorily, the job they are employed to do. Capability is assessed by reference to skills, aptitude, health or any other physical or mental quality.

2.2 A lack of capability can be defined as ‘a situation in which an employee fails consistently to perform their duties to an acceptable standard’ (ACAS). There is a need to differentiate between the issues causing the consistent failing to perform their duties – it may be incapability due to a lack of skills and need for development or incapability due to an underlying medical issue. This procedure specifically deals with incapability due to a lack of skills or aptitude. (Page 3 explains appropriate procedures to apply dependent on the nature of the case being dealt with.)

1.3 This policy should be applied in conjunction with the Schools’ Capability Procedure and toolkit for school based employees. The Capability procedure and toolkit aims to assist schools and their employees in situations where the capability of an employee is unsatisfactory. The aim is to improve the achievement of staff and students and to raise standards across the school.

1.4 This policy and procedure shall be applied in accordance with the County Council’s Equal Opportunities Policy. The Capability Procedure has been developed, taking into account the Employment Rights Act 1996, the Education Act 2002 and the ACAS Code of Practice.

### 3 Scope

2.1 This policy and procedure applies to all school based employees – both teaching and non-teaching.

2.2 It is recommended to all school Governing Bodies for adoption. (In the case of school federations, it is recommended to the federation’s Governing Body.)

2.3 **The Local Authority will not accept liability for any actions, claims, costs or expenses arising out of a school’s decision not to follow this recommended policy and procedure, where it is found that the school’s Governing Body has been negligent or has acted in an unfair or discriminatory manner.**

### 3 The Policy

3.1 The Headteacher and their Governing Body are committed to helping their employees to achieve high quality performance standards and to ensure that employees are supported in achieving those standards.

3.2 <Insert school name here> will seek to ensure that all employees are provided with appropriate induction and supervision. All employees will receive regular appraisal via the school’s performance management mechanisms. Performance targets will be agreed, established and regularly reviewed.

3.4 Initial concerns regarding the standard of work performance of the employee should generally be discussed with the employee by the Headteacher (or delegated Manager or Deputy) as appropriate, via the normal supervisory process and via the Performance and Development Review cycle/Performance Management cycle. The Capability Procedure provides a means whereby more serious issues may be dealt with.

3.4 Where identified performance issues are in respect of the Headteacher, references to the Headteacher should be replaced by Chair of Governors.

3.5 Action under the Capability Procedure is designed, primarily, to achieve improvement through consistent, appropriate and reasonable support mechanisms rather than to exact a penalty. When dealing with issues of capability, the approach taken will be supportive, fair and objective at all times. The emphasis shall be on facilitating improvement.

