

BEFORE THE STATE SUPERINTENDENT OF PUBLIC INSTRUCTION

In the Matter of Sherman County School District)	FINDINGS OF FACT, CONCLUSIONS, AND FINAL ORDER
)	Case No. 11-054-004
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)	

I. BACKGROUND

On February 15, 2011, the Oregon Department of Education (Department) received a letter of complaint from the parent of a student residing in Sherman County School District (District). The parent requested that the Department conduct a special education investigation under OAR 581-015-2030 (2011). The Department confirmed receipt of this complaint and forwarded the request to the District via email the same day.

Under federal law, the Department must investigate written complaints that allege violations of the Individuals with Disabilities Education Act (IDEA) and issue an order within sixty days of receipt of the complaint.¹ This timeline may be extended if the parent and the school district agree to the extension in order to engage in mediation or for exceptional circumstances related to the complaint.²

On February 18, 2011, the Department's complaint investigator sent a *Request for Response* to the District identifying the specific allegations in the complaint to be investigated and establishing a *Response* due date of March 4, 2011. The District submitted its timely *Response* to the Department and to the parent on February 25, 2011. The District's *Response* included a narrative response and documentary file containing IEPs, incident reports, meeting notices and minutes, discipline records, and other related student records. On March 11, 2011, the parent submitted a response to the District's *Request for Response* submission materials.

The Department's complaint investigator determined that phone interviews were required. On March 17, 2011, the Department's complaint investigator interviewed: educational assistants, the high school principal, a speech pathologist, an elementary special education teacher, a secondary special education teacher/special education case manager, an occupational therapist, and a general education teacher. On March 21, 2011, the Department's complaint investigator interviewed the parent.

The Department's complaint investigator reviewed and considered all of these documents, interviews, and exhibits in reaching the findings of facts and conclusions of law contained in this order.

II. ALLEGATIONS AND CONCLUSIONS

The Department has jurisdiction to resolve this complaint under 34 CFR §§ 300.151-153 and OAR 581-015-2030. The parent's allegations and the Department's conclusions are set out in the chart below. These conclusions are based on the Findings of Fact in Section III and the Discussion in Section IV. This complaint covers the one year period from February 16, 2010 to the filing of this complaint on February 15, 2011.

¹ OAR 581-015-2030(12) and 34 CFR § 300.152(a) (2011).

² OAR 581-015-2030(12) and 34 CFR § 300.152(b).

	Allegations	Conclusions
	<p>Allegations to be investigated. The written complaint alleges that the District violated the IDEA in the following ways:</p>	
1.	<p>Assistive Technology</p> <p>Failing to provide assistive technology devices or assistive technology services as required by the student's current IEP.</p>	<p>Substantiated.</p> <p>The Department concludes that the District violated the IDEA by failing to include assistive technology that had been recommended by members of the student's IEP team.</p>
2.	<p>Content of IEP</p> <ul style="list-style-type: none"> a) Failing to provide periodic reports on the progress of the child that would enable the parent to assess the student's progress in meeting annual and educational goals; b) Failing to include appropriate assistive technology devices or assistive technology services in the student's IEP as required as part of the student's special education; and c) Failing to include a statement of the specific special education and related services and supplementary aids and services to be provided to the student and a statement of the program modifications or supports for school personnel that will be provided for the child. 	<p>Substantiated, in part.</p> <ul style="list-style-type: none"> a) The Department does not substantiate the allegation that the District failed to provide periodic reports on the progress of the child that would enable the parent to assess the student's progress in meeting annual and educational goals. b) The Department concludes that the District violated the IDEA by failing to include assistive technology that had been recommended by members of the student's IEP team. c) The Department does not substantiate the allegation that the District failed to include a statement of the specific special education and related services and supplementary aids and services to be provided to the student or a statement concerning program modifications or supports for school personnel.
3.	<p>When IEPs Must Be In Effect</p> <ul style="list-style-type: none"> a) Failing to provide special education in the areas of Math, Written language, and Reading in accordance with the student's current IEP; 	<p>Substantiated, in part</p> <ul style="list-style-type: none"> a) The Department concludes the District violated the IDEA by failing to provide special education and related services in the areas of mathematics and written language in accordance with the student's IEP. The Department does not substantiate this claim in the area of reading.

