

Explanatory Memorandum to The Regulated Services (Special School Residential Services) (Wales) Regulations 2023

This Explanatory Memorandum has been prepared by Health and Social Services Department and is laid before Senedd Cymru in conjunction with the above subordinate legislation and in accordance with Standing Order 27.1.

Deputy Minister's Declaration

In my view, this Explanatory Memorandum gives a fair and reasonable view of the expected impact of The Regulated Services (Special School Residential Services) (Wales) Regulations 2023. I am satisfied that the benefits justify the likely costs.

Julie Morgan MS
Deputy Minister for Social Services

7 November 2023

1. Description

- 1.1 The Regulation and Inspection of Social Care (Wales) Act ('the 2016 Act') provides the statutory framework for the regulation and inspection of social care services and the regulation of the social care workforce in Wales. To help achieve this it provides the Welsh Ministers with a range of regulation-making and other subordinate legislation powers.
- 1.2 *The Regulated Services (Special School Residential Services) (Wales) Regulations 2023* ("the 2023 Regulations") will define the special school residential services to be brought into regulation.

2. Matters of special interest to the Legislation, Justice and Constitution Committee

None.

3. Legislative background

- 3.1 Section 2(1)(i) of the 2016 Act is a regulation making power enabling the Welsh Ministers to prescribe other services comprising the provision of care and support in Wales as a regulated service. Section 2(2) refers to Schedule 1 which makes further provision about the meaning of the terms used and allows Welsh Ministers to specify a "*special school residential service*" for the purposes of Section 2.
- 3.2 These Regulations are subject to the draft affirmative procedure.

4. Purpose and intended effect of the legislation

- 4.1 In March 2022, the Independent Inquiry into Child Sexual Abuse ("the Inquiry") published the investigation report '[The residential schools investigation Phase 1: Music schools, Residential special schools Phase 2: Safeguarding: day and boarding schools](#)'. The Inquiry examined questions concerning sexual abuse of children in residential special schools in England and Wales. The Chief Social Care Officer for Wales and Care Inspectorate Wales (CIW) gave evidence to the Inquiry. The recommendations of the Inquiry include requiring all residential special schools to be inspected against the quality standards used to regulate care homes in Wales.
- 4.2 The purpose of the 2023 Regulations is to define the *special school residential service* for the purposes of the 2016 Act and bring it into the regulation, inspection, and enforcement regime. Currently the services are outside the scope of regulation as a care home service under the 2016 Act because they fall under the 295 days or less threshold. The bringing into regulation of residential special schools as *special school residential services* will fulfil the Inquiry recommendation.

5. Consultation

A 12-week public consultation was undertaken between 15 May 2023 to 6 August 2023 on the suite of draft regulations making up the regulatory framework and the accompanying statutory guidance for the *special school residential services*. The consultation was drawn to the attention of key stakeholders including the current residential special schools, local authorities, the Children's Commissioner for Wales, CIW, Estyn and Social Care Wales. A meeting of the stakeholder group was convened during the consultation period. The consultation responses report can be found [here](#).

PART 2 - REGULATORY IMPACT ASSESSMENT

The Regulated Services (Special School Residential Services) (Wales) Regulations 2023 (“the 2023 Regulations”).

The 2023 Regulations set out the meaning of a “*special school residential service*” for the purposes of the 2016 Act.

Residential special schools will be brought within the scope of regulation under the 2016 Act as a regulated service. This will establish a more consistent approach to the registration, regulation, inspection, and enforcement of services looking after vulnerable children for short or extended periods. The service providers will be subject to registration under the 2016 Act. The regulatory regime focuses on the quality and safety of care and support provided, and the individual’s well-being and outcomes which will have a positive impact on the children staying at the service and the overall quality of service provision. This approach will also ensure that CIW has the necessary powers to mandate improvements identified during inspections and to take enforcement action should services continue to fall short of the expected regulatory requirements.

6. Definition

6.1 Residential special schools provide education and accommodation to children with Additional Learning Needs (ALN), such as Emotional Behavioural Disorders (EBD), Autism, learning and physical disabilities. Residential special schools broadly provide a 24-hour curriculum to support and promote independent living through the development of appropriate social, independent, self-help and life skills. Children stay at the school between one and four school nights a week, during term time only. ‘Residential special school’ is not a term specifically defined in current legislation, but it is used by CIW to differentiate these schools from a special school not providing accommodation.

6.2 CIW relies on powers in the Children Act 1989 (“the 1989 Act”) in its oversight of residential special schools which fall under the 295 days or less threshold and therefore are outside the scope of regulation as a care home service under the 2016 Act. Under the 1989 Act CIW can carry out inspection activity but has no direct powers of enforcement and cannot require the schools to register. CIW inspects these schools against National Minimum Standards (NMS) for Residential Special Schools which were issued in 2003 under section 87 of the 1989 Act. NMS are not enforceable and are focussed on achieving a minimum standard which is not consistent with the broader policy direction on regulation and inspection established under the 2016 Act.

