

REGULATORY APPRAISAL

SOCIAL CARE, WALES CHILDREN AND YOUNG PERSONS, WALES

THE DAY CARE (APPLICATION TO SCHOOLS) (WALES) REGULATIONS 2005

Purpose and intended effect of the measure

1. These new regulations require that all schools must be registered under Part XA of the Children Act 1989 in respect of any day care (as defined in section 79A of the Children Act 1989) provided by them for children aged under eight years old.
2. Schools that will provide day care for the first time on or after 31 January 2005 must be registered as day care providers before they open for business.
3. Under transitional provisions, schools that commenced operation as day care providers before 31 January 2005 are required to apply for registration by 1 April 2005. As long as such existing providers make their application by 1 April 2005, they will not be treated as providing unregistered day care pending the determination of their applications.
4. The draft regulations will only apply to schools where the primary purpose of childcare provision is "looking after" children (as defined in section 79A of the Children Act 1989). As such, educational provision for under 8s which takes place during the normal school day where care is not identified as the primary function, will not be required to be registered or inspected by the CSIW in accordance with Part XA of the Children Act 1989. In addition, other activities such as the supervision of homework after school; out of hours learning; choir practice; and drama clubs will not generally require registration.
5. The introduction of the proposed new regulations will ensure that maintained and independent schools will be on an equal and similar regulatory position to those organisations involved in the provision of private and voluntary sector nurseries.

Background

6. Childcare provided by maintained and independent schools is currently exempt from the national minimum quality requirements imposed on other childcare providers under the Children Act 1989.
7. In this situation young children are potentially at greater risk of harm because of the lack of formal or statutory quality controls over schools' childcare facilities. Furthermore, because of the lack of formal inspection they are able to operate outside of these controls (for example, with ratios of fewer adults to children), and they may be able to reduce costs and therefore unfairly undercut their

competitors in the childcare market who are subject to regulation and inspection to meet the Children Act requirements.

8. For Children in non-school settings, the registration and inspection process is based on an assessment of compliance with The Child Minding and Day Care (Wales) Regulations 2002 and the corresponding National Minimum Standards for under 8s Day Care and Childminding. There are currently up to 23 Standards that set out minimum quality requirements which childcare providers are required to meet. By lifting the current schools' exemptions, childcare facilities in independent and maintained schools would be required to meet the same standards.
9. Up until September 2003, the exemption had in practice only applied to independent schools, as the law did not allow maintained schools to run their own childcare provision unless such provision was part of the school's activities. However, by virtue of Section 27 of the Education Act 2002, governing bodies of maintained schools are themselves able to provide childcare facilities.

Risk assessment

10. Since the introduction of childcare regulation under the Children Act 1989 the risk of harm to children being cared for in settings outside their own home has been reduced. Local authorities have developed standards, based on guidance under the Children Act, and although these have been variable, they have imposed a quality baseline for all providers. Even greater consistency in the minimum quality threshold has now been achieved as the responsibility for childcare regulation has been transferred from the 22 local authorities to CSCIW, and The Child Minding and Day Care (Wales) Regulations 2002 and the corresponding National Minimum Standards are being applied in place of the local standards used previously.
11. Schools have previously been exempt from these requirements. The Welsh Assembly Government's objective is to ensure that children using childcare facilities in schools are given the same level of protection as those in other childcare settings and that all settings are operating on the basis of the same minimum quality level. It could be argued that the risk of children coming to harm is in any case lower in schools because their activities are monitored in other ways and such risks are managed as part of their normal business.
12. The current inequality of treatment whereby the Children Act regulation is applied to private and voluntary sector nurseries but not to maintained and independent schools also brings with it the risk of unfair competition. Private/voluntary sector providers are concerned that schools not subject to the same level of regulation may be able to operate at lower costs, charging the consumer lower prices. This unfair competition could be such as to deter potential providers from entering the childcare market and to threaten the viability of existing providers. This, in turn, puts at risk the expansion that lies at the heart of the Welsh Assembly Government's childcare strategy and the achievement of Assembly targets for more childcare places. The Welsh Assembly Government's objective is to

reduce this risk of unfair competition by making a more “level playing field” as far as regulation is concerned.