	<p>b) Failing to provide related services in the area of occupational therapy in accordance with the student's current IEP;</p> <p>c) Failing to implement the student's behavior plan in accordance with the current IEP; and</p> <p>d) Failing to inform each teacher of their specific responsibilities for implementing the student's IEP and the specific accommodations, modifications, and supports that must be provided in accordance with the student's current IEP.</p>	<p>b) The Department concludes that the District provided occupational therapy services consistent with the student's IEP. The Department does not substantiate this allegation.</p> <p>c) The Department does not substantiate the allegation that the District failed to implement the student's behavior plan in accordance with the current IEP.</p> <p>d) The Department does not substantiate the allegation that the District failed to inform each teacher of their specific responsibilities for implementing the student's IEP and the specific accommodations and modifications in accordance with the student's current IEP.</p>
	<p>Requested Corrective Action.</p> <p>Compensatory services for the student to include:</p> <p>a) 40 hours of Special Education instruction with a qualified instructor during Summer 2011; and</p> <p>b) A special reading summer school paid for at District expense.</p>	See <i>Corrective Action, below.</i>

III. FINDINGS OF FACT

1. The student is a resident of the District, is 13 years old, and is eligible for special education services as a student with a specific learning disability and a communication disorder.
2. On April 1, 2009, the student was evaluated by professionals from three disciplines at the Oregon Health and Sciences University ("OHSU") Leadership Education in Neurodevelopmental and Related Disabilities ("LEND") Clinic. A progress report, dated April 1, 2009, from a special education/case coordinator states the student "would benefit from assistive technology and other supports to increase [] ability to access a general education curriculum." A separate report from the Psychology department at the LEND clinic indicates that the student "would benefit from working closely with a teacher who has specialized training in working with children with learning disabilities."
3. Recommendations from the April 1, 2009 OHSU evaluation suggest that the "information should be shared with members of the Individual Education Plan (IEP) team for consideration in determining [the student's] current abilities, needs, and eligibility for special

education" and that "[t]he team should define the modifications and accommodations that will assure [the student] receives a fair and appropriate education."

4. An Occupational Therapy Evaluation of the student, dated May 18, 2009, recommends the use of the "Handwriting Without Tears" ruled paper when appropriate for the student.
5. The student's IEP dated April 2, 2010 affirmatively states that the student needs assistive technology devices or services, and an occupational therapy summary in that IEP recommends the use of a paper that facilitates motor writing skills, such as the "Handwriting Without Tears" paper.
6. The April 2, 2010 IEP Service Summary reflects specially designed instruction in the areas of math, written language, and reading as occurring in a special education setting. It also reflects Related Services for an occupational therapy consult of 30 minutes monthly. Supplemental Aids/Services/Modifications/Accommodations include, but are not limited to frequent checks for understanding, dictate to scribe, frequent adult assistance, pair auditory with visual supports, wait/processing time, and breaking tasks into small steps.
7. A Prior Notice of Special Education Action, dated April 2, 2010, indicates that the student's transition needs from elementary to high school will be discussed at a later date and the meeting minutes indicate that this meeting will be held "later in May @ H.S. – need to discuss various programs (technology) that align with CDRC (Child Development and Rehabilitation Center) report."
8. Meeting minutes dated September 3, 2010 from a parent meeting reflect parental concerns related to general education inclusion potentially not meeting the student's needs and the parent's desire for one-to-one instruction.
9. The student's schedule for the 2010-11 school year was as follows:
 - 1st period is PE;
 - 2nd period is English taught in a special education setting and is devoted to reading, writing, and communication. The Orton-Gillingham program is used during this time period and is taught by a credentialed aide (Holds a Masters in Education);
 - 3rd period is Science taught in a general education setting although a special education aide is present;
 - 4th period is Math provided in a general education setting reported to be in a small class of 7 students along with a teacher and a special education aide;
 - 5th period is Social Studies in a general education classroom;
 - During the first term of the 2010-11 school year, 6th & 7th period were held in the resource room, and the time is used to provide assistance in areas of need.
 - Since the conclusion of the first term of the 2010-11 school year, 6th period has been held in the resource room, and the time is used to provide assistance in areas of need. 7th period is Technical Industry Skills provided in a general education setting.
10. On February 9, 2011, the parent sent a letter to the District expressing concerns related to an apparent regression in the student's skills, one-to-one instruction time, and teacher credentialing.
11. On February 14, 2010, the parent filed a complaint on behalf of her child.