6.3 All schools in Wales, including residential special schools, are also inspected by Estyn under the Education Act 2005 and related regulations. Estyn inspections consider the well-being of pupils, (including safeguarding arrangements) and the school amenities in terms of the educational provision, but do not include the residential care and support aspects of the school.

6.4 The proposed approach will bring the residential element of residential special schools into the scope of regulation under the 2016 Act. This will mean that existing services and new services will be required to register with CIW. They will be required to meet requirements set out in regulations in relation to the quality and safety of the care and support provided. These requirements include the suitability of the service, the environment, staffing, staff training and safeguarding. The services will be inspected by CIW. The regulator has powers of enforcement under the regulatory framework.

6.5 The proposed approach recognises the differences between residential special schools where children stay at the school overnight for between one and four nights a week but live with their parents, and care home services where adults or children reside full-time. The intention, therefore, is to regulate residential special schools as a new regulated service in its own right – *special school residential services*.

7. Options

Two options have been considered in the analysis of the costs, risks, and benefits. The options are:

Option one: Do nothing

Under this option, there will be no new stand-alone regulation to define the *special school residential service* resulting in this service not being brought into regulation under the 2016 Act.

Option two: Make new stand-alone regulation to define the special school residential service.

Under this option, the Welsh Government will define *special school residential services* and initiate the process of bringing the service into the registration, regulation, inspection, and enforcement regime.

7.1 Costs

Option one: Do nothing

Under this option there would be no costs to the regulator or the sector as this represents the “do nothing” option.

Option two: Make new stand-alone regulation to define the special school residential service

Under this option there would be no costs to the regulator or the sector as this option is defining the *special school residential service*. Costs will be incurred by the Welsh Government, specifically for CIW as the service regulator, only at the point the *special school residential services* are brought into the registration, inspection, and enforcement regulations.

7.2 Risks

Option one: Do nothing

As this is the “do nothing” option the NMS for Residential Special Schools will be retained, and CIW not provided with the enforcement powers to deal with a failure by a service provider. The service providers will continue to be inspected against a minimum standard which is not consistent with the broader policy direction on regulation and inspection established under the 2016 Act. This option will not respond effectively to the Inquiry recommendation and may have unintended consequences for the on-going quality of services and the outcomes for children staying at the services. This may have reputational consequences for the Welsh Government.

Option two: Make new stand-alone regulation to define the special school residential service

There is a minimal risk the definition of the *special school residential service* overlaps with existing regulated services such as care home services or has unintended consequences of bringing other services into regulation such as boarding schools. To mitigate the risk, meetings with the existing service providers and stakeholders have been held to establish the characteristics of their distinctive service provision, and links have been made with education policy leads in Welsh Government.

7.3 Benefits

Option one: Do nothing

No significant benefits have been identified in relation to this option.

Option two: Make new stand-alone regulation to define the special school residential service

Under this option, the definition enables clarity and distinction between other care services defined under the 2016 Act and education services. The Welsh Government can bring *special school residential services* into the scope of registration, regulation, inspection, and enforcement processes. This will establish a more consistent approach to the registration, regulation and inspection of services looking after vulnerable children for short or extended periods. The regulatory regime focuses on the quality and safety of care and support, and the individual’s well-being and outcomes which will have a positive impact on children staying at the service and the overall quality of service provision.

This option responds to the Inquiry recommendation “...*the Welsh Government should; require all residential special schools to be inspected against the quality standards used to regulate children’s homes in England and care homes in Wales;*”.

8. Competition Assessment

The competition filter test	
Question	Answer yes or no
Q1: In the market(s) affected by the new regulation, does any firm have more than 10% market share?	Yes
Q2: In the market(s) affected by the new regulation, does any firm have more than 20% market share?	Yes
Q3: In the market(s) affected by the new regulation, do the largest three firms together have at least 50% market share?	Yes
Q4: Would the costs of the regulation affect some firms substantially more than others?	No
Q5: Is the regulation likely to affect the market structure, changing the number or size of firms?	No
Q6: Would the regulation lead to higher set-up costs for new or potential suppliers that existing suppliers do not have to meet?	No
Q7: Would the regulation lead to higher ongoing costs for new or potential suppliers that existing suppliers do not have to meet?	No
Q8: Is the sector categorised by rapid technological change?	No
Q9: Would the regulation restrict the ability of suppliers to choose the price, quality, range or location of their products?	No

There are only four existing residential special schools which will be required to register as *special school residential services* and for the purposes of the filter test this means that the market share of two firms equals 50%. We do not consider it necessary to undertake a competition assessment for this Regulation since it will not have a detrimental effect on competition or affect the business or third sector in any significant way.

9. Post implementation review

CIW will monitor the implementation of these Regulations following their coming-into-force date of 31 December 2023.