

**CHAPTER 137**  
DIVISION 50  
SUPPORT ENFORCEMENT

**NOTE:**     **The following blends new and previously issued commentary in order to provide practitioners with a comprehensive tool in applying the guidelines.**

**137-050-0320**

**Definitions**

(1) OAR 137-050-0490 constitutes the formula for determining child support awards as required by ORS 25.275. For purposes of OAR 137-050-0320 to 137-050-0490, unless the context requires otherwise, the following definitions shall apply:

(2) "Adjusted gross income" means modified gross income minus deductions for the nonjoint child(ren) as allowed by OAR 137-050-0400 and plus Social Security or Veterans benefits as allowed by OAR 137-050-0405.

(3) "Apportioned Veteran's benefits" means the amount the Veterans Administration deducts from the veteran's award and disburses to the child or his or her representative payee. The apportionment of Veteran's benefits is determined by the Veterans Administration and is governed by 38 CFR 3.450 through 3.458.

(4) "Basic child support obligation" means the support obligation determined by applying the parent's adjusted gross income, or if there are two parents, their combined adjusted gross income, to the scale in the manner set out in OAR 137-050-0490.

(5) "Gross income" means:

(a) The gross income of the parent calculated pursuant to OAR 137-050-0340 and 137-050-0350;

(b) The potential income of the parent calculated pursuant to OAR 137-050-0360 in certain cases where the parent is unemployed or employed on less than a full time basis; or

(c) A combination of gross income and potential income as calculated under subsections (a) and (b) of this rule.

(6) "Joint child" means the dependent child who is the son or daughter of both the mother and the father involved in the support proceeding. In those cases where support is sought from only one parent of a child, a joint child is the child for whom support is sought.

(7) "Low income adjustment" means the child support scale amount appropriate for a low income obligor under the provisions of OAR 137-050-0465, determined by applying the lesser of:

(a) the parents' pro rata share of the basic support obligation; or

(b) the support obligation determined by applying the parents' single adjusted gross income to the scale in the manner set out in OAR 137-050-0490.

(8) "Modified gross income" means gross income minus any mandatory contribution to a labor organization and plus or minus court ordered spousal support as allowed by OAR 137-050-0390.

(9) "Nonjoint child" means the legal child of one, but not both of the parents subject to this determination. Specifically excluded from this definition are stepchildren.

(10) "Parent A" means the parent who has more than 50 percent of the overall parenting time with the joint child(ren) as calculated in OAR 137-050-0450. If the child(ren) is in the physical custody of the Department of Human Services or the Oregon Youth Authority or another person who is not the child's parent, there will be no Parent A for purposes of calculating child support.

(11) "Parent B" means the parent who has less than 50 percent of the overall parenting time with the joint child(ren) as calculated in OAR 137-050-0450, or a parent whose child(ren) is in the physical custody of the Department of Human Services or the Oregon Youth Authority or another person who is not the child's parent.

(12) "Parenting time" means the amount of time the child(ren) is scheduled to spend with a parent according to an existing written agreement between the parents or a court order.

(13) The parent having "primary physical custody" means the parent who provides the primary residence for the child(ren) and is responsible for the majority of the day-to-day decisions concerning the child(ren).

(14) "Social Security benefits" means the monthly amount the Social Security Administration pays to a joint child or his or her representative payee due solely to the disability or retirement of either parent. Specifically excluded from this definition are benefits paid to a parent due to the disability of a child.

[Publications: The publications referenced in this rule are available for review at the agency.]

Stat. Auth.: ORS 180.340 & ORS 25.270 – ORS 25.290

Stats. Implemented: ORS 25.270 – ORS 25.290

#### **COMMENTARY TO OAR 137-050-0320 - DEFINITIONS**

The definitional rule contains definitions of key terms as well as defining the elements contained in terms within the calculation. OAR 137-050-0330 will refer to several of these items in quotations. In these instances, the reader should refer back to the definitions to reference the appropriate use of that term.

Modified gross income allows for the subtraction of mandatory contributions to a labor organization. These contributions are not voluntary and reduce a parent's gross income. The drafters found this to be a frequent rebuttal to support calculations. As the guidelines are federally required to set forth the formula for calculating

support in the majority of situations, it was appropriate to permanently add this to the child support calculation.

**Section (9):** Stepchildren are specifically excluded from the definition of “nonjoint child” in OAR 137-050-0320 as it is presumed that the biological parents of the stepchild are providing for his or her support. However, this may be an appropriate basis for a rebuttal. See OAR 137-050-0333(1)(e).

**Sections (10) and (11):** The drafters chose to use the terms “Parent A” and “Parent B” to denote the parties in the calculation. Other suggestions considered were noncustodial and custodial parent, obligee/obligor and mother/father. These terms were rejected as either parent may have custody of one or more of the children and the parent in either column of the child support calculation may end up being the obligor (obligated parent).

**Section (13):** “Primary physical custody” is also defined. Parent A may have custody of two children with Parent B having custody of one child. Parent B is still the primary physical custodian of the child in his or her care.