3.6 Dismissal may arise following the exhaustion of reasonable avenues provided by the Capability Procedure.

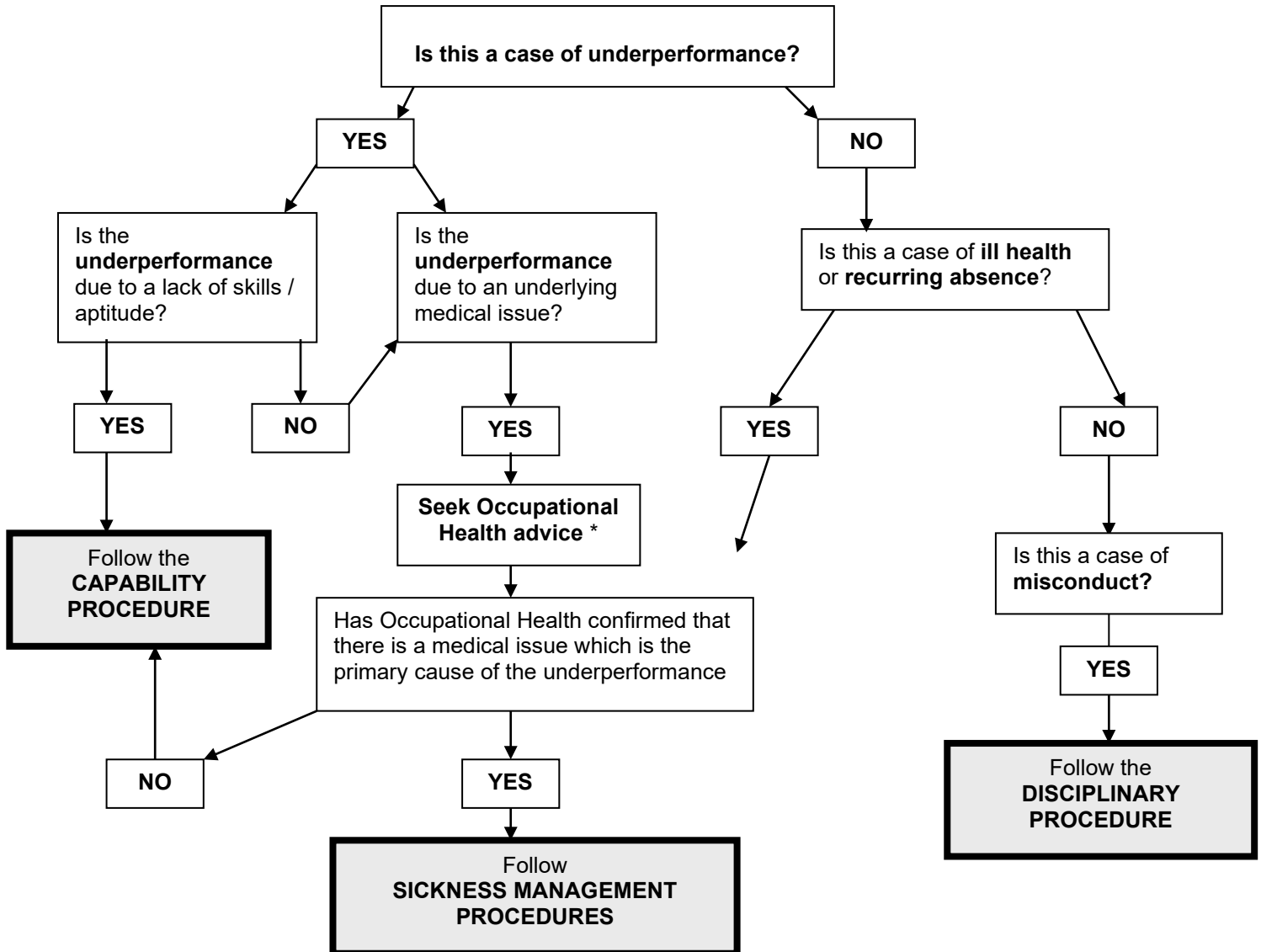
3.7 The employee will be encouraged to make contact with their Professional Association/Trade Union representatives at the early stages of the procedure, with the employee having the right of representation at all stages of the formal procedure.

3.8 In respect of teaching employees, the Headteacher may seek advice and guidance from Pupil and School Improvement regarding appropriate educational targets and standards within action plans. Advisors will not however be expected to attend in person, any of the informal meetings but they may be called upon for support and guidance.

3.9 The Capability Procedure must be followed properly, within an adequate timeframe, with adequate support, so as to facilitate improvement, as to do so otherwise may, by definition, render the action taken unfair.

## Application of the Capability Procedure

This procedure is specifically used to deal with cases of employee underperformance (previously referred to as competence). This procedure should be applied when there is a need to deal formally, with an issue of underperformance. The flow chart below clarifies the appropriate procedures to follow when managing certain employment relations issues.



\*In cases of stress, it may be deemed more appropriate to refer to the school's **Stress Management Procedure**.