Options

13. The advantages and disadvantages of maintaining the status quo (i.e. continuing the exemption for schools from the Children Act arrangements for childcare regulation) have been looked at carefully. However, in doing nothing the current level of risk would be maintained, in terms of children’s welfare, and would continue to give preferential treatment to schools in terms of the requirements of childcare regulation.

14. In view of this, the following 2 options were considered–

Option 1- Make regulations in order to apply the National Minimum Standards and supporting criteria to schools without modification using the procedures and sanctions available under the Children Act;

Option 2 Apply the National Minimum Standards to schools, in a modified form that recognises their particular child-related business, but still using the procedures and sanctions available under the Children Act.

15. Option 2 would allow a degree of flexibility and sensitivity to the particular needs of schools. However, it would create an inconsistency of approach between childcare provided by the voluntary or private sector on the one hand and schools on the other. This would be contrary to the Assembly Government’s policy to encourage a diversity of provision and equity between different sectors.

16. We therefore believe Option 1 is the best way forward.

Benefits

17. As indicated above, the objective of the proposed regulations is to produce a more equitable system so that all childcare providers are treated equally as far as the regulatory requirements are concerned. We recognise, however, that childcare providers range from self employed childminders operating on their own, to large nursery chains with considerable administrative and technical backup facilities. The varying nature of childcare provision is acknowledged both in the National Minimum Standards, where different criteria apply to different types of settings, and in CSIW’s processes, so that, for example, the length of the inspection is proportionate to the size of establishment, the number of children being cared for and the length of time it is operating. As with other settings, CSIW will have discretion to ensure that regulation is proportionate.

18. The most significant benefits of the regulation of childcare facilities in schools would be the achievement and promotion of basic minimum standards for quality of care, and the consequent reduced risk of harm to young children. The sanctions that can currently be applied where

quality of childcare is unacceptably low are limited. The Children Act arrangements would provide better protection for children. It is not possible to quantify this benefit in terms of reduced incidence and impact of harm caused to young children as there is no data available to compare incidence or risks before and after the Children Act was introduced.

19. A more “level playing field” would increase fair competition in the childcare market. This would potentially create more childcare places, in accordance with Welsh Assembly Government targets for the expansion of the market, as new providers might be encouraged to set up childcare provision in areas they may not have otherwise considered. However, such increases may be counter-balanced by the fact that some independent schools may no longer wish to provide childcare. Fair competition will also create more choice for parents, particularly those who may be concerned about the quality of care in schools. Applying the National Minimum Standards without specific concessions for schools would guarantee minimum quality across the different types of childcare settings.

Costs

Independent Schools

20. Independent schools that are already meeting the majority of the National Minimum Standards will incur minimal costs in meeting the required minimum standards. However, it must be acknowledged that some schools will incur costs in meeting some of the standards, in particular, staff ratios, qualifications and space requirements, although this would be a sign that their provision was of unacceptably low quality.

21. Higher costs may lead to the closure of provision or costs being passed on to parents. We have considered this risk and take the view that a more competitive environment will, in the longer term, encourage more providers into the market because they will have a fairer environment in which to operate. In addition, cost should not compromise the safety and well-being of children.

22. The main focus for the Welsh Assembly Government’s expansion objectives is disadvantaged areas, where any adverse impact on independent school provision would have a minimal effect. Independent schools are less likely to be operating in such areas where, typically, the voluntary and public sectors play a greater role.

Maintained schools

23. Governing bodies of maintained schools have only themselves been able to provide childcare facilities since September 2003 and the Community Focused Schools National Assembly for Wales Circular No: 34/2003 issued on 15 December 2003 advised schools planning to set up such provision to take account of the National Minimum Standards. The community focused schools

guidance deals specifically with some of the standards which imply costs, for example, space requirements, staff ratios and qualifications. As such, it is envisaged that the total policy costs for maintained schools would be minimal.

