

The child's right to family and parental care during hospitalisation: Exploring legal obligations and policy standards for hospitals

P Mahery, LLB, LLM

Oliver Schreiner School of Law, University of the Witwatersrand, Johannesburg, South Africa

Corresponding author: P Mahery (prinslean.mahery@wits.ac.za)

All children are guaranteed the right to family or parental care in section 28 (1)(b) of the South African Constitution. This right also applies to hospitalised children who require support from parents and family during hospitalisation. The entitlements that stem from this right create various obligations for public and private hospitals. These include the obligation that hospitals should refrain from interfering with the hospitalised child's right to family and parental care, as well as their obligation to facilitate the enjoyment of this right in the best interest of all child patients. The effective implementation of existing and perhaps additional healthcare policy standards can assist hospitals in ensuring consistent and equal enjoyment of family and parental care for all hospitalised children.

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Everyone, including children, has the right to access healthcare services. This right is found in section 27(1) of the South African (SA) Constitution.^[1] As healthcare establishments, hospitals provide healthcare services in accordance with this Constitutional right. On the other hand, s28(1)(b) of the Constitution gives parents and family the Constitutional duty to care for and protect children in accordance with the child's rights to family or parental care.^[1] This article seeks to determine the extent, if any, of the duties on hospitals in respect of the child's rights to family and parental care while in hospital. It is argued that facilitating the child's enjoyment of family and parental care is in the best interests of children who have been hospitalised. This article also highlights ways in which hospitals could facilitate the enjoyment of family and parental care for child patients. This essentially requires effective implementation of existing national and international health policy standards, and an exploration of new policy considerations to advance the child's right to family and parental care during hospitalisation.

What does the right to family and parental care entail for the hospitalised child?

Every child (<18 years old) has the right to family care or parental care, as indicated in s28(1)(b) of the Constitution. Parental care includes care provided by biological parents, and family care includes care provided by extended family.^[2] However, despite the disjunctive framing of the right as a right to family 'or' parental care, these rights are not necessarily mutually exclusive in the life of a child. S28(1)(b) is ultimately aimed at protecting family life,^[3] and this should be understood to mean that a child's right to family care does not necessarily exclude parental care, and vice versa. Drawing on this view, the article continues on the premise that s28(1)(b) also entitles

children to a right to family *and* parental care, as has been alluded to in several cases.^[4-6]

The right to family and parental care is given substance through the provisions of the Children's Act No. 38 of 2005.^[7] Section 1 of the Act gives a broad definition of 'care' as it applies to all children. When applied specifically in the context of the hospitalised child, 'care' includes promoting the child's wellbeing, ensuring that the child's rights are respected and given effect to, guiding and assisting the child to make treatment or surgical decisions if the child is old and mature enough to do so,^[8] having contact and maintaining a relationship with the hospitalised child and generally ensuring that the best interests of the child are served during his or her stay in the hospital.

Parents and families are expected to fulfil these and other care duties in accordance with the child's right to family and parental care. This right must therefore be realised even and especially when a child is hospitalised. This is so because hospitalisation increases the vulnerability of children, and thus requires a heightened level of care and support from parents and family that will minimise the challenges faced by the child during the period of hospitalisation. The next section considers the relationship between the right to family and parental care and the right to access healthcare services.

Linking the right to access healthcare services and the right to family and parental care

First, it must be noted that children have a right to basic healthcare services under s28 of the Constitution. However, it is unclear whether inpatient hospital care falls within the scope of basic healthcare services, given that a 'package of basic healthcare for children' has yet to be formulated by decision-makers.^[9] Hence the focus on the broader right to access healthcare services in this section.

Hospitalisation can be used to demonstrate the relationship between the right to access healthcare services and the right to family and parental care. The provision of hospital services is a means to implement a child's right to access healthcare services so as to restore the child's wellbeing. However, parental and family care are equally important to the overall wellbeing of children.^[10] In the same way as hospital healthcare services are generally aimed at restoring good health, it has also been accepted that family plays an essential role in the recovery of hospitalised children.^[11]

According to the World Health Organization (WHO)'s constitution, 'health' is a 'state of complete physical, mental and social wellbeing and not merely the absence of disease or infirmity.'^[12] This means that when hospitals work towards securing the health of the hospitalised child, they must focus not only on the ailment itself, but must also have regard to the mental and social wellbeing of the child patient. Parents and family play a significant role in providing for the emotional and psychological needs of a child,^[13] especially during the child's hospitalisation. Children must therefore enjoy both the right to access healthcare services and the right to family and parental care during hospitalisation. However, the extent to which they will enjoy the latter right also depends on the existence of obligations on hospitals in relation to this right. This is further explored in the section that follows.