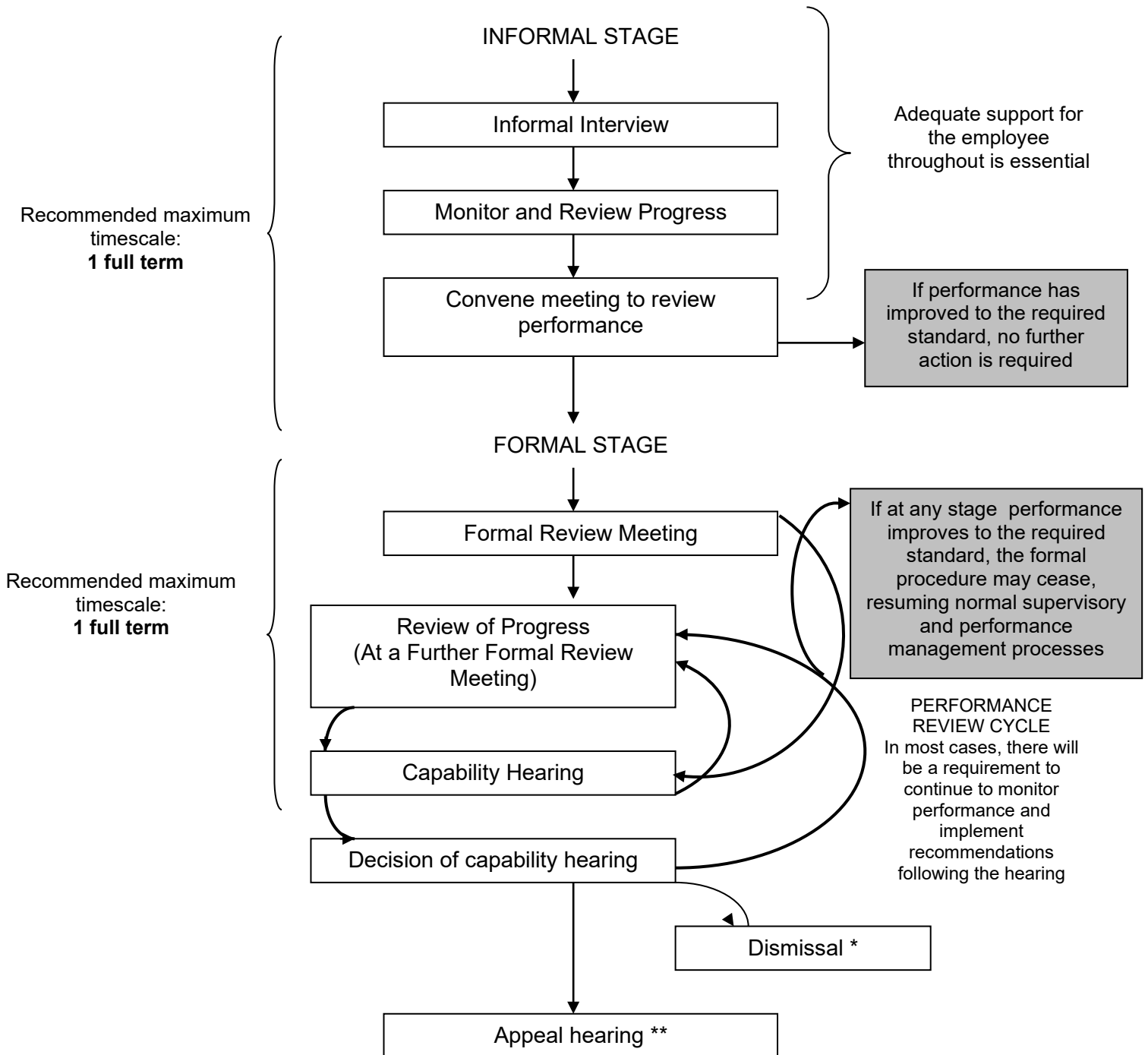
**NB: Urgent action is required if sickness absence intervenes during the capability procedure.**

If **long term absence** appears to have been triggered by the commencement the capability procedure, the case should be referred to Occupational Health to assess the employee's health and fitness for continuation with the procedure and/or employment. Occupational Health should be asked for guidance on the condition, likely prognosis and timescale for a return to work. The case shall then proceed in accordance with the resultant advice and the appropriate procedure followed thereafter.