## **137-050-0330**

### **Computation of Individual Child Support Obligations**

To determine the amount of support owed by a parent, follow the procedure set forth in this rule.

- (1) Determine “Parent A” and “Parent B”.
- (2) Determine the “gross income” of each parent.
- (3) Determine the “modified gross income” of each parent.
- (4) Determine the “adjusted gross income” of each parent, and if there are two parents, the combined “adjusted gross income.”
- (5) If there are two parents, determine the percentage contribution of each parent to the combined adjusted gross income by dividing the combined adjusted gross income into each parent’s adjusted gross income.
- (6) Determine the “basic child support obligation.”
- (7) Determine each parent’s share of the basic child support obligation by multiplying the percentage figure from subsection (5) of this rule by the “basic child support obligation.”
- (8) Determine the parenting time credit, if any, and apply to the basic child support obligation as provided in OAR 137-050-0450.
- (9) Apply the “low income adjustment”, if appropriate, as provided in OAR 137-050-0465.
- (10) Determine the cost for each parent for child care costs as allowed by OAR 137-050-0420,

medical expenses as allowed by OAR 137-050-0430, and health care coverage as allowed by OAR 137-010-0410. If costs are not equal each month, annual costs shall be averaged to determine a monthly cost.

(11) Calculate the total costs owed by each parent to the other by applying the parent's percentage of income as determined in subsection (5) of this rule to the out-of-pocket costs incurred by the other parent. Add these amounts to each parent's child support obligation.

(12) Determine the net child support obligation by subtracting the smaller of the obligations from the larger.

(13) If Social Security benefits or apportioned Veterans benefits are received by Parent A as a representative payee for a joint child due to Parent B's disability or retirement, subtract the amount of benefits from Parent B's net child support obligation, if any.

(14) Determine the portion of the calculated child support obligation the obligated parent has the ability to pay as provided in OAR 137-050-0475.

Stat. Auth.: ORS 180.340 & ORS 25.270 – ORS 25.290

Stats. Implemented: ORS 25.270 – ORS 25.290

#### **COMMENTARY TO OAR 137-050-0330 - COMPUTATION OF INDIVIDUAL CHILD SUPPORT OBLIGATIONS**

This rule sets forth the step-by-step procedure for a child support calculation under the guidelines. All rebuttal criteria were removed from this rule in 2003 and placed in OAR 137-050-0333.

Practitioners question how the guideline changes in 2003 are to be applied for a child attending school. The drafters acknowledge that the current guideline methodology does not contemplate a child who may be away at school and not living in the home or a child who may be seeking support against both parents.

Practitioners with these scenarios may want to take a more basic approach to the guidelines. Although the guidelines focus on computing a support obligation for one parent, it still contemplates that both parents are contributing to the child's support.

The basic child support obligation (the scale figure) for the combined income of the parties and total number of joint children, represents total presumed support for both parents. This basic child support can be divided and treated accordingly. For example, for two children, one of whom is a child attending school, 50% of the basic child support obligation can be used to determine the support obligation for the minor child. The other 50% can be used to determine relative support obligations for the child attending school.

This is one possible approach. The drafters continue to struggle with ORS 107.108 and the difficulties it presents to the guidelines. At this time, we believe these difficulties can better be addressed on a case by case basis by the fact-finder rather than a specified methodology for all child attending school cases.

The practitioners have requested direction as to what method of rounding should be used for a child support calculation. We recommend the use of standard rules of rounding as follows:

- If the digit next beyond the one to be retained is less than five, the retained digit is kept unchanged. (E.g., 2.541 becomes 2.5 to two significant figures)
- When the digit next beyond the one to be retained is greater than or equal to five, the retained digit

is increased by one. (E.g., 2.453 becomes 2.5 to two significant figures)

Standard of Rounding from the U.S. Department of Education, Center for Education Statistics.

### **137-050-0333**

#### **Rebuttals**

(1) The amount of child support to be paid as determined in OAR 137-050-0330 is presumed to be the correct amount. This presumption may be rebutted by a finding that the amount is unjust or inappropriate based upon the criteria set forth in subsections (1)(a) through (1)(p) of this rule. Both the presumed correct amount and the new amount, in variance from the guidelines, shall be recited as part of findings which explain the reason for the variance.

(a) Evidence of the other available resources of the parent;

(b) The reasonable necessities of the parent;

(c) The net income of the parent remaining after withholdings required by law or as a condition of employment;

(d) A parent's ability to borrow;

(e) The number and needs of other dependents of a parent;

(f) The special hardships of a parent including, but not limited to, any medical circumstances or extraordinary travel costs related to the exercise of parenting time, if any, of a parent affecting the parent's ability to pay child support;

(g) The extraordinary or diminished needs of the child;

(h) The desirability of the custodial parent remaining in the home as a full-time parent or working less than full-time to fulfill the role of parent and homemaker;

(i) The tax consequences, if any, to both parents resulting from spousal support awarded, the determination of which parent will name the child as a dependent, child tax credits, or the earned income tax credit received by either parent.

(j) The financial advantage afforded a parent's household by the income of a spouse or domestic partner.

