

Report

on an investigation into
complaint numbers 11 017 875, 11 017 876,
11 017 877, 11 017 878, 11 017 879,
11 017 880 and 11 023 439 against
Suffolk County Council

11 October 2012

Investigation into complaint numbers 11 017 875 to 11 017 880 and 11 023 439 against Suffolk County Council

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S30(3) Local Government Act 1974 requires that I report without naming or identifying the complainants or other individuals. The names used in this report are not the real names.

The complainants

Mrs H Ms B
Mrs L Mr L
Mr T Mr N
Mrs A

Report summary

Subject

RNIB complains for Mrs H and six others who are blind or visually impaired. Suffolk County Council paid for them to have RNIB's Talking Books Service. In 2010, the Council wrote to all those whose subscriptions it paid, saying it would no longer pay for the service because they had not borrowed 20 books in the previous year. Mrs H said this was unfair because the Council had not told her beforehand that she had to borrow a minimum number of books.

Finding

The Ombudsman found the Council acted with maladministration when it stopped the subscriptions. The Ombudsman found that:

- Before a public body decides to change policies or services, it should consider the likely impact of any proposals on disabled service users.
- Decision makers should also consider the need to promote equality of opportunity and to take account of disabilities, even where that involves treating disabled people more favourably than others.
- The Council did not consider equality issues when it decided to set a minimum usage retrospectively or when it stopped individual subscriptions.
- The Council wrongly thought it could assess the impact on individuals after it made the decision. But a number of court cases say that decision makers should assess the impact before the decision is made.
- The Council did not identify that it funded Talking Books under community care legislation. It should have used the social care complaints procedure for Mrs H's complaint. And it should have considered carrying out social care assessments for those whose subscriptions it stopped.

The Council's maladministration meant the complainants lost out on an opportunity to influence a decision affecting them and to have a say in what and how services are provided to them. They may have had opportunities to join in normal and important aspects of personal life, such as education and leisure activities, diminished.

Ombudsman's recommendations

The Council agreed to implement the Ombudsman's recommendations. It has updated its equality training and provided further training to its staff on the public sector equality duty and equality impact assessments. It will also reconsider its decision in each case having proper regard to its legal duties and will:

- Contact each of the 250 people whose subscriptions it stopped and assess the impact on them. It will then review the decision to stop funding on each person, bearing in mind the impact on them.
- Offer social care assessments to everyone whose subscription it stopped and reinstate it, if, following a social care assessment, there is an eligible social care need which a subscription could meet.
- Pay compensation equal to the value of the lost subscription to anyone who has the service reinstated.

Introduction

1. The Royal National Institute of Blind People (RNIB) complains for six blind or partially sighted adults (Mrs H, Mrs L, Mr T, Ms B, Mr L and Mr N) that Suffolk County Council's decision to stop paying their subscriptions for the Talking Books service was flawed because:
 - a. There was no consultation with those affected before the decision to stop funding;
 - b. The Council failed to have regard to its obligations under the Equality Act 2010;
 - c. The requirement to borrow 20 books a year was unfair because it applied retrospectively and did not take account of individual circumstances;
 - d. A Talking Books subscription might have been provided as an eligible social care need for some of those affected and, if so, a full assessment of need should have been carried out before stopping funding;
 - e. The Council failed to have regard to the duty to provide a comprehensive and efficient library service with reference to the needs of blind and partially sighted people;
 - f. The Council has placed a limit on the number of Talking Books subscriptions it will fund and has therefore fettered its discretion.
2. The RNIB also complains the Council did not deal with the complaint properly because:
 - a. It should have used the statutory adult social care complaints procedure, not its corporate complaints procedure;
 - b. No-one spoke to the complainants about their complaint, in particular, to explore whether there was good reason for not meeting the Council's minimum usage guideline;
 - c. The response to the complaint was a paper exercise based on correspondence already provided by its legal department.
3. Mrs A also complained to her MP about the Council's decision to stop her Talking Books subscription. Her MP referred her complaint directly to me without the RNIB's involvement.
4. During the course of the investigation, my Investigator has considered the complaint, correspondence between the Council and RNIB, including letters to and from the complaints and legal departments, the Council's response to enquiries and the complainants' social care records. My Investigator has

discussed the issues with the complainants' representative. All parties have seen a draft of this report and I have taken their responses into account. The Council has agreed to my recommendations, and I am grateful for this. I consider it to be in the public interest to publish this report, which sets out my findings.

