



**MELLERS PRIMARY SCHOOL
CAPABILITY POLICY
FEBRUARY 2022**

1. INTRODUCTION

- 1.1 This Policy has been developed in consultation with the recognised teaching and school support unions (NAHT, NEU, NASUWT, ASCL, UNISON, GMB, UNITE).
- 1.2 It is acknowledged that employees are normally competent, effective and are able to develop through the range of opportunities provided by the school. There are, however, occasions when a significant gap may develop between the requirements of a job and the individual's performance and, if not appropriately addressed, the situation may affect pupils' education and the performance of the school.

2. PURPOSE

Nottingham City Council and Mellers Primary School value all employees and the intention is always to support and retain employees wherever possible.

This policy sets out the arrangements that will apply when employees, including head teachers, teachers and support staff, fall below the level of performance that is expected of them.

3. APPLICATION

This policy applies to all employees about whose performance there are serious concerns that the appraisal process has been unable to address.

This procedure does not apply to support employees who are still subject to a probationary period.

The school has a separate process in place for staff appraisal.

Sections 8 – 15 of this policy outline the procedure that should be followed to manage matters of capability for all staff. A flowchart outlining this procedure is at Appendix 1 of this policy.

Separate procedures exist for handling matters of misconduct or complaints made by parents or other persons.

Schools may wish to contact their HR advisor for advice on the implementation and application of this policy.

This policy should be applied consistently and fairly so as not to discriminate against any particular group on the grounds of a protected characteristic under the Equality Act, e.g. age, disability, gender reassignment, marriage/civil partnership, pregnancy and maternity, race, religion and belief, sex and sexual orientation.

The right to representation by a representative of a recognised trade union or work colleague applies at the formal stages of this policy (sections 9 – 15).

4. DEFINITIONS

Staff	The term 'staff' applies to all school employees, including support staff, teachers and the head teacher but excludes any employees on their probationary period.
Representative	The person who accompanies the employee to any meeting under the formal stage of this policy, who could be a work colleague or representative of a recognised trade union. The Representative has the right to make statements, provide advice and ask questions on behalf of the employee, but not to answer questions on their behalf
Manager	This will, in most cases, be the employee's immediate line manager. It could also refer to other members of the senior leadership team, heads of establishments directly employing staff or Chairs of Governing Bodies, where the head teacher is the subject of proceedings.
Support	By 'support', the school intends this to include a range of measures put in place to assist the employee to meet the expected standard of performance. This could include shadowing, coaching, mentoring, training, equipment, etc. It is expected that the support required will be discussed and agreed before the commencement of the improvement period.
TU senior officer	In most cases this will mean a full time official, regional or executive officer of the designated union, or other accredited official.
'Incompetence/ lack of capability'	This refers to situations where, due to a lack of capability and/or application, an employee fails to perform his/her duties to a professionally acceptable standard. Such situations should initially be dealt with informally under the appropriate appraisal process or through regular supervision meetings initially
Misconduct	This is an act or omission by an employee which is considered to be unacceptable professional behaviour. It can range in seriousness from minor to gross misconduct. Such matters should be dealt with under the Disciplinary Procedure
External complaints	Where complaints are made against an employee from parents or other persons outside the school, the school's complaints procedure should be used initially to investigate. It may be necessary to progress issues arising using a different procedure, which may include either the Capability Procedure or the Disciplinary Procedure.