Competition Assessment

Competition Filter

24. There are 62 independent schools in Wales and 1924 maintained schools in Wales, of which 1724 are nursery, infants or primary.
25. It is accepted that some of the costs of the proposed regulation will affect a number of schools, particularly those in the independent sector, substantially more than others. The factors that will influence costs will include the existing standards of unregulated day care provision; type of day care provision; and the size of the individual schools involved.
26. One of the aims of the proposed regulations is to provide a more 'level playing field' for existing and potential organisations seeking to deliver a high quality childcare service which will contribute to the Welsh Assembly Government's targets for expansion of childcare places.
27. It is also accepted that regulation could lead to higher set up costs for some schools wishing to provide childcare in the future, however this will bring parity between schools and other potential organisations wishing to set up childcare provision.

Small Firm Impact Test

28. Most childcare providers would be classed as small businesses. Although there is a danger of a small number of independent schools closing provision, it is felt that the proposed regulation would bring equality and consistency across settings, and equity between the statutory school settings and small businesses.

Consultation

With Stakeholders

29. These regulations were subject to full public consultation between 28 May 2004 and 23 July 2004. Over 500 copies of the consultation document were distributed to schools and other interested parties in Wales (a copy of the distribution list is attached). None of the 17 consultation responses received were in disagreement with the regulations. A summary of the responses is attached.
30. The draft Regulations sent out with the consultation document (28 May 2004 and 23 July 2004) were amended to reflect more closely the policy intention set out in the consultation document. This amendment clarifies the circumstances in which schools will have to register with the Assembly. In order to avoid a challenge to the Regulations on the basis of the consultation process, the revised draft regulations were issued in

September 2004 to the original 500 consultees for clarification purposes. The revised draft regulations make it explicit that, where the main purpose of the day care is to look after children, other than in the course of providing them with education (i.e. the prescribed circumstances), the provision must be registered. However, where the main purpose of the day care is the provision of education, this will continue to be exempt. Of the 3 responses received, all were in agreement with the regulations and there were no adverse comments to the content of these revised draft regulations.

With Subject Committee

31. This Instrument was formally scrutinised by the Health and Social Services Committee on 3 November 2004 (item No.5). Members raised a point of clarification asking if I could confirm that before a school governing body becomes a provider of childcare that all relevant members of the governing body will need to be checked by the Criminal Records Bureau (CRB). (Notwithstanding the current situation where there is no requirement for all governing body members to be subject to CRB checks. We are still considering the desirability of CRB checks on all school governors in the normal course of their duties). The Minister confirmed that local authorities were responsible for monitoring and enforcing compliance. The Minister also added that issues around the role of governors in providing childcare under the regulations should be referred to the Review of Safeguarding Vulnerable Children. The Committee recommended approval of the Instrument without amendment.

Significant Costs

32. There will be costs to CSIW arising from extra registration and inspection activity with regards to schools. A small proportion of those costs will be recovered from the childcare settings through registration and inspection fees, though these at present only apply to full day care.

33. Our planning assumptions are based on a number of factors:

- There are currently 62 independent schools in Wales and 1924 maintained schools in Wales (of which 1724 are nursery, infants or primary).
- Clybiau Plant Cymru Kids' Clubs identified 523 school based childcare clubs already registered with CSIW, and 32 schools where it is known an application to CSIW will be made once these regulations are in place.
- In considering the impact of the regulations on CSIW costs, we need to estimate the marginal addition to the flow of registrations caused by schools having the new power. The availability of start up funds is a crucial factor in whether new provision is offered.
- At the same time, schools will have the advantage that management will be in the hands of the existing governing body, rather than relying on seeking volunteers for a new management committee.