**Short term absences** should not normally delay any part of the formal stage of the capability procedure.

**In all cases, please seek advice from your HR Officer.**

**Summary Flowchart of Capability Procedure and timescales**



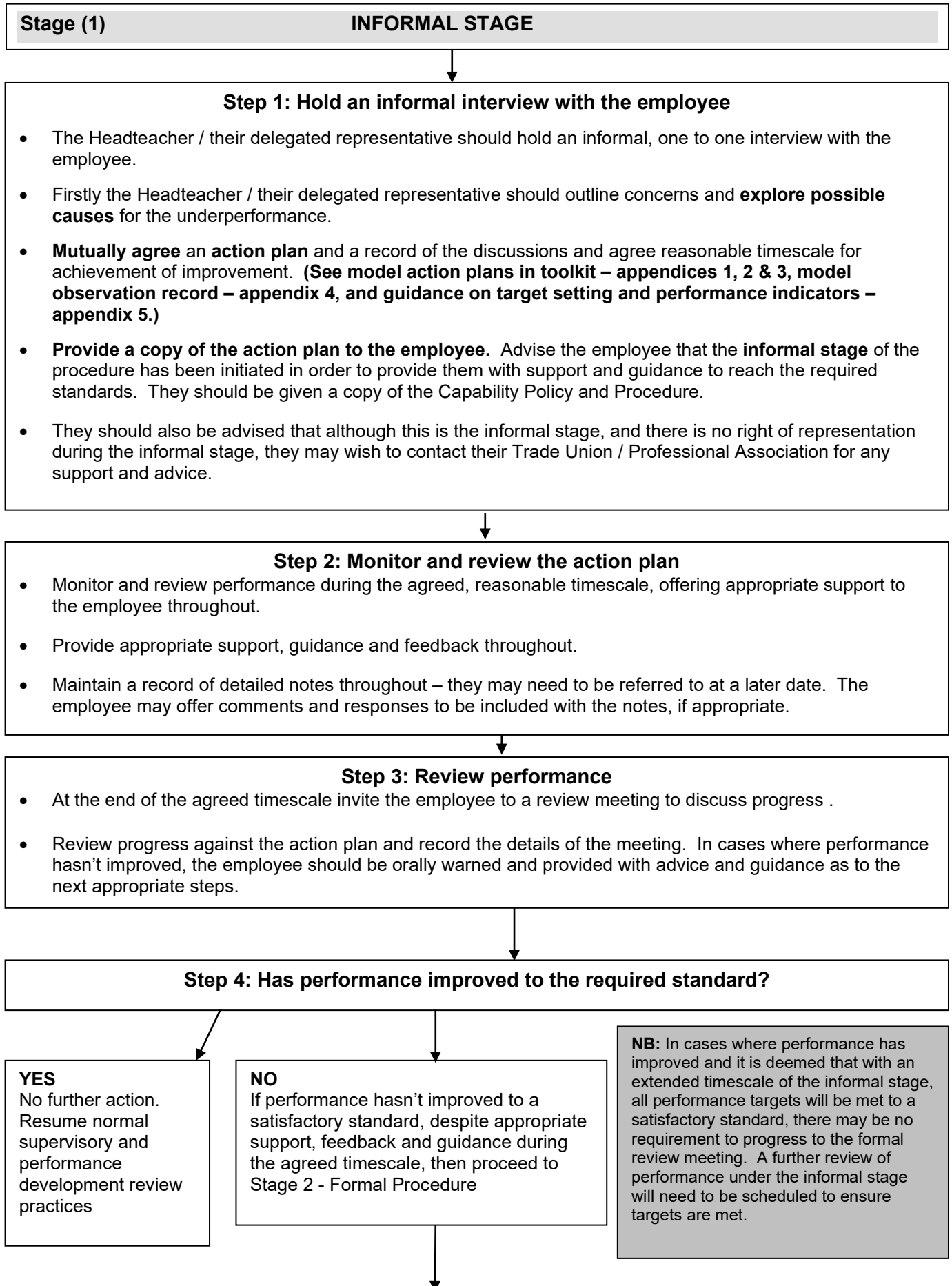
**\* Dismissal may arise following the exhaustion of reasonable avenues provided by the capability procedure.**