Role of governors	<p>Governors should not normally be involved with a capability procedure before the dismissal stage. The exception to this is where a governor or governors are involved in considering an appeal against a warning or in a capability procedure against the head teacher. It is important to be prepared for the possibility of dismissal. The use of governors to hear any grievances or appeals against warnings should be limited to ensure that a sufficient number of impartial governors remain available for the dismissal and dismissal appeal committees. Normally at least three governors are required for the dismissal committee and no fewer for the appeal, but where this number is not reasonably practicable it can be reduced to two. Governors should seek advice from the school's HR advisor at all stages.</p>
Role of head teacher	<p>The head teacher may act as the line manager for an individual employee, but in any case will take any decision to initiate the capability process for other staff.</p> <p>Where the head teacher has performed both of these roles, the governing body will not normally delegate the initial dismissal decision to the head teacher.</p>
Notice	<p>Notice of 7 working days must be given for any formal capability interview. The dates of successive evaluation meetings should be set at the commencement of the formal process. Notice of at least 10 working days must be given for a staff dismissal committee or dismissal appeal hearing.</p>
Complaints about the procedure	<p>Any disagreements or grievances about the interpretation of the procedure, or the application of any related matters not covered in the procedure, must not delay any of the component stages of the capability procedure or the overall timetable determined as appropriate for handling any particular case. In exceptional circumstances an employee may raise a grievance about the behaviour of a head teacher, another manager or governor during the course of a capability procedure. Exceptionally it may be appropriate to suspend the procedure until the grievance can be considered. Such a delay should only be considered where there is a strong indication that the employee has been mistreated. Governors should seek advice from the schools HR advisor at all stages.</p>
Appeals against warnings or dismissal	<p>Appeals should normally be restricted to considering the reasonableness of the decision made, any relevant new evidence, or any procedural irregularities. An employee is entitled to be accompanied at an appeal hearing by a union representative or colleague. The appeal decision should be confirmed in writing and the employee told that there is no further appeal against the decision. Where the reasonableness of the decision is being</p>

questioned it should be considered whether the decision was so unreasonable that it was one that no other decision maker, acting with proper regard to his or her responsibilities, could have chosen to take. Where monitoring would otherwise be continuing, it should not be halted while an appeal is pending.

5. KEY PRINCIPLES

- 5.1 In most cases, issues relating to professional capability can be dealt with informally through the appraisal process without recourse to the Capability Policy.
- 5.2 Staff are constantly striving to improve their skills and expertise in order to develop their effectiveness. In this regard, they may draw upon support available within the service and from their own trade union and related learning provisions.
- 5.3 Within schools, staff may look to the advice, support and encouragement available from colleagues, particularly those with professional leadership roles, including members of the senior leadership team.
- 5.4 All staff should have clear job descriptions and be aware of the appropriate standards, to ensure they fully understand their role within the school.
- 5.5 Staff taking up new posts may require induction support, particularly where there are changes to the role or additional responsibilities. Developments in the curriculum may require appropriate INSET and support programmes for the staff involved.
- 5.6 These everyday processes of support, training and advice are fundamental to professional effectiveness and wherever possible any difficulties should be resolved informally in a spirit of partnership. Only where these processes do not succeed in overcoming the difficulties should consideration be given to entering the formal stage of the Capability Policy.

6 CONFIDENTIALITY STATEMENT

- 6.1 All parties involved in this policy will be expected to observe the principle of confidentiality in relation to the processes involved and any documentation that arises. This expectation of confidentiality also applies to the employee's representative.
- 6.2 Any correspondence or record of action taken will be retained in the employee's personal file and will not be recorded in any place where there is a risk of information being disclosed to any person who does not have a genuine reason to access the information. Notes will be retained only for the period specified and will be removed and discounted after this period has expired.
- 6.3 Documentation arising from the procedures involved in this policy will only be shared with individuals who have genuine reason for accessing this information, including those involved in monitoring performance, or those involved in any capability proceedings that may follow. Such documentation should be stored securely.

6.4 Specific information about any employee being dealt with under these procedures should not be shared at meetings attended by other employees or governors not involved in the case. This will preserve confidentiality and avoid tainting the judgement of those involved in possible future stages (e.g. formal hearing or appeal).

7 HEALTH & ATTENDANCE ISSUES

7.1 In the event that an employee commences a period of sickness absence during action under this policy, advice should be sought from the school's HR advisor. Monitoring and assessment under this policy should be based on evidence of performance at work and normally requires the employee to be present.

7.2 Where an employee commences a period of sickness absence whilst being monitored under this policy, the manager should consider a referral to the school's Occupational Health Advisor. Employees should also be reminded of the support that may be available to them from their trade union. The City Council's employee assistance programme (currently PAM Assist) is available to staff of all schools purchasing this service. It may be appropriate for an independent individual to be identified within or outside of the school, to provide confidential support.

7.3 Cases of sickness absence during capability proceedings should be dealt with under the school's attendance management provisions.

