Shared Insights

Safeguarding Forum:

The challenges caused by disordered eating in education, health and social care settings

7 November 2023

Browne Jacobson

Introduction

The session was chaired by Browne Jacobson's Vicky Wilson, Senior Associate and specialist in education law.

We were also delighted to be joined by Sam Channon, Chief Operations Officer at West Sussex Alternative Provision College (APC), who spoke about the importance of collaboration between education and healthcare providers and Browne Jacobson's Ed Pollard, Partner in the Inquest and Advisory team.

Legal Background

This is a sensitive and complex topic. Often the application of the law, policy and practice will depend on specific facts and the individual at the centre of a case. Vicky explained that much of the work we do at Browne Jacobson with schools and colleges around safeguarding, is about putting the right scaffolding around a child or young person to support their educational and pastoral needs – this will require use of all the tools in the box including solid policies, trained and skilled members of staff, external sources of support as well as regular monitoring and review of all of these things to ensure they are effective.

It is recognised that eating disorders present in a range of settings, including primary and secondary healthcare; social care; and education. The importance of co-ordination of care between the services involved is recognised in guidance across these sectors.

NHS definition of an eating disorder

"An eating disorder is a mental health condition where you use the control of food to cope with feelings and other situations… Anyone can get an eating disorder, but teenagers between 13 and 17 are mostly affected."

Statutory safeguarding guidance for schools

Keeping children safe in education 2023

- Schools can and are expected to be aware of mental health problems, through indicators from the child or those around them in their day to day observations and interactions with children.
- Only appropriately trained professionals should attempt to make a diagnosis of a mental health problem.
- Education staff – spot and escalate in line with Child Protection Policy

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Legal background – Statutory guidance, consent, capacity and parental responsibility

Vicky Wilson, Senior Associate, Browne Jacobson

- Role of school nurse
- There is a recognition that the need for mental health support is increasing – the DfE is providing funding to support a training programme for Senior Mental Health leads to support the whole school approach to mental health. Funding should be available by 2025.

Consent and confidentiality

There are three elements to consent:

1. Must have capacity
2. Must be acting voluntarily – not under undue influence
3. Must be appropriately informed

This applies to the individual or anyone giving consent on behalf of a child.

The legal position concerning consent and refusal of treatment by those under the age of 18 is different from the position for adults. ‘Children’ refers to people aged below 16 and ‘young people’ refers to people aged 16–17.

With capacity

Young people are presumed to be capable of consenting to their own medical treatment, and any ancillary procedures involved.

If a child or young person is capable of giving valid consent, it is not legally necessary to obtain consent from a person with parental responsibility as well. It is best practice to involve the child’s family, but they may not consent to sharing their information. (NICE Guidance)

A decision to refuse treatment can in certain circumstances be overridden by either a person with parental responsibility or a court.

Lack of capacity

In the case of Gillick, the court held that children who have sufficient understanding and intelligence to enable them to understand fully what is involved in a proposed intervention will also have the capacity to consent to that intervention.

Where a child under 16 lacks capacity to consent (ie. is not Gillick competent), consent can be given on their behalf by a person with parental responsibility or by the court.

NB: it is less clear when there is a fluctuation in mental state and ability to consent (are they truly Gillick competent at the time); and

The level of understanding required for different interventions will vary considerably.

Other issues to consider in practice include:

- The duration of consent?
- What to do when consent is refused?
- Withdrawal of consent when it had initially been given?

Parental Responsibility (PR)

Some people acquire this automatically:

- the child’s mother
- the child’s father, if he was married to the mother at the time of birth
- fathers can acquire PR via a PR Order from the court
- the child’s legally appointed guardian
- anyone named in a residence order concerning the child
- a local authority designated in a care order in respect of the child

Legal background – Parental Responsibility and Information Sharing

Vicky Wilson, Senior Associate, Browne Jacobson

- a local authority or other authorised person who holds an emergency protection order

Foster parents do not automatically have parental responsibility.

PR can take a number of forms and essentially entitles the individual to have a say in important decisions relating to the child.

As only a person exercising parental responsibility can give valid consent, in the event of any doubt then specific enquiry should be made.

Consent given by one person with parental responsibility is valid, even if another person with parental responsibility withholds consent. However, the courts have stated that a 'small group of important decisions' should not be taken by one person with parental responsibility against the wishes of another.

Where persons with parental responsibility disagree as to whether something is in the child's best interests, it is advisable to refer the decision to the courts.

From a safeguarding perspective, the guidance Working Together to Safeguard Children 2018 covers situations involving parental consent where abuse or neglect is suspected. In such instances, practitioners should not necessarily rely on a parent's consent.

In an emergency, it is justifiable to treat a child who lacks capacity without the consent of a person with parental responsibility, if it is impossible to obtain consent in time and if the treatment is vital to the survival or health of the child.