Obligations in relation to parental and family care during a child's hospitalisation

It must be made clear from the outset that the obligations that arise from s28(1)(b) are placed firstly and primarily at the feet of parents and families,^[14] who must provide the child with parental care and family care.^[15] It is not the duty of hospitals to provide the child with family and parental care. The essential question is, therefore, what are the duties of hospitals in relation to the hospitalised child's right to family and parental care? What follows next is a consideration of duties placed on public and private hospitals in respect of the child patient's right to family and parental care during hospitalisation.

Obligations prescribed for public hospitals

Section 7(2) of the SA Constitution^[1] obligates the state to respect, protect, promote and fulfil all the rights in the Bill of Rights. Public hospitals are organs of state and are bound by these obligations.^[16] What do these obligations entail for the right to family and parental care, and for public hospitals specifically? Based on Bilchitz's interpretation of the s7(2) obligations,^[17] it can be said that public hospitals are obligated to:

- respect the child's right to family and parental care by not arbitrarily interfering directly or indirectly with the child patient's enjoyment of parental and family care – for example, hospitals should not pass regulations or practice directives aimed at preventing or making it difficult for parents to visit their children in hospital
- protect the child's right to family and parental care by putting in place measures, such as policies and standards of practice, to prevent others (for example hospital staff or hospital administration) from unreasonably and unjustifiably interfering with the child's parental or family care during hospitalisation

- fulfil the child's right to family and parental care by actively facilitating the child's enjoyment of parental and family care, for example, through established visiting hours for family members
- promote the child's right to family and parental care by putting measures in place that could encourage the child's enjoyment of family and parental care during hospitalisation through, for example, family support programmes.

Notwithstanding these explanations of the s7(2) obligations in relation to the child's right to family and parental care, it must be noted that 'in law, context is everything.'^[18] The obligations in respect of the child patient's enjoyment of family and parental care must be fulfilled within the context of hospitalisation. This means that, for instance, the duty to fulfil the right to family and parental care could not possibly be interpreted to mean that parents and families can demand that they be present in the operating theatre so as to be with the child during surgery. Such a demand would be unreasonable and not generally in line with healthcare practices. Instead, what the obligation demands, in the context of hospitalisation, is, for example, that parental consent be sought before health services are provided to the child, in accordance with the consent provisions in the Children's Act.^[8] Non-compliance with the Children's Act provisions would then constitute interference with the child's right to parental care. The duties prescribed therefore require the hospital to take steps that are reasonable^[19] in order to meet the family and parental care needs of the child during hospitalisation.

The obligations of private hospitals are considered next.

Obligations prescribed for private hospitals

Private hospitals are non-state entities, and therefore do not have such extensive obligations as prescribed for public hospitals. This does not mean that they have no obligations at all. Section 8(2) of the Constitution indicates that private entities can also be bound by the rights in the Bill of Rights in certain instances. For example, the right to not be refused emergency healthcare^[20] has direct application to private hospitals, and they have a duty to give effect to this right.^[21,22]

The Constitutional Court has explained that the objective of s8(2) is 'to require private parties not to interfere with or diminish the enjoyment of a right.'^[23] This means that private entities have a duty to respect the rights of individuals, including the child's right to family and parental care. Section 8(2) therefore requires private hospitals not to interfere with the hospitalised child's enjoyment of this right. The explication and examples applicable to the duty to respect the right noted in the section for public hospitals above would thus also apply to private hospitals.

Obligations prescribed for both public and private hospitals

Section 28(2) of the Constitution indicates that the best interests of the child are of paramount importance in all matters that affect the child. Being hospitalised affects a child both physically and mentally, and therefore hospitals must approach the overall care of a child in a manner that would serve the best interests of the child. This should mean that hospital policies, administrative decisions and general

professional ethics of care must at all times be guided by the best interests of the child.