7.4 In cases where the employee attributes the concerns about their performance to a disability or other ill health, the manager should consider making an occupational health referral and should consider any advice before making a decision to proceed, including any provided about making reasonable adjustments for the employee.

7.5 Consideration must be given to the employee's work/life balance throughout the process, particularly with regard to setting a realistic timetable for improvement.

8 INFORMAL PROCESS

8.1 It is expected that the duration of the informal procedure will take account of the individual circumstances and nature of the improvement required. This should not normally exceed 6 weeks and should be agreed, where possible, at the commencement of the procedure. This period should be reviewed during the procedure should any extenuating circumstances arise.

8.2 Where concerns arise about any aspects of the employee's performance, which cannot be resolved through the appraisal process, the appraiser and/or manager will meet the employee to:

- give clear written feedback about the nature of the concerns;
- give the opportunity to comment and discuss the concerns, including any extenuating circumstances that have led to the concerns being raised;

- agree any support that will be provided to help address those specific concerns;
- make clear how, and by when, progress will be reviewed. It may be appropriate to review and revise existing objectives/targets, and it will be necessary to allow sufficient time for improvement;
- explain the implications and process if insufficient improvement is made. This may include reference to the formal stages of the Capability procedure;
- agree a meaningful timeframe during which the improvement should be demonstrated.

8.3 Whilst there is no right to representation at this meeting, the manager may decide to offer that right. At the very least, the employee should be advised to consult their trade union representative. If the employee involved is a trade union representative, the manager should contact the TU senior officer of the relevant union at the outset of the informal process.

8.4 A record of all meetings should be taken and shared with the employee.

8.5 When progress is reviewed following this meeting and the appraiser is satisfied that the employee has made sufficient improvement, the capability procedure will cease at this point and revert to the appraisal process.

8.6 When progress is reviewed following this meeting and the appraiser is not satisfied that the employee has made sufficient improvement, the employee the manager should consider whether to commence formal capability proceedings. The employee should be advised to seek the support of their trade union.

9 FORMAL PROCEDURE - FORMAL CAPABILITY MEETING

9.1 Where the appraisal process has failed to resolve concerns about an employee's performance, the manager will invite the employee to a Formal Capability Meeting, giving at least 7 working days' written notice.

9.2 Where maternity leave commences during the formal procedure, the process will be paused until the employee's return to work. In the case of long term sickness and/or disability, medical advice will be sought and a decision made appropriate to the individual case.

9.3 Employees are entitled to representation from the commencement of the formal process. If the employee is a trade union representative, the manager should contact the TU senior officer of the relevant union.

9.4 During the meeting, the manager may be accompanied by a performance advisor and/or the school's HR advisor.

9.5 The notification of the meeting will detail the concerns about performance and the possible consequences, along with any written evidence, in order to give the

employee the ability to adequately prepare to answer the case. The notification will also provide the date, time and location of the meeting and will advise the employee of their right to representation. The employee should also be provided with a copy of this policy.

- 9.6 If the employee's trade union representative is not available at the time allocated for the meeting, the meeting should be postponed and reconvened within 5 working days of the original date. The manager may liaise with the trade union representative to identify a mutually convenient date for the meeting.
- 9.7 The meeting is intended to establish the facts. It will be conducted by the manager. The meeting allows the employee to respond to concerns about their performance and to make any relevant representations. This may provide new information or a different context to the information/evidence already collected.
- 9.8 During the meeting, or any other meeting which could lead to a formal warning being issued, the person conducting the meeting will:
- Identify clearly and document the areas and level of concern, for example, which of the standards expected of the employee are not being met;
 - Identify the evidence used to reach this conclusion;
 - invite the employee to provide an explanation/response to the concerns raised, including any mitigation;
 - Clarify the expected level of performance required and the improvements expected, identifying any success criteria that might be appropriate and that may assess whether or not the necessary improvement has been made;
 - Document the support available
 - Clarify the consequences of failing to improve their performance.
- 9.9 At the end of the meeting, the person conducting the Formal Capability Meeting may conclude one of the following outcomes:
- (i) that there are insufficient grounds for pursuing the capability issue and that it would be more appropriate to continue to address the remaining concerns through the appraisal process;
 - (ii) that there are insufficient grounds for pursuing the capability issue and that the concerns should be addressed through the appraisal process, but that the employee should be provided with informal counselling/advice, written guidance or instruction or additional support under the terms of the Equality Act. Where it is not possible to make adjustments, further advice should be sought from the school's HR advisor and/or occupation health provider.