IV. DISCUSSION

1. Assistive Technology

The parent's complaint alleges that the District violated the IDEA by failing to provide assistive technology devices or assistive technology services to the student as a part of the child's special education, related services, or supplementary aids and services.

The District, in their *Response*, states that “[t]here is no specific Assistive Technology tool or program listed in the IEP.” The District further states that “the student is allowed to access the computer to complete assignments if [the student] so chooses” and references the Speech Language Pathologist’s (“SLP”) iPad that has been periodically utilized when working with this student.

In the *Reply*, the parent confirms the District's contention that the IEP does not specify which, if any, assistive technology is to be used. The parent also asserts that it is the District's responsibility for determining the appropriate assistive technology and that this determination should be based upon prior evaluations at both the OHSU Child Development and Rehabilitation Center and the OHSU LEND Clinic. In short, the parent is alleging that the District has failed to include appropriate AT services and devices in the student's IEP, not that the District has failed to provide the student with access to AT services and devices included in the student's IEP.

Under Oregon law, the term "assistive technology device" is defined as "any item, piece of equipment, or product system, whether acquired commercially off the shelf, modified, or customized, that is used to increase, maintain, or improve the functional capabilities of a child with a disability."³ The law further defines "assistive technology service" as "any service that directly assists a child with a disability in the selection, acquisition, or use of an assistive technology device. The term includes, but is not limited to:

- Purchasing, leasing, or otherwise providing for the acquisition of assistive technology devices by children with disabilities;
- Selecting, designing, fitting, customizing, adapting, applying, maintaining, repairing, or replacing assistive technology devices;
- Coordinating and using other therapies, interventions, or services with assistive technology devices, such as those associated with existing education and rehabilitation plans and programs; and
- Training or technical assistance for professionals (including individuals providing education or rehabilitation services) who provide services to or are otherwise substantially involved in the major life functions of that child.”⁴

In *Letter to Anonymous*, 24 IDELR 854 (OSEP 1996); *Letter of Fisher*, 23 IDELR 565 (OSEP 1995); and *Letter to Naon*, 22 IDELR 888 (OSEP 1995) the United States Department of Education clearly states that school districts are required to provide assistive technology devices or services to a student with a disability if the student's IEP team determines that the student needs an assistive technology device or service in order to receive a free and appropriate public education.”

³ OAR 581-015-2000.

⁴ OAR 581-015-2000.

In order to resolve the issue of whether the District failed to include appropriate assistive technology in the student's IEP, the Department must determine if the student's IEP Team adequately considered the student's need for AT devices and services and whether the student's IEP reflected the student's AT needs. The Department concludes that the IEP Team properly evaluated the student's AT needs but that those needs were not adequately addressed in the student's IEP.

The 2009 OHSU evaluation of the student and the occupational therapist's evaluation of the student both made recommendations related to the use of AT devices and services. The Educational Summary and Recommendations of the OHSU evaluation states that the student "would benefit from intensive, specially designed instruction to address his reading, writing, and math skill deficits." The report further states that the student "would also benefit from assistive technology and other supports to increase [the student's] ability to access [the] general education curriculum." With respect to writing, the report indicates that the student would benefit from the use of dictation and keyboarding that would enable [the student] to access assistive technology and spell check capabilities. Specifically, the report identifies assistive technology in the form of writing software programs such as DraftBuilder, CoWriter, and WriteOutloud.

The student's April 2, 2009 occupational therapy evaluation also concluded that the student would benefit from assistive technology devices and services. The notes from the occupational therapist recommended the use of an assistive technology device referred to as "Handwriting Without Tears" paper. Additionally, the IEP meeting minutes reflect the team's intent to acquire and utilize the "Handwriting Without Tears" paper with the student.

Based on interviews with District staff and the parents, the Department concludes that the student had access to some AT devices and services during the 2010-11 school year. Specifically, the student had access to two on-line programs (Lexia and Starfall) for reading and word processing software with spell-check capabilities for writing. However, the student's access to these AT devices was not documented in the student's April 2010 IEP. The student's April 2010 IEP also failed to include access to the "Handwriting Without Tears" paper recommended in the 2009 occupational therapist's report and agreed upon at the April 2010 IEP Team meeting.