The best interest principle sets the 'benchmark for the treatment and protection of children.'^[24] The Constitutional Court has confirmed that private entities are also bound by s28(2), and that the section creates positive obligations.^[25] This means that all hospitals must be held to the standards of s28(2), and must actively put measures in place to safeguard the best interests of all children receiving inpatient care in their institution. Given the significant role of family and parents in ensuring the overall wellbeing of the child, it would be in the best interests of child patients for hospitals to put measures in place that would facilitate and promote the hospitalised child's right to parental and family care. Some of these measures are explored below.

Facilitating the child patient's right to family and parental care in hospital

It is clear from the sections above that both public and private hospitals have obligations in respect of a child patient's right to family and parental care during hospitalisation. In addition to the legal obligations that are binding on hospitals, existing health policies that create standards of care for health facilities should also be adhered to. The next section looks at ways in which national and international health policy standards could be used to assist all hospitals in facilitating a child patient's enjoyment of family and parental care during hospitalisation.

Promoting communication strategies and positive user experiences

The WHO has indicated that one of the standards to improve the quality of care for children is to ensure that 'communication with children and their families is effective, with meaningful participation, and responds to their needs and preferences.'^[26] Hospital policies should therefore promote communication strategies that allow for easy access to information for parents and family, and empower them to support the child in the recovery process.

Effective communication strategies can also promote positive user experiences for families of children who are hospitalised. A 2012 audit of health facilities in SA highlighted the low levels of positive and caring attitudes of health providers in health facilities, including hospitals.^[27] It has even been said that unprofessional and uncaring conduct by health practitioners has contributed to an increase in medical malpractice claims in the country.^[28] Poor attitudes from health providers can constitute a bar to child healthcare services,^[29] and are not in line with national policy that requires 'a positive disposition displayed by healthcare providers that demonstrate courtesy, human dignity, patience, empathy and tolerance.'^[30]

If hospitals were to effectively implement policies geared towards improving access to information for families, and promoting positive user experiences, they would be supporting parents and families in

their care duties towards the hospitalised child, thus facilitating the child patients' enjoyment of family and parental care.

Promoting contact between the hospitalised child and family

It has been established that hospitalisation creates anxiety and fear for children.^[31] There is therefore a need for hospitals to adopt child-sensitive health practices that limit fear, anxiety and suffering of children and their families.^[32] An example of a child-sensitive health practice, which promotes contact between the child and family, can be seen in the case study in Table 1.

Maintaining contact with a parent and family during hospitalisation is not only an essential component of that child's right to family and parental care, but as demonstrated by the study, it is also important for the child's recovery.

It is standard practice for hospitals to have visiting hours, and this clearly promotes contact between families and their hospitalised child. Contact could also be promoted if all hospitals facilitated overnight stays for parents, particularly in cases where it is impractical or impossible for them to make daily visits. Hospitals must have policies and guidelines for parents or guardians to stay overnight, and have available means to accommodate them with, for example, recliners, chairs or beds.^[33] The SA Health Facilities Guide: Neonatal and Paediatric Units^[34] not only requires sleeping areas for parents but even spaces where parents can prepare meals, do laundry and shower when children are receiving inpatient care. However, a recent inspection report shows that not all hospitals meet these healthcare standards.^[35] If not all hospitals comply with these prescribed standards, it creates inequality, as some child patients have more access to parental care than others.

It is accepted that hospitals (particularly public hospitals) function on limited budgets.^[27] However, it is in the best interests of hospitalised children to be able to have contact with a parent or caregiver throughout the period of hospitalisation. Given that parents and family contribute to the child's recovery, their presence can result in less time spent in hospital for the child. A reduced length of stay means fewer resources are used by the hospital.^[36] Ensuring accommodation for parents should therefore be considered an investment in the speedy recovery of children, which translates to saving expenses through early or quick discharge of the child patient.

If hospitals make concerted efforts to implement existing policies, it will advance the rights of the child patient to family and parental care. However, the creation of policies that more directly speak to family-centred healthcare might also guide hospitals on how to facilitate the child's enjoyment of family and parent care during hospitalisation. This is further discussed below.