**\*\* The employee has a right of appeal against the decision(s) taken at the capability hearing. If the employee wishes to exercise this right then arrangements shall be made accordingly.**

**NB:** The timescales provided for in this procedure are upper limits, which may be shortened if appropriate e.g. where it is clear that an acceptable level of improvement is beyond the ability of the employee, or where there is a lack of co-operation by the employee. In exceptional cases where the education of the children is in jeopardy e.g. a teacher's classroom control is so poor that no order can be established to enable teaching to take place, an accelerated, short procedure may be appropriate.

## Procedure Summary

Headteachers subscribing to the Employee Relations SLA should read this in conjunction with the Capability toolkit and guidance for schools.





## Stage (2)

## FORMAL STAGE

### Step 5: Formal Review Meeting

- Invite the employee to a Formal Review meeting, giving the employee 5 working days written notice and advising them of their right of representation and including relevant documentation as appropriate. **(See model letter– appendix 6.)**
- **At the meeting, establish the facts of the case with the employee and decide on one of the following options as to the way forwards and any appropriate support for the employee.**

### NB: INVESTIGATORY STAGE

It may be necessary to commence an investigation to gather facts prior to the formal review meeting (e.g. in cases of gross incompetence) **and/or** after the formal review meeting to gather facts prior to the capability hearing.

The employee will be advised accordingly – **See guidance on conducting investigations appendix \***.

#### (a) To agree a further action plan and support

Agree to further performance targets, arrange further support as required and monitor Issue revised Action Plan.  
**(Progress to step 6 then 7.)**  
**(See appendices 1, 2 and 3.)**

#### (b) Arrange to hear the case at a formal capability hearing

This may be appropriate in particularly serious cases, where the education of the children is in jeopardy. An acceleration of the procedure is required. **(Progress to step 6 then 8.)**

#### (c) Suspend the employee if appropriate

This will normally apply only in cases of gross incompetence, where the health and safety of pupils and or colleagues is at risk Advice should be sought from HR prior to any decision to suspend.  
**(See guidance on suspension in the toolkit – appendices ,8 and 9). (Progress to step 6 then 8.)**

### Step 6: Confirm the outcome of the Formal Review Meeting in writing

- Following the Formal Review meeting, the decision taken and action agreed should be confirmed to the employee, in writing, within 5 working days of the meeting. **(See model letter in the toolkit – appendix 7.)**
- If further support is agreed, a further formal review meeting should be scheduled, within a reasonable timeframe to consider progress, and confirmed to the employee in writing.

### Step 7: Review progress at a further Formal Review Meeting

- A formal review meeting shall take place to review progress. The meeting should be between the Headteacher and the employee. The employee can be accompanied by a trade union representative, friend or colleague but not in the capacity of a practising lawyer. The Headteacher may invite an HR Officer to attend.
- Progress shall be reviewed and one of the following outcomes agreed –
- **If performance has improved to the required standard – no further action.** Normal supervisory and performance management processes will resume.
- **If performance hasn't improved despite appropriate support - progress to a formal capability hearing.**
- Prior to progressing to a hearing, advice should be sought from Human Resources.