Therefore, the Department concludes that the student's IEP failed to include an appropriate statement of the AT devices and services necessary to increase, maintain, or improve the functional capabilities the student. The Department substantiates the parent's allegation that the student's IEP failed to provide access to appropriate AT devices and services.

2. Content of IEP

The parent's complaint alleges that the District violated the IDEA by: 1) failing to provide periodic reports on the progress of the child that would enable the parent to assess the student's progress in meeting annual and educational goals; 2) failing to include appropriate assistive technology devices or assistive technology services in the student's IEP as required as part of the student's special education; and, 3) failing to include a statement of the specific special education and related services and supplementary aids and services to be provided to

the student and a statement of the program modifications or supports for school personnel that will be provided for the child.

In the *Response*, the District stated that: 1) progress reports have been sent home quarterly; 2) the IEP lists no specific assistive technology tool or program; and 3) the IEP Service Summary page lists appropriate modifications and accommodations.

In the *Reply*, the parent acknowledged that the District does provide quarterly reports; however, the parent questions their efficacy at providing useful information concerning the student's academic and functional progress. In commenting upon the quarterly reports, the parent also notes that the reports record the student's performance on specific measures with prompting but do not reflect the student's performance without prompting.

Under Oregon law, the IEP must contain a description of how the child's progress toward meeting the annual goals will be measured and when periodic reports on the progress the child is making toward meeting the annual goals (such as through the use of quarterly or other periodic reports, concurrent with the issuance of report cards) will be provided.⁵ Materials submitted by the District and the parent reflect that periodic reporting that included grade progress reports, report cards, and progress reports from the Lexia reading program have been routinely generated and provided to the parent. The student's April 2010 IEP indicates that the District will report the student's progress though either written reports or conferences and that the reports will be provided with the District's general education progress reports.

Although the parent does not find value in progress reports that reflects a percentage of goal attainment, the nature of learning and the possibility that a student may exceed the goal one day and fail to meet it the next makes overall averaging a meaningful and reliable method for assessing student progress.

The parent also states that the student will meet some requirements when prompted but does not perform at an equivalent level without prompting. This is more an issue of appropriate service delivery than appropriate progress monitoring; the amount and frequency of prompting should be discussed by the IEP Team when determining which how special education and related services will be provided for the student.

The Department concludes that the District adequately recorded the student's progress and accurately reported that progress to the parent. Therefore, the Department does not substantiate the allegation that the District failed to provide periodic reports on the progress of the child that would enable the parent to assess the student's progress in meeting annual and educational goals.

Regarding assistive technology and services, the discussion is found in the assistive technology discussion above and need not be repeated. Consistent with that discussion, the Department substantiates the allegation that the District failed to provide the student access to appropriate assistive technology devices and services.

Finally, the Department is unable to substantiate the parent's final allegation concerning the content of the student's IEP – that the IEP does not contain adequate special education and related services, modification, accommodations, and supplementary aids and services. The

⁵ OAR 581-015-2200.

Service Summary page of the student's April 2010 IEP lists the following modifications and accommodations:

- Frequent checks for understanding;
- Dictate to scribe;
- Frequent adult assistance;
- Pair auditory with visual supports;
- Wait/processing time;
- Repeat/simplify directions;
- Break tasks into small steps;
- Preferential seating;
- Read assignments to student;
- Note taker; and,
- Calculator.

These modifications and accommodations, along with the specially designed instruction in math, reading, and writing, match the recommendations from the OHSU LEND Clinic evaluation summary reports. As noted above, the student's IEP failed to include all of the AT devices and services available to the student or agreed upon by the student's IEP Team; however, those deficiencies were addressed elsewhere in this order. With the exception of the inadequacies, the Department is unable to conclude that the District failed to include appropriate special education and related services, modifications, accommodations, or supplementary aids and services in the student's April 2010 IEP.

Therefore, the Department does not substantiate the allegation that the District failed to include relevant statements, based upon peer-reviewed research, of the specific special education and related services and supplementary aids and services that were to be provided to the student to advance appropriately toward attaining the annual goals.