- The likely impact was discussed at a meeting of representatives of the childcare organisations, and the consensus is that the impact of the new power will be marginal in the absence of new funding for childcare.

34. With these factors in mind, we made the following working assumptions:

- In 2004-5, we estimate 50% of the 62 independent schools will register childcare provision and 50 maintained nursery, infants or primary schools – 81 schools (comprising 31 independent schools and 50 maintained schools).
- In 2005-6, the remaining independent schools will register childcare provision and the rate of registration within maintained schools will then continue at 50 schools per annum. The first inspections will take place within 2005-6.
- On this basis, we estimate that within five years, a total of 312 schools across both sectors may register childcare provision, above the registration of new out of school clubs that would have occurred without the new regulations.

CSIW unit costs

35. The CSIW have produced unit costs of:

- £700 per setting for the year round business of inspection, reporting, complaint investigation and enforcement, once settings are registered. The matching annual fee to the provider is £95. However, this applies only to settings providing full day care – that is care for a continuous period of four hours or more in any day. If schools opt to provide only wrap-around care in the form of breakfast and after school clubs, there will be no fee. Nor will there be a fee if they provide only sessional care for pre-school children. And if they provide full day care – but do so only in the school holidays – again there will be no annual fee. At most, we consider only half of these settings would pay the fee.
- Experience suggests that the one-off business of registration will be twice as time consuming as the year-in-year-out involvement, once registration has taken place. This would give us a costing of £1400 per registration. The matching registration fee to the provider is £125, but again this would not be payable for wrap-around care, sessional care or holiday provision. Again, we assume that only half of the applications would pay the fee.

36. On the basis of our assumptions:

- In the first year registration would cost CSIW 81 schools x £1,400, a total of £113,400.
- In the second year again, registration would cost CSIW 81 schools x £1,400, a total of £113,400. CSIW would also have the first year's inspection etc. costs across the board, which would cost 81 schools x £700, or £56,700.
- In the third and subsequent years, registration would cost CSIW 50 schools x £1,400, a total of £70,000. Each year, the previous

registrations would be added to the inspection workload. So in year 3 this would cost CSIW 162 schools x £700 (£113,400), in year 4 this would cost 212 schools x £700 (£148,400) and in year 5 this would cost 262 schools x £700 (£183,400).

37. On this basis and assuming no turnover, our best estimates of the total cost to the CSIW for registration and inspection for each of the first five years would be:

Year	Registration	Inspection	Total
1	£113,400	£0	£113,400
2	£113,400	£56,700	£170,100
3	£70,000	£113,400	£183,400
4	£70,000	£148,400	£218,400
5	£70,000	£183,400	£253,400

Review

38. Regulation of childcare under the Children Act 1989 carries with it an effective enforcement regime, administered by the CSIW. Measures range from agreed action plans for improvement to legal proceedings in serious cases, for example where children are at immediate risk of harm.

39. The Child Minding and Day Care (Wales) Regulations 2002 and the corresponding National Minimum Standards for childcare were issued in April 2002. Arrangements will be subject to regular and continuing review based on the information collected by CSIW in the course of its regulatory activity and other evidence.

Summary

40. The Welsh Assembly Government is keen to ensure that there are proper safeguards for children being cared for in schools. This is now more pertinent in light of the new power given to governing bodies of maintained schools in the Education Act 2002 that enables them to provide childcare facilities for the wider community. In addition, we are also seeking to provide a high quality childcare service. As such, we are proposing to lift current exemption of schools from the regulatory requirements of Part XA of the Children Act 1989.

41. It is recognised that these proposals may have an impact on some independent schools whose provision is considerably different from the requirements of The Child Minding and Day Care (Wales) Regulations 2002 and the corresponding National Minimum Standards. The proposed regulations will only apply to those maintained schools that wish to take advantage of the new powers given to governing bodies under the Education Act 2002 to provide childcare facilities themselves.

42. It is therefore recommended that agreement in principle is given to these regulations being introduced for the reasons outlined above.