**Stage (3)****CAPABILITY HEARING****Step 8: Arrange the Capability Hearing**

- The Headteacher (or their delegated representative) shall advise the employee in writing of specific allegations to be considered at the hearing and list the possible outcomes as detailed under **step 10**, giving at least 10 working days written notice of the date, time and place of the hearing. (See model letter **appendix 11** in the toolkit.)
- The employee should also be advised that:
  - The case will be heard by a panel of 3 Governors, chaired by the nominated school Governor, advised by an HR Officer.
  - The employee can be accompanied by a trade union representative, friend or colleague but not in the capacity of a practising lawyer.
  - The Headteacher (or their delegated representative) will be asked to present their case, call witnesses and give evidence.
  - The employee (or their representative) will be asked to present their case, call witnesses and give evidence.
- Both parties shall provide any papers / evidence they may refer to at the Capability Hearing, at least 5 working days before the hearing is due to take place.

**Step 9: Conduct of the Capability Hearing (See conduct of a Capability Hearing in the toolkit)**

- The hearing will be conducted by a panel of 3 Governors and Chaired by a nominated Governor, advised by an HR Officer.
- The nominated school Governor will be responsible for the conduct of the hearing, in accordance with the capability policy, supported by / advised by an HR Officer as appropriate.
- The presenting officer (usually the Headteacher or their delegated representative) shall present the case against the employee, calling any witnesses / presenting witness statements as appropriate.
- The employee and his / her representative shall have the opportunity to question the presenting officer and any witnesses, as appropriate.
- The employee (or their representative) shall put forward their case, calling any witnesses / presenting witness statements as appropriate.
- The presenting officer shall have the opportunity to question the employee, his/ her representative and his / her witnesses, as appropriate.
- The Panel and HR Officer may question either party and their witnesses at any stage
- Both parties may summarise their case but not introduce any new evidence at this stage.
- All parties will withdraw, leaving the panel to consider the matter in consultation with an HR Officer.
- A suitably detailed note of the hearing proceedings should be taken (see Step 11) and retained for at least 12 months.



### Step 10: Decision of the Hearing

- The outcome / decision may be any of the following:
  - **Recommend a medical referral (if appropriate) and adjourn the hearing (pending consideration of the medical advice)** (see guidance on medical incapability appendix 13 and example letter (appendix 12).
  - **Recommend additional training or support and / or set targets for improvement with timescales \***.
  - **Issue a first written warning \***. (See model letter in toolkit – appendix 15.)
  - **Issue a final written warning \***. (See model letter in toolkit – appendix 16.)
  - **Consideration of an offer alternative employment if appropriate / viable as an agreed outcome or as an alternative to dismissal, subject to a trial period** (Model letter on redeployment – appendix 14).
  - **Dismiss (NB: An employee SHALL NOT be dismissed prior to being issued a final written warning, except in cases of gross incompetence)** In the case of Foundation and Voluntary Aided Schools this letter shall be issued by the Governing Body, within 10 working days of the decision being taken. In the case of Community and Voluntary Controlled schools this letter shall be issued by the Local Authority within 10 working days of the decision being taken. (See model letter in toolkit – appendix 14 and advice on notice periods – appendices 19 and 20.)
- **\* NB: In cases where this is an outcome of the hearing, there will be a resultant need to continue to monitor performance. The cycle of performance review will continue for an appropriate timeframe, after which, performance will be reviewed and appropriate steps taken.**
- The employee will have a right of appeal against the outcome of the hearing.
- The outcome will normally be announced at the end of the hearing (or, if not possible, by the end of the next working day) and communicated in writing to the employee no more than 5 working days after the date of the hearing. (See appropriate model letter in the toolkit – appendices 12-16.) The employee shall be advised of their right of appeal.