Legal and administrative background

5. Councils are required to carry out an assessment of the care needs of individuals in their area who appear to qualify for community care services.¹ The state of a local authority's resources is irrelevant to this duty.² An assessment should identify needs and put them in one of four bands: critical, substantial, moderate or low. Statutory guidance³ tells councils how to decide which band a need should be in based on the level of risk to a person's independence if care were not available. Each council can decide, as a matter of policy, which band of needs it will meet by providing services or direct payments. Assessed needs in the bands that a council will fund are known as eligible needs. Suffolk County Council's policy is to provide or fund services to meet needs that have been assessed as being in the critical or substantial risk bands.
6. Councils may make arrangements for promoting the welfare of persons who are blind.⁴ They have a duty, where they consider this necessary to meet the needs of a disabled person, to arrange for the provision of, or assistance in obtaining wireless, television, library or similar recreational facilities.⁵ Councils also have a general duty to provide a comprehensive and efficient library service. In order to provide a comprehensive and efficient service, a council should *'have regard to the desirability of securing...facilities for the borrowing of books.... and other materials sufficient in number, range and quality to meet the general and any special requirements of both adults and children'*⁶
7. Councils must adhere to the public sector equality duty, to have due regard to the need to:
 - a. Eliminate discrimination, harassment and victimisation
 - b. Advance equality of opportunity between those who have a protected characteristic (including a disability) and those who do not
 - c. Promote good relations between those who have a protected characteristic and those who do not.⁷

¹ S47 NHS and Community Care Act 1990

² R v Bristol City Council ex parte Penfold [1998] 1 CCLR 315

³ Prioritising Need in the Context of Putting People First

⁴ S29 National Assistance Act 1948

⁵ S2 Chronically Sick and Disabled Persons Act 1970

⁶ S7 Public Libraries and Museums Act 1964

⁷ S149 Equality Act 2010 Act

8. The courts have decided these duties (above) must be clearly brought to the attention of decision-makers in public bodies. In a leading⁸ case, the courts gave guidance on how to interpret the 'due regard' which must be given to the equality duty when a public authority is making a decision. The judge said that:
 - a. The authority should be aware of the equality duty before it makes the relevant decision
 - b. The duty must be fulfilled before the decision is made
 - c. The decision-makers must exercise the duty 'with rigour and with an open mind'
 - d. The duty is continuing and cannot be delegated
 - e. There need not be a specific 'disability equality policy' document, but it must be possible to reference the decision to some documents. Otherwise the authority would not be able to show that it had considered all the relevant factors.
9. In a more recent case, the judge quashed a council's decision to restrict adult social care services. In that case, the council was aware of equality duties. But it had not carried out an assessment of the practical impact on those disabled people whose services would be cut. The council had considered how to address the needs of disabled people when it was making the decision. But this was not what the law said it had to do. First, it had to consider the impact of the proposal. Then, it had to ask whether a decision with that potential impact would be consistent with the need to pay due regard to the principles of disability equality.⁹
10. My role is to investigate complaints of administrative fault ('maladministration') or service failure by councils (and some other bodies) brought by or for individuals who claim to have suffered injustice. The Council has created a social enterprise which provides statutory services to adults in Suffolk who have sight and hearing loss. As it exercises a council function, I have jurisdiction over complaints about its actions.¹⁰ I refer to its actions as those of the Council.
11. Councils should normally be given the opportunity to investigate and respond to a complaint before I become involved. However, I do not always follow this rule, particularly where it is not reasonable to allow the council to provide a response first.¹¹ I have exercised my discretion to consider these complaints as I have been considering other cases raising the same issues.

⁸ R (oao Brown) v Secretary of State for Work and Pensions [2008] EWHC 3158 (Admin)

⁹ R (WM and others) v Birmingham City Council [2011] EWHC 1147 (Admin), Para 179

¹⁰ S25(7) Local Government Act 1974

¹¹ S26(5) Local Government Act 1974

12. Complaints about a local authority's social services functions are first made to it under the Local Authority Social Services and NHS Complaints Regulations 2009. Complaints about other council services have a separate corporate complaints procedure. Regulation 13 of the 2009 Regulations says councils should offer to discuss the complaint with the complainant at the time they acknowledge the complaint.