- (iii) that the concerns are not those of capability, but misconduct and as such, the person conducting the meeting may consider referring the matters through the disciplinary procedure;

In i.-iii. above, action under the Capability Policy would cease;

- (iv) In cases where the person conducting the meeting believes that the formal capability procedure should continue, the person conducting the meeting will:
 - (a) remind the employee of the improved standard of performance expected, identifying any success criteria that might be appropriate and that may assess whether or not the necessary improvement will be made;
 - (b) discuss and agree any support that will be available to help the employee improve their performance and consider any requests from the employee for such support;
 - (c) set out the timetable for improvement and explain how performance will be monitored and reviewed. The timetable will depend on the nature and seriousness of the concerns, and is anticipated to be between **4 and 8 weeks** (see section 10 below). It is for the manager to determine the set period in each case. It should be reasonable and proportionate, but not excessively long, and should provide sufficient opportunity for an improvement to take place. Allowance should be made to enable the employee to maintain a healthy worklife balance; and
 - (d) Issue the employee with a warning (formal or final depending on the stage of procedure) and advise the employee that failure to improve within the set period could lead to a final warning or dismissal (depending on the stage of procedure). In very serious cases, this warning could be a final written warning.

9.10 A suggested template for a performance improvement plan (PIP) covering iv. (a)-(c) above, is contained at Appendix 2.

9.11 The person conducting the meeting may adjourn the meeting at any time in order to seek advice, to arrange for further investigations, or because more time is needed in which to consider any additional information.

9.12 Any request for an adjournment by any party should not be unreasonably refused.

9.13 Notes will be taken of the Formal Capability Meeting and a copy provided to the employee.

9.14 A written outcome of the Formal Capability Meeting will be provided to the employee within 5 working days. The written outcome will include the matters covered in (a)-(d) above and give information about the timing of the review stage. The outcome will contain the procedure and time limits for appealing against the warning. If a final written warning has been issued, the employee will also be informed that failure to

achieve an acceptable standard of performance within the set timescale, may result further action which could result in dismissal.

10 MONITORING AND REVIEW PERIOD (from 4 - 8 weeks)

- 10.1 A performance monitoring and review period will be set during the formal capability meeting. Formal monitoring, evaluation, guidance and support will continue during this period.
- 10.2 If the employee was issued with a warning other than a final written warning, they will be invited to a Formal Review Meeting at the conclusion of the monitoring and review period.
- 10.3 If the employee was issued with a final written warning, they will be invited to a Decision Meeting at the conclusion of the monitoring and review period.

11 FORMAL REVIEW MEETING

- 11.1 The Formal Review Meeting will be conducted by the manager.
- 11.2 At least 7 working days' written notice of a Formal Review Meeting will be provided and the notification will contain details of the time, date and place of the meeting and will advise the employee of their right to be accompanied by a representative.
- 11.3 During the meeting, the manager may be accompanied by the school's HR advisor.
- 11.4 If the person conducting the meeting is satisfied that the employee has made sufficient improvement, action under the Capability Policy will cease and the appraisal process will re-start.
- 11.5 In cases where the person conducting the meeting believes that there has been some progress/improvement and there is confidence that more is likely, it may be appropriate to extend the monitoring and review period further, as deemed appropriate; however, this will not normally be extended by more than the duration of the original monitoring and review period, unless specific circumstances apply. In such cases, a further Formal Review Meeting will take place at the conclusion of the monitoring and review period.
- 11.6 If the person conducting the meeting believes that there has been no or insufficient progress/improvement during the monitoring and review period, the employee will be issued with a final written warning and the monitoring and review period extended for a further period, expected to be between 4 to 8 weeks (see Section 10 above).
- 11.7 Notes will be taken of formal review meetings and a copy will be provided to the employee. The final written warning will mirror any previous warnings that have been issued.
- 11.8 The employee should also be provided with a written outcome of the meeting within 5 working days, which should provide details of any further monitoring and review

period and the procedure and time limits for appealing against the final written warning. The outcome should also inform the employee that they will be invited to a Decision Meeting at the conclusion of the further monitoring period. Where a final written warning has been issued, the employee will be informed in writing that failure to achieve an acceptable standard of performance within the set timescale may result in a referral to the Governing Body for a Capability Hearing, with dismissal a possible outcome.