3. When IEPs Must Be In Effect

Under Oregon law, school districts must provide special education and related services to a child with a disability in accordance with an IEP.⁶

The parent alleges that the District violated the IDEA by failing to provide special education and related services consistent with the student's current IEP. Specifically, the parent alleges that math, written language, and reading specially designed instruction and occupational therapy are not being provided according to the student's IEP. The parent also alleges that the student's behavior plan has not been incorporated correctly and that the teachers and aides are not adhering to the listed accommodations.

With regard to the allegations regarding service delivery, the parent points to the apparent overlap of times when two different courses are to be taught. The District's *Response* identifies the student's coursework for the 2nd, 6th, and 7th period as occurring in the resource room but does not identify the location of the student's 3rd, 4th, 5th periods classes. The District's *Response* identifies the 2nd period as English and 6th and 7th period as being used to provide assistance in the area of math and other areas where the student needs assistance. A detailed schedule of the student's instructional day was provided during interviews.

⁶ OAR 581-015-2220.

The IEP lists math specially designed instruction as occurring four times weekly for 50 minutes in a special education setting, written language specially designed instruction as occurring four times weekly for 50 minutes in a special education setting, and reading specially designed instruction occurring four times weekly for 50 minutes in a special education setting. The IEP also lists communication specially designed instruction as occurring two times weekly for 30 minutes in a small group setting. The listed Related Services reflect an Occupational Therapy Consult as occurring 30 minutes monthly.

The schedule provided by the District during interviews indicates that the District was not providing the student math specially designed instruction consistent with the student's IEP. Specifically, the District was providing the student's math instruction in the general education setting. Although math is listed on the IEP as occurring in a special education setting, the student's performance in the regular education math setting provides evidence that such a setting is not required. In *Van Duyn v. Baker School District*, 502 F.3d 811, 47 IDELR 182 (9th Cir. 2007), the court held that the failure to fully implement a student's IEP does necessarily result in a requirement for compensatory education. Only material failures to implement the IEP matter, such as when services provided fall significantly short of the services listed in the IEP and educational performance suffers. Although the District failed to implement the student's IEP as written with regard to math instruction, the Department concludes that the District's deviation from the IEP did not have any impact on the student's education performance in that area.

The Department concludes that the District did not provide the student with written language specially designed instruction consistent with the student's IEP. The student's schedule does not include a dedicated time for written language instruction, and the District's Response does not directly address this allegation. During the first term of the 2010-11 school year, the student's schedule provided ample time for the student to receive specially designed instruction in written language in the special education setting during the 6th and 7th periods. However, the addition of Technical Industry Skills to the student's schedule in the second term leads the Department to conclude that the District has not been providing written language instruction consistent with the student's IEP since the end of the first term.

Given the student's second term schedule, it is clear that the District could not have been providing written language instruction consistent with the student's April 2, 2010 IEP during the time that the student was enrolled in Technical Industry Skills. Absent the communication instruction or the occupational therapy consults, the times listed may have been easily reconciled, but any time used for communication instruction or occupational therapy would result in a failure to deliver the daily 50 minutes of specially designed instruction in written language contained in the student's IEP. Therefore, the Department concludes that the District has not been providing written language instruction consistent with the student's IEP since the end of the first term.

Conversely, the Department concludes that the District provided the student with reading specially designed instruction consistent with the student's IEP.

The student's schedule clearly indicates that the student receives reading specially designed instruction for 50 minutes daily during the school week. Therefore, the Department does not substantiate the allegation that the student is not receiving reading instruction consistent with the student's IEP.

Finally, the Department finds no evidence to support the parent's allegation that the District failed to provide occupational therapy consultations as required by the student's IEP. The Department does not substantiate this allegation.

Concerning the behavior plan, the parent identifies an instance wherein the student was summoned to the office to explain an incident and, after admitting unacceptable behavior, was given a detention. The parent points to this incident as an example of the teachers and aides not following the accommodations listed in the behavior plan. However, there was no evidence to suggest the District failed to fully implement the student's behavior plan. The situation the parent reports concerning the detention awarded to the student for "telling the truth" is not supported by the facts in this case. The student was not given a detention for telling the truth but for unacceptable behavior. The admission of the improper behavior, while admirable, did not release the student from being held accountable for the underlying offense. Therefore, the Department does not substantiate the allegation that the District failed to implement the student's behavior plan.