Investigation

The Talking Books Service

13. Talking Books is an audio books service provided by the RNIB on an annual subscription (currently £82), designed to meet the needs of people who are blind or visually impaired. The Talking Books come in a 'DAISY' (Digital Accessible Information System) format so most books fit onto a single CD. The subscription includes a DAISY player which is designed to overcome the practical difficulties blind people have using standard audio equipment. The player allows users to change CD or take a break without losing their place. Users can also bookmark a section or passage, skip easily to the right chapter or passage and customise the volume and speed.
14. The Council paid for 600 subscriptions to the RNIB for Talking Books. It funded some subscriptions for many years. The Council says that all recipients received an assessment of their needs at some stage. This was commonly after a referral from the hospital which diagnosed their sight loss.
15. In January 2011, the Council wrote to the complainants saying they had not been using the Talking Books service very often over the past year and so it would no longer be able to fund their subscriptions. It asked them to return their DAISY players to the RNIB. Mrs H complained to the Council. The Council told her a review of the Talking Books service was under way to see if it would continue to pay and meantime the Council had decided to set a temporary minimum usage of 25 books per year. This would continue until a final decision at the end of the current financial year.
16. The RNIB received complaints about the Council's decision and wrote to the Council about this. The Council responded in March 2011. It said:
 - a. The temporary minimum usage mentioned in its January letter was now 20 books instead of 25, and it would complete a full review by the end of March
 - b. Its libraries had different types of audio books for blind and visually impaired service users
 - c. The minimum usage was set in consultation with experienced members of the sensory team

- d. Recipients were only allowed to use the DAISY player to listen to Talking Books¹²
 - e. There were no plans to re-assess those whose service might be withdrawn because there were too many people and not enough staff available to do the assessments. If the Council assessed everyone who had the service withdrawn, it would have a negative impact on other service users
 - f. It would decide whether to complete an Equality Impact Assessment after the review.
17. The RNIB wrote to the Council in April, saying the 20 book minimum threshold was arbitrary, amounted to a blanket policy and that some people had good reasons for their limited usage. It asked the Council to reassess people to take into account their individual circumstances. The Council replied that it was not possible to carry out individual reassessments for resource reasons. It said the review was more complex than it first thought and that it would complete an Equality Impact Assessment after it made the decision. The RNIB then made a Freedom of Information Act request to find out how many audio books the Council held in its libraries. The Council provided details of the home library service and of the number of spoken word and print items in stock.
 18. In May, the Council told the complainants it was stopping their subscription because they had not borrowed 20 books in the previous year.
 19. The RNIB and the Council met in June. The Council said it originally agreed funding for each subscription following an assessment. Some people had moved out of the county and others were no longer using the service at all. The Council had stopped paying their subscriptions. So the number of subscriptions had reduced from 600 to 350. There was now a waiting list for the service.
 20. Following further correspondence, the Council's legal department said an Equality Impact Assessment was unnecessary; there was no statutory obligation to fund Talking Books and any duties it had under the Chronically Sick and Disabled Persons Act 1970 were met by the spoken items available in public libraries.
 21. The RNIB made a formal complaint using the Council's adult social care complaints procedure in October. But the Council dealt with the complaint through its corporate complaints procedure instead because it said the complainants were not receiving social care services. The Council's response to the complaint did not say anything new. The RNIB complained to the Ombudsman in January 2012.

¹² The player can be used to play other types of audio material

The complainants

22. The Council says each of the complainants had an individual assessment of their needs.
23. In Mrs H's case, the assessment does not appear in the Council's computerised records. The subscription seems to have been agreed after she requested it, rather than following any formal assessment of her needs. The records show Mrs H received Talking Books from 2006. She says she used the service to read cookery books and the Bible (where DAISY formatting is particularly important). She finds the formatting and packaging of other audio books very difficult to use, for example she says one standard audio book from the library had 20 CDs. She had a 6 month gap where she did not use the service because she moved house, although in previous years she borrowed over 20 items.
24. Mrs L received Talking Books from February 2006. There does not appear to have been an assessment of her needs, but she requested the service and the Council agreed to fund it. Due to family illness and caring responsibilities, she did not use the service between April and October 2010. She borrowed 19 books in the relevant period (only one short of the required minimum) and 22 books the year before. Mrs L struggled using a non-DAISY player and now pays for the subscription herself. She borrowed more than 20 books in 2011.
25. Mr T is Mrs L's father and is in his eighties, is blind and also has hearing loss. His wife died during the period the Council imposed the 20 book minimum usage. He now pays for the service himself. Mr T had an assessment in April 2010. This noted his daughter helped him with shopping and housework, he had poor mobility and balance and did not go out on his own. He needed to hold on to another person's arms to be guided. He could not read correspondence and received frozen meals.
26. Ms B moved house during the relevant period and was studying with the Open University. The records indicate she had assessments and services provided by the Council previously, including Braille classes and long cane training. She also subscribes to Talking Books privately now.
27. Mr L is a student. He only borrowed 2 books over the relevant period, but one of them was an essential reference text for his course. It was only available in audio format from RNIB. He also used his DAISY player to listen to a DAISY version of the Bible every day. Mr L had an assessment of need in 2007 and received 4 hours per week support from a support worker to enable him to complete shopping tasks and deal with correspondence. This enabled him to stay independent and to rely less on his wife who looked after their two children. Mr L also had route familiarisation training in 2008 and 2009. Support stopped following a review in 2010; the records indicate Mr L agreed to this.