12 DECISION MEETING

- 12.1 The Decision Meeting will be conducted by the manager.
- 12.2 At least 7 working days' written notice of a Decision Meeting will be provided and the notification will contain details of the time, date and place of the meeting and will advise the employee of their right to be accompanied by a representative.
- 12.3 During the meeting, the manager may be accompanied by the school's HR advisor. A note-taker may also attend to clerk the meeting.
- 12.4 If an acceptable standard of progress/improvement has been achieved during the further monitoring and review period, action under the Capability Policy will end and the appraisal process will re-start.
- 12.5 If the employee's performance continues to be a cause for concern, a decision will be made to refer the matter to the Governing Body for a Capability Hearing, with a recommendation that the employee should be dismissed from their role within the school.

13 CAPABILITY HEARING

- 13.1 During a Capability Hearing, the Governing Body will be accompanied by the school's HR advisor.
- 13.2 At least 7 working days' written notice of a Capability Hearing will be provided and the notification will contain details of the time, date and place of the meeting and will advise the employee of their right to be accompanied by a representative. At the same time as the notification, the employee will also be provided with a copy of the report that is to be presented by the manager.
- 13.3 The employee has the right to present evidence to the Hearing and this should normally be provided in advance of the meeting. Requests to present additional evidence during the hearing will be considered by the Chair of the panel.
- 13.4 Employees may request witnesses of fact (i.e. not character references) to attend on their behalf where there is a discrepancy over the evidence. They should provide the chair of the panel with a minimum of 3 days advance notice of their intention.
- 13.5 Prior to a dismissal decision being taken, the Governing Body will consult with the school's HR advisor.

13.6 The procedure to follow at a Capability Hearing is contained at Appendix 3.

14 DISMISSAL

14.1 In the event that a decision to dismiss is taken, the employee will receive due notice.

14.2 The notice period will commence from the date that the decision to dismiss is taken.

15 RIGHT OF APPEAL

15.1 If an employee wishes to appeal against any action taken by the manager or Governing Body under this policy (e.g. a warning, final written warning or dismissal), they should submit a written appeal within 10 working days of receipt of the written outcome, outlining the grounds for appeal.

15.2 Appeals against warnings issued under this procedure will be heard by the Appeal Committee of the school's Governing Body.