Information sharing

There is a lot of unpicking that needs to be done before you can answer a simple question like: can I share this piece of information with this person or organisation?

- Who is the data controller?
- Who is the data subject and how old are they?
- What is the data about?
- Who is asking for/needs the data?
- Why does it need to be shared?

The seven golden rules to sharing information include the reminder that the Data Protection Act 2018 and human rights law are not barriers to justified information sharing, but instead provide a framework to ensure that personal information about living individuals is shared appropriately.

Health data is special category data under the UK GDPR and so you will need a lawful basis and a lawful condition for processing.

Lawful basis under GDPR could be:

- Consent; Contract; Legal obligation; Vital interests; public task; legitimate interests

Conditions for processing under DPA 2018 include:

- Health or social care purposes;
- Support for individuals with a particular disability or medical condition;
- Counselling; and
- Safeguarding of children or individuals at risk.

If there is intended to be regular sharing of information, is there an Information Sharing Agreement in place?

Conduct a DPIA (Data Protection Impact Assessment) when using new technologies and the processing is likely to result in a high risk to the rights and freedoms of individuals.

Legal Background – Access to information by individuals, Social Media, Counselling & Complaints

Vicky Wilson, Senior Associate, Browne Jacobson

Access to information by individuals (GDPR – Subject Access Requests)

Individuals are increasingly aware of their data protection rights and, in particular, their right to request copies of their personal information from organisations by making a Subject Access Request – either verbally or in writing.

As part of considering the response to any request, you should take into account the age of the child and whether they consent to the sharing of their information.

If an individual has Parental Responsibility and the child is under 12 years of age, the individual can request copies of the child's personal data without the child's consent being required.

A child can refuse to consent to their parent accessing their personal data under the UK GDPR and DPA 2018 if they have reached the required level of maturity, which is generally assumed to be aged 12 or over. Check what your Data Protection Policy and/or Privacy notice says – it could be 12 or 13. The policy should always be considered in light of the specific facts of the case.

There are exemptions to the right of access that apply to health, education, social work and child abuse data, although these must be carefully considered in context before they are relied upon.

Serious harm test - The ICO defines this as an exemption "from providing education data in response to a SAR to the extent that complying with the request would be likely to cause serious harm to the physical or mental health of any individual".

Under the legislation, you have one month to respond – "without undue delay and within a month from the date the request is received".

Can extend the deadline if complex or involves a large number of documents.

Social media

The Dove campaign earlier in the year demonstrated the negative impact social media can have on mental health and healthy eating habits. A young girl is given a mobile phone for her birthday and the video tracks her eating disorder journey from that point onwards.

Social media is now a part of our everyday lives, with limited control measures in place once people have access. It is important for schools to have clear policies on:

- Behaviour and Anti-Bullying – to identify and deal with any issues of bullying; and
- Acceptable use of technology/mobile phones.

Counselling

- Often a service provided in schools, but not necessarily by schools.
- Look at the arrangement in place and duties to share information
- Remember the limits of confidentiality

And finally…. Complaints

- Just a recognition of the number of complaints that schools are dealing with.
- Complaints addressed to schools from parents should be dealt with using the standard Complaints Policy and procedure in the first instance.
- You may need to consider the scope of a school's Complaints Policy – safeguarding issues may be expressly excluded from the policy's remit and it is only if there is a safeguarding issue and a pupil is in immediate danger that this would need to be expedited and alternative/external authorities involved.

The APC's perspective

Sam Channon, West Sussex Alternative Provision College

Sam explained her role at APC West Sussex where their medical provisions include an adolescent mental health unit and an eating disorder service. They also provide home tutors for young people who can't attend mainstream education for medical reasons. They work closely with social workers, parents, schools and colleges.

Sam shared her experiences of collaborative working between education and healthcare and some of the challenges experienced including:

- Data protection
- Consent
- Sharing of information
- Social media

APC is a school separate from the NHS and Sam sees their role as educationalists supporting the transition of a young person back into the community. Access to health information is required to provide the right education and support and for effective risk assessment.

Their education staff are experienced in clinical environments and able to interpret health records but there can be concern about what they are sharing and how to use that information. Data sharing agreements could be a good way to provide clarity on this.

Practical issues around communication can include e.g. young people being admitted in the evening and expected to attend education the next day. Admission to services brings consent issues such as whether they have capacity to consent and how to ascertain that. Generally speaking there can be a lack of understanding and lack of insight of data protection issues which can cause staff anxiety.

All children are different so it can be difficult to put prescriptive policies in place.