Lastly, the Department does not substantiate the parent's allegation that District failed to inform each teacher of their specific responsibilities for implementing the student's IEP and the specific accommodations and modifications, as well as the behavior plan. The parent did not identify any specific instances in which District staff failed to adhere to the student's IEP. During the interview each interviewee was able to articulate how they were made aware of the IEP's requirements and spoke specifically of the accommodations for this student. No evidence was discovered either during the interviews or when reviewing the submission packet that supported this allegation.

V. CORRECTIVE ACTION⁷
In the Matter of Sherman County SD
Case No. 11-054-004

#	Action Required	Submissions ⁸	Due Date
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⁷ The Department's order shall include any necessary corrective action as well as documentation to ensure that the corrective action has been completed. OAR 581-015-2030 (13). The Department expects and requires the timely completion of corrective action and will verify that the corrective action has been completed as specified in any final order. OAR 581-015-2030 (15). The Department may initiate remedies against a party who refuses to voluntarily comply with a plan of correction. OAR 581-015-2030 (17), (18)

1.	<p>Training: IEP Development & Content</p> <p>Provide training⁹ to all staff and administrators who may participate in IEP meetings regarding:</p> <p>a) The inclusion of Assistive Technology (AT) in the Oregon Standard IEP including, but not limited to:</p> <ul style="list-style-type: none"> • Definition of AT • Required consideration AT as one of the special factors; • Understanding use of AT as a supplementary aid or service; • Specially designed instruction and AT; and • Recording AT consideration and decisions in the Oregon Standard IEP <p>b) Indicating instructional time and place in the Oregon Standard IEP</p>	<p>Submit evidence of completed training, including presenter; agenda; copy of training materials; meeting notes; sign-in sheet including names and positions of attendees.</p>	August 31, 2011
2.	<p>Compensatory Education Services:</p> <p>Evidence of Completion</p> <p>a) The District shall provide 40 hours of compensatory education services for the student in the areas written language; or</p> <p>b) Reimburse the parent up to \$1,400 for 40 hours of private tutoring in written language.</p> <p>If the District and the parent select compensatory education services provided by the District:</p> <p>1) The District and parent shall develop a compensatory education services plan that identifies:</p>	<p>a) Submit evidence of completion, signed by parent and authorized District representative; or</p> <p>b) Submit evidence of reimbursement paid to the parent.</p> <p>Submit compensatory education services plan signed by parent and</p>	<p>October 31, 2011</p> <p>May 16, 2011</p>

⁸ Corrective action plans and related documentation as well as any questions about this corrective action should be directed to Rae Ann Ray, Oregon Department of Education, 255 Capitol St. NE, Salem, Oregon 97310-0203; telephone – (503) 947-5722; e-mail: raeann.ray@state.or.us; fax number (503) 378-5156.

⁹ District staff may, but are not required to, contact ODE for assistance with content.

	<ul style="list-style-type: none"> • how the services will be provided; • the schedule for services, including beginning date; • and the contact person for the District. • If the student is enrolled in a public or private school, the services must be provided outside the regular school day. The District shall reasonably accommodate parent and student preferences for scheduling these services. <p>2) The District shall provide transportation as necessary for the student to access these services.</p> <p>3) The District does not have to provide make-up sessions for sessions scheduled but missed due to student absence. The District shall provide make-up sessions for services scheduled but cancelled due to provider illness or unavailability.</p> <p>4) The District shall maintain a log of services provided, identifying date, type of service, provider, and amount of time.</p> <p>5) The District and parent may agree in writing to modify any of the provisions except the use of qualified staff and district oversight.</p> <p>6) The District shall submit any written agreement to modify the provisions of this compensatory education plan within a week of the agreement.</p>	District.	
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Dated: April 15, 2011

Nancy J. Latini, Ph.D.
Assistant Superintendent
Office of Student Learning & Partnerships

Mailing Date: April 15, 2011

APPEAL RIGHTS: You are entitled to judicial review of this order. Judicial review may be obtained by filing a petition for review within 60 days from the service of this Order with the Marion County Circuit Court or with the Circuit Court for the County in which you reside. Judicial review is pursuant to the provisions of ORS 183.484.