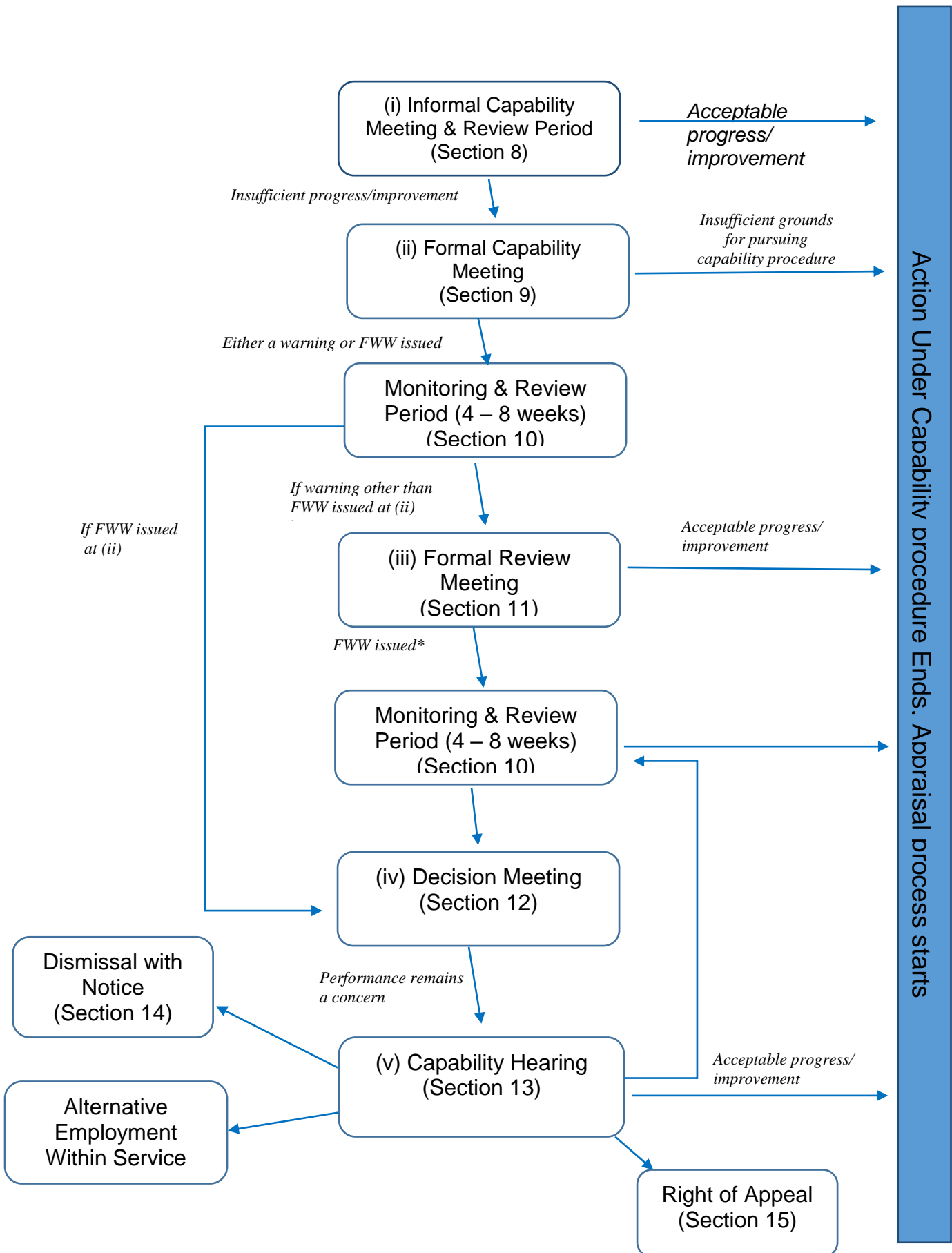
15.3 The Appeals Panel must consist of 3 governors previously uninvolved in the case. The panel could be advised by the school's HR advisor.

15.4 The appeal will be heard without unreasonable delay. The same arrangements for notification (i.e. with 7 working days) and right to be accompanied by a representative will apply, as with other meetings held under this policy.

15.5 Notes of any appeal hearing will be taken and a copy provided to the employee.

15.6 The employee will be informed in writing of the outcome of the appeal hearing within 5 working days of the hearing.

Flowchart Summarising the Capability Procedure



MODEL CAPABILITY POLICY FOR EMPLOYEES IN SCHOOLS – PERFORMANCE IMPROVEMENT PLAN

CAPABILITY CONCERN	CURRENT PERFORMANCE	EXPECTATIONS	HOW TO ACHIEVE	MONITORING MANAGER AND PROCESS
<p><i>Define the specific issue(s) causing concern. Refer to clarity given in letter to employee following formal capability meeting</i></p>	<p><i>Define the problem in greater detail - how does the problem present itself?</i></p>	<p><i>Set out the performance expected, improvements to be made and timeline.</i></p>	<p><i>Indicate how you see the employee reaching your expectations. Make arrangements for support clear and ensure that appropriate support is in place.</i></p>	<p><i>Who will monitor progress and give feedback. In most cases this is likely to be a member of the senior leadership team or line manager, but not the deciding manager for the next stage of the procedure. Clarify the monitoring process and where evidence of improvements will come from.</i></p>

