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Injection of clarity needed

Stalker, K. and Carpenter, J. and Phillips, R. and Connors, C.

The legal status of children who stay in hospital for three months or longer gives rise to considerable confusion among managers in social services and social work departments. And the number of young people affected is significant. NHS statistics for the year ending 31 March 2000 suggest that in England around 2,800 children aged 0-19 on admission were discharged after spending more than two months in hospital, as were more than 500 children in Scotland. (A small number of these would have been discharged as adults.)

A two-year study, commissioned by the Joseph Rowntree Foundation¹ and carried out by the universities of Stirling, Durham, Newcastle and York, investigated the numbers, characteristics and circumstances of children and young people with complex needs who spend long periods in health care settings. Interviews were conducted in England and Scotland with 11 social services or health managers responsible for these children.

The findings show a worrying degree of uncertainty about the position of young people who find themselves in a hospital or other health care setting for at least three months. One social services manager believed such children become looked after under the terms of the Children Act 1989. Another said children are not formally looked after but nevertheless receive the same services and safeguards as those who are. One Scottish social work manager did not know whether children going into health care settings for short-term (respite) care are looked after or not. And discussion with the research team's advisory group indicated that the confusion is not confined to our fieldwork areas.

So what does the law say? Strangely - since there is no clear reason why this should be so - the legal position differs north and south of the border. In England and Wales, under section 85 of the Children Act 1989, a health authority, NHS trust or local education authority has a duty to notify the responsible social services department when a child has been "provided with accommodation" for at least three months - or where it is intended this will happen. Local authorities then have a duty to find out if the child's welfare is being sufficiently safeguarded and promoted, and they must decide whether or not to make use of any of their welfare functions under the act. Under Section 86, residential children's homes, nursing homes and "mental nursing homes" have the same duty.

Scottish health boards, NHS trusts and nursing homes have the same duty, under section 36 of the Children (Scotland) Act 1995, to children in health care settings - but only if a child has not had, or is unlikely to have, contact with their parents for three months. The confusion north and south of the border may partly be due to the general wording of the legislation under the act, which requires them to "consider the extent to which (if at all) they should exercise their duties". This could mean anything from doing nothing to giving a child looked-after status. However, a child cannot become looked after simply because she has been in hospital for three months. This could

change if, for instance, the child is abandoned or abuse uncovered. Significantly, research from the US suggests more abuse takes place within hospitals than in family homes.²

Another reason for confusion may be that under other parts of the legislation, in both England and Scotland, children become looked after when they take a planned series of short-term care breaks, each lasting more than 24 hours, in residential or family settings. However, this rule does not apply to health care settings. This is presumably because, although disabled children do still undergo social admissions to hospital, this is generally recognised as poor practice - often a last resort when no other short break is available - and cannot be officially sanctioned.

There has long been concern about the legal status of children at residential schools - at least in England. In October 2001, the chief inspector of social services Denise Platt sent a letter to the Association of Directors of Social Services to clarify the position. This stated that, where social services were contributing to the cost of a placement, they were, in the Department of Health's view, providing accommodation under section 20 of the Children Act. Thus the child should be treated as looked after.

However, social services never pay for children to be in hospital, so it could be argued that this group remains unprotected. Yet if children spend long periods in hospital, surely they are entitled to the same standards of care and protection as young people in other settings. How can this be achieved?

Those with long-term illnesses or impairments are classed as children in need under both the Children Act 1989 and the Children (Scotland) Act 1995. This means local authorities must assess their needs if requested to do so by a parent or guardian. Children do not have a statutory right to have their needs met, but good practice indicates that services should be provided to meet identified need - albeit within reasonable resource levels. The research found that some health staff in English councils were not familiar with the framework for the assessment of children in need and their families. Joint training with colleagues in social services would help raise awareness and promote multi-agency working. Other research has shown that the latter is crucial to supporting families who look after children with complex needs at home.³

In some cases, the results of assessment may indicate that strong measures are needed to protect children and promote their welfare. Where their circumstances warrant it and the appropriate criteria are met - for example, where there are indications of abuse - then children with complex needs, like any others, should be taken into the looked-after system. In England this will occur through the courts, and in Scotland via the children's hearing system.

The research highlights a need for clarification, and perhaps strengthening, of existing law. Disabled children, and those with acute or chronic health conditions, must be treated in the same way as other children. In addition, those north and south of the border should enjoy the same levels of protection.

Who is responsible

Clare, aged 12, had been in a Scottish hospital for six months when we interviewed her mother. Clare's illness and the best treatment were still being investigated, and doctors had said she would be in hospital for another year.

The family lived 150 miles away, but Clare's mother had been staying nearby for most of the preceding five months. Clare did not have a key nurse. Her mother felt that social and recreational facilities for children in the hospital were limited and that Clare was missing her friends from home. A hospital social worker had helped the mother to arrange a medical appointment for herself, but the support on offer did not seem to go beyond that.

As Clare had a long-term illness, her mother was entitled to request a needs assessment, but the Scottish NHS trust had no duty to refer her to a social work department for that purpose - although, with the parents' agreement, it would be good practice to do so. Had Clare been in an English hospital, the NHS trust would have had a duty to refer her to the local authority to ascertain whether or not her well-being and safety were being adequately safeguarded. Because Clare's mother kept in constant contact, however, again there was no duty on the Scottish trust to act.

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