28. Mr N had a subscription from 2003. An occupational therapist carried out an assessment in March 2011 to advise on equipment that would help him to maintain his safety and independence in the home. There was no reference to Talking Books in the assessment. Mr N only borrowed 14 books during the relevant period. His wife is also blind.
29. Mrs A works as a Library Manager for the Council. She has not had a social care assessment, but received a subscription for several years. She has been registered as partially sighted since 1990 and says the Talking Books service was invaluable to her. She was an avid reader until 18 months before the Council withdrew funding. During this period, she was unable to read as much because her husband was ill. She says she would have borrowed more books if she had known the Council had set a minimum usage. Mrs A is professionally and personally qualified to comment on the alternative reading provision available at no cost to blind and partially sighted people in Suffolk. She says the spoken word CDs available in the library are limited in number compared with the large RNIB catalogue. The CDs scratch easily and often have to be taken off the shelves. Also, they are available for everyone to borrow and so blind and visually impaired readers have to compete with the general public to borrow them. Mrs A says the e-books on the Council's website have to be read on an e-reader, which she could not use without her husband's help. She comments that those without a computer and assistance from others would not be able to use this service.

The Council's position

30. The Council's position is:
 - a. Initially, the Council said it only funds Talking Books for those people for whom losing the ability to read has had a significant impact on their life and has increased their isolation. They will have been a keen reader and will find this hobby particularly difficult without the service. The Council now says this comment was accurate and the service may be purchased in response to a need identified in a social care assessment in accordance with Fair Access to Care procedures.
 - b. It fulfils the duty to provide a comprehensive and efficient library service to those with visual impairment by providing large print and spoken word formats, including e-audio books. Housebound customers can use the mobile library service. There are no hire charges for any of these services.
 - c. Rehabilitation Officers carry out a specialist assessment focusing on mobility, safety and independence. Rehabilitation programmes address social care needs.
 - d. All disabled people are entitled to an assessment. All the assessments by the Council are in line with statutory requirements.

- e. There is no cap on the number of subscriptions.
 - f. People do not have to borrow a minimum number of books to receive a subscription – the 20 book minimum was only temporary during the review.
 - g. No-one's health or well being has been adversely affected by the decision.
 - h. The lead complainant (Mrs H) was not receiving social care services and so was not eligible to use the social care complaints procedure.
31. The Council says there are another 250 people whose subscriptions it stopped at the same time as the complainants. None of these people have made a formal complaint to the Council.

Conclusion

Findings: Maladministration

No consultation when setting the minimum book use

32. When reviewing the funding of Talking Books, the Council decided it would look at how many books people had borrowed over the previous 12 months. If they had borrowed more than 20 books, the Council would continue to fund the subscription. The Council set the 20 book threshold without consultation and then applied it to the previous year. So those affected did not know in advance and were unable to influence the 'rules' by which their borrowing would be judged. The complainants lost out on an opportunity to influence the decision-making process. The minimum use rule was applied retrospectively and in a way which failed to take account of individual circumstances. This was maladministration.

Failure to follow the legal duties in the Equality Act 2010

33. The Council did not tell the complainants about the minimum use in advance, or that it proposed to stop their subscriptions if they did not borrow enough books. The only information the Council considered when it made the decision to stop funding a person's subscription, was the number of books they had borrowed in the previous year. Because the Council did not carry out any consultation, it had no information about the likely impact of the decision on the complainants. It was wrong for the Council to say that an impact assessment could be carried out after the event: case law stipulates that this should be done before making the decision. I consider the Council failed to have regard to the public sector equality duty. In particular, the failure to carry out individual consultation and an assessment of the individual impact was maladministration.