APPENDIX 3**CAPABILITY HEARING**

1. The Capability Dismissal Panel will comprise three governors. The selection of governors must ensure that no conflict of interest may arise in hearing the case.
2. The date of the disciplinary hearing should be provided to the employee as soon as possible and at least 7 working days before the due date. The employee should be given the opportunity to send any written submission or evidence to the panel prior to the hearing. A copy of any submission should also be made available to the head teacher or adviser. The head teacher or adviser should always submit the case in writing to the panel with a copy to the employee. This must be sent at least 7 working days before the date of the hearing.
3. The date of the hearing should always be notified to the school's HR advisor who should attend in order to advise the panel on any procedural aspects or matters of employment law.
4. At the hearing the head teacher (and/or advisor) will be responsible for presenting the evidence to the disciplinary panel in the presence of the employee and representative. Witnesses may be called individually by the head teacher in support of the case.
5. The head teacher and any witnesses may be asked questions by the employee or his/her representative.
6. The witnesses may then be asked further questions by the head teacher.
7. Members of the Staff Dismissal Committee may ask questions of the head teacher and witnesses on the evidence submitted.

Note: After completion of the stages the witnesses will be:

- a. instructed not to discuss the case in any way until after the hearing has been determined.
 - b. asked to retire. Unless otherwise determined by the parties to the hearing, the witnesses may be subject to recall.
8. The employee or representative will state his/her case in the presence of the head teacher. Witnesses may be called by the teacher in support of his/her case.
 9. The employee and any witnesses called may then be asked questions by the head teacher.
 10. The witnesses may then be asked further questions by the employee or representative.

11. Members of the disciplinary panel may ask questions of the employee and his/her representative and any witnesses called.

Note: After completion of the stages the witnesses will be:

- a. Instructed not to discuss the case in any way until after the hearing has been determined.
 - b. Asked to retire. Unless otherwise determined by the parties to the hearing, the witnesses may be subject to recall.
12. The head teacher shall then have the opportunity to sum up the case against the employee.
 13. The employee or his/her representative shall have the opportunity to sum up on his/her behalf and offer the Staff Dismissal Committee details of any mitigating circumstances he/she considers should be taken into account.
 14. The employee, representative, head teacher and clerk/secretary for the hearing shall then withdraw.
 15. The Staff Dismissal Committee (together with the HR advisor and any other officer(s) acting as clerk/secretary to the panel) will then deliberate in private, only recalling the employee (and his/her representative) and the head teacher to clear points of uncertainty on evidence already given. If recall is necessary, both parties will return, notwithstanding that only one of them is concerned with the point giving rise to doubt.
 16. After deliberating, the Chair of the Staff Dismissal Committee will announce the decision to the employee, representative and head teacher personally. The right of appeal against the decision will also be explained. The panel will then formally write to the employee within three working days confirming the decision and appeal rights.
 17. The procedure outlined above will also be followed to hear any appeals against decisions of final warnings given by head teachers or decisions of Staff Dismissal Appeal Panel, save that there will be no further rights of appeal against the decision other than to an Employment Tribunal where employees have qualifying rights.

APPEALS

- 7.1 An employee has a right to appeal against any decision and must be informed in writing that they have 10 working days from receipt of the letter confirming the decision in which to appeal and to whom they should appeal.
- 7.2 The employee should be given notice in writing at least 5 working days in advance of the time and place of the hearing.

- 7.3 An appeal will be heard by the Staff Dismissal Appeals Committee, the members of which must have played no part in the disciplinary hearing itself. In cases where the Staff Dismissal Committee heard the initial hearing the appeal must be heard by at least the same number of governors as comprised the original disciplinary panel.
- 7.4 The procedure for hearing an appeal will be the same as that for the disciplinary hearing itself. There is no further right of appeal other than to an Employment Tribunal.
- 7.5 The decision of the Staff Dismissal Appeals Committee will be communicated, in writing, within 3 working days of the appeal hearing.

8. DISMISSALS BY THE LOCAL AUTHORITY

- 8.1 Staff dismissals are normally a matter for the school, but the LA may dismiss staff in its employment directly in the following circumstances:
- a) where the school's delegated budget has been suspended;
 - b) where the Secretary of State or the Teaching Agency have prohibited further employment of any member of staff because of previous conduct or capability;
 - c) where an unqualified teacher has failed to secure qualified teacher status within the time limits set out in the regulations;
- 8.2 The circumstances above will remove the governing body's (and the head teacher's) responsibilities for the dismissal process including dismissal hearings and appeals.