Social media access:

- APC have been supporting NHS Trusts in implementing policies on the use of social media/access to the internet for young people who are inpatients.
- Access to social media during school time can create issues. However blanket banning access in health settings is not necessarily the answer and could be more problematic than helpful if this is deemed too restrictive.
- Collaborative working with NHS teams including training for NHS staff - training for clinical teams on these issues is not always child-focused whereas APC's educational training is focussed on working with young people.
- Elements of training to be accessible by NHS staff:
  - When children have access to mobile phones they can access the internet, video things in school, it can cause data protection issues, bullying and result in parental complaints.
  - Strong union thoughts around the use of mobile phones in educational settings.

Practical steps taken towards collaboration

- Educational representation at ward rounds
- Being involved in planning for areas of improvement in mental health unit following CQC inspection
- Education and ward staff run morning and afternoon assemblies to allow pick up between teams at beginning and end of day
- Supportive relationship building between all teams
- Follow up of educational provision 6-8 weeks after patient discharge
- Development of educational programmes to support teaching practice
- Preventative support including when to speak to specialists in eating disorder clinics, language used by teachers and support of parents, recognising that educationalists often have involvement long before healthcare providers.

The Advisory Lawyer's perspective

Ed Pollard, Partner, Browne Jacobson

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Ed explained that inevitably staff in the healthcare setting will focus on health; however it is important to think about patients holistically, ensuring both psychological and physical safety.

Capacity, Gillick competence and Consent

Adults, children and young people might have competence to make one decision but not to make another which makes it difficult to create policies e.g. a blanket policy that says "reaching x age means you have access to y" can be problematic as the application has to be bespoke for the individual and in the context of the decision to be made.

There has been a huge rise in the number of eating disorder cases, often occurring during the crossover period of moving up to adulthood. Patients are often extremely eloquent and capable, making it easy to assume they have capacity and competence' however we hear a lot about the "anorexic voice" and many experts have opined that this will 'take over' an otherwise capacitous persons decision-making ability around their eating disorder.

Deprivation of Liberty (DOLS)

- DOLs for under 16s are very difficult
- If those aged between 16-18 lack capacity to make a decision and restrictions to their liberty are attached, we have to go to the Court of Protection.
- If those aged between 16-18 have capacity/competence it can be difficult to place restrictions on them but the inherent jurisdiction may still be available.
- In a CAHMS setting, with those under 16, we frequently see the authorisation of DOLs by inherent jurisdiction.
- The court have not been able to define a black and white line as to when parental responsibility applies and when it does not. One example is the use of detention in schools which is a DOL but falls under parental responsibility (PR).
- Moving into more unique arrangements e.g. someone who must be monitored while they are eating their lunch, the line gets greyer – does that fall under PR or does that tip into a formal DOL and therefore require court authority?
- Re D gives helpful guidance about the 'zone of parental responsibility' - Think about the 'normality' of the restriction
- Educational establishments must take care to consider any restrictions being imposed, how they are lawfully applying them and whether their extent necessitates court involvement.
- Give thought and consideration about why the restrictions are in place, how they are measured and whether they are the least restrictive possible.

Social media

There can be an inclination to remove phones but doing this in a blanket way is likely to breach Article 8 rights. Consideration has to be given to whether it is detrimental to remove contact as there may be some young people who are heavily reliant on the contact social media provides.

Discussion

How we can help

Risk assessments

- Where they should be placed or supervised.
- How good is the risk assessment that is undertaken?
- Is the risk assessment by a school, a healthcare organisation or a mix of both?
- Move away from tick box forms. These can be really good reminders of points to consider but they also need to demonstrate adequate assessment/consideration has been given.
- A signed consent form that has not been completed properly is not valid consent.
- Be mindful that measures must be justified and be the least restrictive we can be to assist that young person.

Discussion

We discussed a number of topics, including

- Practical examples of collaboration (see page 5)
- The impact of delays and waiting lists for CAMHS particularly since COVID and the reliance on the education sector to provide support in the interim
- The need for training of school nurses to be in a position to have a greater input on mental health support.
- The importance of early intervention
- How to support children with a medical condition, with regard to their transition to other settings, i.e. the creation of a healthcare plan to ensure that support and care is continuous.

How we can help

This session covered a number of complex legal topics. Our contact details are on the next slide if you would like to discuss a particular issue or case.

We also have resources and training packages that you might be interested in, including:

- Complaints Management Support Pack https://www.brownejacobson.com/products/complaints-management-support-pack
- Complaints Management CPD course *New* https://www.brownejacobson.com/products/complaints-management
- Safeguarding training courses https://www.brownejacobson.com/services/health-and-social-care-disputes/child-protection-and-safeguarding-in-schools
- DPO training courses https://www.brownejacobson.com/products/data-protection-officer-cpd-programme
- Retainer services for schools:
  - Quick Call and MAT Partner Plus: https://www.brownejacobson.com/products/quickcall-education;
  - https://www.brownejacobson.com/products/mat-partnerplus

We are also happy to provide training on

- Deprivation of Liberty
- Consent/Gillick Competence
- Court of Protection
- Inherent Jurisdiction

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