Developing new policies

Existing policies do not appear to be centred directly and expressly on the needs of the child patient within a family context. Perhaps the

Table 1. Case study

A study by North *et al.*^[11] highlights the practice of a particular hospital in KwaZulu-Natal Province that allows mothers of children who are hospitalised to stay in the hospital throughout the child's hospitalisation. The hospital facilitates this stay by providing free meals for mothers, and beds so they can sleep with their children in the ward, and by using mothers to assist and care for the child during the treatment process. This study showed how the continued presence of mothers with hospitalised children made the children less likely to resist treatment, and reduced their anxiety.

production and implementation of family-centred healthcare policies could produce better results for the child's enjoyment of family and parental care during hospitalisation. The next section considers two policy approaches that could be incorporated and implemented in the SA healthcare system in order to directly advance the child patient's right to family and parental care while in hospital.

Family-centred care

Family-centred care is internationally regarded as an ideal method of care for children in hospital, and is applied in many countries.^[37] A family-centred approach to health is one that accepts the important roles of parents and families in the delivery of healthcare services.^[38,39] This model of care has been found to benefit the health of children,^[11,38] and applies the best interests of the child^[40] to the standard of care.

However, as is the case in other African countries,^[41,42] SA does not have a clear policy that guides the implementation of family-centred healthcare generally, or in hospitals in particular. There is also not much literature on family-centred care models in Africa.^[41,42] However, there has been a call for the incorporation of family-centred healthcare in the SA health system. Shung-King *et al.*^[43] advise that achieving a health system that is child and family centred requires efforts from the entire healthcare system, and not only those who work in child care programmes. Mckerrow *et al.*^[44] posit that the implementation of a family-centred healthcare system in SA would require its own workforce. This shows that a family-centred healthcare system requires strategic planning, which should be guided by national policy.

Elements of family-centred healthcare that would be addressed in such a policy would include, *inter alia*, ways in which to promote parental and family participation in the care of hospitalised children, and ways to formulate partnerships between the child patient, parents and families and the health professional. It would also consider ways to address health provider-patient ratios and high workloads, which have been found to be a barrier to effective implementation of family-centred care models.^[37,38]

A national policy on family-centred healthcare could serve as a comprehensive guide for all hospitals on how to provide healthcare services in a manner that advances the child patient's right to family and parental care during hospitalisation. Another policy consideration could be the creation of a Child Patients' Rights charter, as discussed below.

Developing a Child Patients' Rights Charter

Although the Patients' Rights Charter^[30] exists, its obvious limitation in relation to children is that it is not child-centred, and therefore fails to emphasise the unique context of children as patients. Healthcare policy-makers should consider the drafting of a Child Patients' Rights Charter comparable to that created by non-profit health organisations in other parts of the world. For example, the European Association for Children in Hospital has crafted a Charter of Children's Rights,^[45] and the Children's Hospitals Australasia with the Association for the Wellbeing of Children in Health Care produced a Charter on the Rights of Children and Young People in Healthcare Services in Australia.^[46]

These charters include specific provisions that speak directly to the right to family and parental care during hospitalisation. Examples of rights in the charter by the European Association include article 2, which gives hospitalised children the right to have a parent or

caregiver with them at all times; article 3 promotes participation of parents and the provision of accommodation for parents, and article 8 promotes the provision of services from healthcare workers who are skilled and able to respond to the needs of the child patient and their families. On the other hand, article 5 of the Australasia Charter provides impressively that 'every child and young person has a right to be nurtured by their parents and family, and to have family relationships supported by the service in which the child or young person is receiving healthcare.'^[46]

Creating and implementing such family-centred health policy documents in SA would demonstrate a commitment to promoting care services that are child-centred and dedicated to facilitating the child patient's right to family and parental care. The formulation of rights specifically for children in the healthcare system will reinforce the Constitutional obligations that hospitals have toward child patients, particularly in respect of the child's right to family and parental care during hospitalisation.

Conclusion

All hospitals are obligated to act in the best interests of child patients receiving in-service care in their facilities. Promoting the right to family and parental care during hospitalisation will serve the best interests of child patients. Hospitals should therefore put measures in place to ensure consistent and equal enjoyment of family and parental care for all child patients during the period of hospitalisation. These measures should include effective implementation of healthcare policies that advance the child's right to family and parental care during hospitalisation.

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