Failure to identify people who may need social care assessments and be eligible for social care services

34. A Talking Books subscription might be one way of meeting an eligible social care need. For example, if an assessment of need found a person to be at critical or substantial risk because they could not access or be involved with learning, then the Council would have an enforceable duty to provide services or a direct payment. The person could use the payment flexibly, for example towards a Talking Books subscription to read their course text books, as Mr L did. I have no power to direct the Council to provide community care services to an individual. That decision is for the Council to take following an assessment of need and application of the eligibility criteria. But the Council is required to carry out a social care assessment for those who appear to it to require community care services. The threshold for a social care assessment is low. The Council said that cost meant it was unreasonable for it to assess each person receiving a subscription before stopping it, but a council cannot use a lack of resources as a reason for not assessing someone's social care needs. The failure to consider whether any of the complainants appeared to need community care services and if so, to offer them a social care assessment before stopping their subscriptions was maladministration.

Failings in complaint handling

35. These complaints concern statutory social services functions. The funding of subscriptions for the Talking Books service has been made under National Assistance Act powers or Chronically Sick and Disabled Persons Act duties, in most cases following a sensory assessment. I am therefore satisfied the Council should have used the adult social care complaints procedure. It was maladministration to use the wrong complaints procedure.
36. The social care complaints regulations say that a council should offer to discuss the complaint with the complainant or their representatives. The RNIB met with council officers to discuss the review of Talking Books. But that meeting was not part of the complaints procedure. There was no discussion with Mrs H or her representative in response to Mrs H's complaint. The Council's response to Mrs H's complaint was superficial. It failed to address the issues her representative raised and repeated the arguments already put forward in previous correspondence. The failure to discuss Mrs H's complaint with her or to provide a comprehensive response to the complaint was maladministration.
37. In response to a draft of this report, the Council says it was not given an opportunity to consider six of these complaints through its own complaints procedure. So it had no chance to remedy any injustice to those affected by its own investigation of their complaints. That is the case. Normally a council should have an opportunity to resolve a complaint before I become involved. But in this case, it was unlikely that the Council's own complaints procedure would

have been effective in achieving a remedy for the complainants. The issues involved in all seven complaints were identical and the Council failed to identify any fault in the one case it did investigate under its own complaints procedure. In these circumstances, it was not reasonable to give the Council an opportunity to investigate.

Findings: No Maladministration

Duties under the Public Libraries and Museums Act 1964

38. There is no specific duty to fund Talking Books as part of a comprehensive and efficient library service. And there is pressure on all council budgets. Councils are entitled to judge that Talking Books subscriptions would not be a desirable way of securing library services if there is another more cost-effective way of meeting blind and visually impaired library users' requirements. The Council offers other audio book provision and a mobile library service which it considers meets special requirements. I therefore consider the Council met the duty to *'have regard to the desirability of securing the provision of library services to meet particular special needs'* as required by law.
39. The 1964 Act also says a council should consider whether its library services have material in sufficient number, range and quality to meet the needs of blind and visually impaired service users. I have not taken a view on whether the current audio provision available to Suffolk residents who are blind or visually impaired is appropriate or not. That is for the Council to determine. I note that one of its senior library staff, Mrs A, has concerns about the quality and range currently on offer and the Council should give her views some weight.

No cap on subscriptions

40. The Council has explained that there is no limit to the number of subscriptions it will fund. I do not consider it to be at fault here.

No restriction on using the DAISY player for funded subscriptions

41. The Council said during the investigation that DAISY players may not be used to play anything other than Talking Books. The DAISY player makes it much easier for blind people to access information that sighted people might take for granted. It plays other types of audio material as well as RNIB's Talking Books. In response to a draft of this report, the Council has clarified that it never intended to apply this restriction on the DAISY player to people whose subscriptions it continued to fund following the review. I welcome this clarification.

Findings: Injustice

42. The consequence of the maladministration I have identified is that the complainants have not been treated fairly. They will rightly feel aggrieved that

they have lost out on an opportunity to influence a decision affecting them and to have a say in what and how services are provided to them. They may have had opportunities to join in normal and important aspects of personal life, such as education and leisure activities, diminished.

43. In response to recommendations in a draft of this report, the Council updated its equality training and provided further training to its staff, including those working for the social enterprise, on the public sector equality duty and equality impact assessments. The Council has also said it will:
 - a. Contact each of the 250 people (including the complainants) whose subscriptions have been withdrawn and assess the impact on them. It will then review the decision to stop the subscriptions to these individuals, bearing in mind the impact on them.
 - b. Offer to carry out social care assessments for everyone who has had their subscription stopped and reinstate it, if, following a social care assessment, there is an eligible social care need which a subscription would meet
 - c. Pay compensation equal to the cost of the 'lost' service to anyone who has the service reinstated.
44. I welcome the Council's decision to agree my recommendations. I consider this to be an appropriate remedy for the injustice caused. I have published a report about this complaint because it is in the public interest that councils are reminded of their duties.

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11 October 2012