### Stage (4)

### APPEAL HEARING

### Step 11: Conduct of the Appeal Hearing

- The employee has a right of appeal against the decision of a capability hearing. They should make their appeal in writing to the Chair of Governors within 10 working days of receipt of confirmation of the outcome of the hearing.
- The Chair of Governors shall convene and advise the employee in writing of the arrangements for an appeal hearing, giving 10 working days written notice of the date, time and place of the hearing and their right of representation. (See model letter in the toolkit - appendix 17.)
- Both parties will submit an outline statement of their case, in writing, 5 working days before the date of the hearing for circulation to all parties. The employee and School Governor who chaired the original hearing will be in attendance at the appeal hearing.
- At the appeal hearing, a panel chaired by a nominated school governor will consider the decision of the panel that originally heard the case, against the employee's appeal. The panel should comprise Governors who have no prior knowledge of the case. The appeal panel will be advised by an HR Manager.
- The panel may allow the appeal, dismiss the appeal or impose an alternative remedy.
- Where the employee appeals on the grounds that there was a procedural error or omission during any stage of the Capability procedure, the appeal panel will determine, as a preliminary question whether a full new hearing should take place on a date to be arranged.
- Employee and/or his/her representative shall present their case for appeal. The procedure to be followed shall be the same as a Capability hearing as outlined in step 9. However the employee will present their appeal case first. The School Governor who chaired the Capability hearing will respond and outline a summary of the reason for their decision. All parties will have the right to ask questions. Both parties will summarise their case and all parties will then withdraw, leaving the Panel to consider the matter in consultation with the HR Officer. The employee will be notified of the outcome of the appeal (see model letter – appendix 18).
- The outcome of the appeal will be communicated in writing to the employee no more than 5 working days after the date of the hearing. (See model letter in the toolkit – appendix 18.)

## Further reference documents

- **Capability Policy and toolkit for School Based Employees**
  - This provides detailed policy guidance in regards to Capability. There is further guidance on conducting hearings and appeal hearings as well as presenting cases at hearings. Also provided in the toolkit are model letters for use at specific stages of the procedure.
- **Management of Attendance Policy and Toolkit for School Based Employees (to be made available to schools academic year 07/08 – in the interim, refer to school’s existing policy)**
  - This provides detailed policy guidance with regards to Management of Attendance. It would be appropriate to refer to this policy when dealing with cases of medical incapability.
- **Disciplinary Policy and Toolkit for School Based Employees (to be made available to schools academic year 07/08 – in the interim, refer to school’s existing policy)**
  - This provides detailed policy guidance with regards to conduct. It would be appropriate to refer to this policy to distinguish between capability and conduct.
- **Guidelines for referrals to Occupational Health**
  - These guidelines should be referred to when referring cases of medical incapability to Occupational Health.
- **Stress Management Policy for School Based Employees**
  - This policy should be referred to when dealing with cases of stress.
- **Equal Opportunities Policy**
  - This policy can be referred to in order to ensure adherence to Equal Opportunities throughout the capability procedure.

## Legal Context

**The Employment Rights Act 1996** states that a dismissal is fair if it:

'relates to the capability or qualifications of the employee for performing work of the kind which he was employed by the employment to do' S.98(2)

'Capability' in relation to an employee, means his capability assessed by reference to skill, aptitude, health or any other physical or mental quality S.98(3)(a)

'Qualifications', in relation to an employee, means any degree, diploma or other academic, technical or professional qualification relevant to the position which he held. S.98(3)(b)

The determination of the question whether the dismissal is fair or unfair (having regard to the reason shown by the employer) - S.98(4)

- a) depends on whether in the circumstances (including the size and administrative resources of the employer's undertaking) the employer acted reasonably or unreasonably in treating it as a sufficient reason for dismissing the employee; and
- b) shall be determined in accordance with equity and the substantial merits of the case.

**The ACAS, Code of Practice - 'Discipline at Work'** sets out some key points regarding under performance:

- Careful recruitment, selection and training will minimise the risk of poor performance.
- When employment begins, the standards of work required, the consequences of failure to meet them and conditions attaching to any probationary period should be fully explained.
- Where warnings are in operation, an employee should be given both time to improve and, where appropriate, training.
- The availability of suitable alternative work should be considered before dismissal action is taken.

## Other legal considerations

**The Education Act 2002**

**School Staffing (England) Regulations**

**General Teachers Council – Standards and Regulations**

**Dispute Resolution Regulations 2004**

**Should further guidance be required, please contact your Human Resources Officer.**