(k) The financial advantage afforded a parent's household by benefits of employment including, but not limited to, those provided by a family owned corporation or self-employment.

(l) Evidence that a child who is subject to the support order is not living with either parent or is a

"child attending school" as defined in ORS 107.108.

(m) Prior findings in a Judgment, Order, Decree or Settlement Agreement that the existing support award was made in consideration of other property, debt or financial awards.

(n) The net income of the parent remaining after payment of financial obligations mutually incurred.

(o) The tax advantage or adverse tax effect of a party's income or benefits.

(p) The return of capital.

(2) If the child support presumption is rebutted pursuant to subsection (1) of this rule, a written finding or a specific finding on the record must be made that the amount is unjust or inappropriate. That finding must recite the amount that under the guidelines is presumed to be correct, and must include the reason why the order varies from the guidelines amount. A new support amount shall be calculated by determining an appropriate dollar value to be attributed to the rebuttal criteria upon which the finding was based and by making an appropriate adjustment to the calculation.

Stat. Auth.: ORS 180.340 & ORS 25.270 – ORS 25.290

Stats. Implemented: ORS 25.270 – ORS 25.290

#### **COMMENTARY TO OAR 137-050-0333 - REBUTTALS**

The scale is based on a national average of incomes, cost of living, etc., therefore rebuttals should not be used for lower/higher wages and/or cost of living for out-of-state obligors.

The child support amounts set by these rules are presumptive and should be adjusted if the result of the formula is unjust or inappropriate. This rule sets forth the criteria for a rebuttal of the presumptively correct amount produced by a guidelines calculation. The court has found in *Petersen and Petersen*, 132 Or. App. 190, 198, 888 P.2d 23 (1994), that the list of criteria are not exclusive. The drafters have chosen not to add a rebuttal criteria for other scenarios and believe that circumstances that do not fall within the listed rebuttal criteria should be rare.

**Section (1)(a):** “Evidence of the other available resources of the parent” may include any income earned as overtime, not already included in gross income. The drafters note that overtime earnings are generally included in quarterly or annual earnings reports and should be considered as part of regular gross income. Evidence of overtime earnings not included in quarterly or annual reports is “evidence of other available resources of the parent.”

**Section (1)(b):** Some practitioners requested that an adjustment to child support be allowed when a party is required to provide life insurance. The drafters question whether it is appropriate to reduce the current support amount in order to provide for future support in the eventuality that the obligated parent is deceased. This decision is better left to the fact finder for a case by case determination as to whether the additional expense places an unnecessary burden on the obligated parent.

**Section (1)(c):** The phrase, “including, but not limited to the parent’s mandatory contribution to a retirement plan as a condition of employment” was removed from this section of the rule in 2003.

Employee contributions to a retirement plan required as a condition of employment may or may not make a significant impact on a parent's ability to pay the presumed amount of child support. In order to be considered as a rebuttal by the trier of fact, any adjustment must be mandatory and significantly reduce or enhance the income that is available to the parent.

**Section (1)(e):** Stepchildren are specifically excluded from the definition of “nonjoint child” in OAR 137-050-0320 as it is presumed that the biological parents of the stepchild are providing for his or her support. However, the drafters recognize that this may not always be the case and the stepparent may be providing substantial support for stepchild(ren) in their home. In this circumstance, a rebuttal may be appropriate.

**Section (1)(f):** This rebuttal was broadened in 1994 to specifically include extraordinary travel costs related to the exercise of parenting time. The drafters were persuaded that in certain cases, when a parent incurs extraordinary transportation costs in the exercise of parenting time with a child(ren), and when that expense would impair the ability to pay the presumed correct child support amount, the trier may find it appropriate to reduce the amount of support to be paid by a parent. This criterion could also be used, however, to justify an increase in the amount of support when the nonpaying parent incurs extraordinary travel costs to facilitate parenting time between the child and the other parent.

Note that the transportation costs must be extraordinary, such as the traveling of a distance which requires an overnight stay or transportation other than by auto. The parenting time credit is intended to provide for the basic travel costs of the parent in exercising parenting time.

**Section (1)(g):** The formula for the presumed guideline amount is intended to provide for the educational, physical and emotional needs of the child for whom support is sought. In some circumstances, these needs may be higher or lower than that of the average child.

In 2003, the phrase “extraordinary or diminished” was inserted before “needs of the child”, and the phrase “including but not limited to extraordinary child care costs due to special needs” was removed. The drafters acknowledge the original language appeared to suggest that needs of the child could only be considered to the extent that they increased the child support obligation. This is not the intent.

Regarding a child’s earnings or property, the drafters adopt the Oregon Supreme Court’s analysis in Redler and Redler, 330 Or. 51, 996 P.2d 963 (2000), that a child’s earnings may be considered as a possible basis for departing from the presumed support amount if there is evidence that those earnings diminish the child’s need for parental support. Such earnings, therefore, should be extraordinary, e.g., a large personal injury settlement or a significant trust fund, etc. In the vast majority of cases, a child’s earnings or property should not impact a parent’s responsibility to contribute to the support of his or her child. To conclude otherwise would negatively impact the parent-child relationship and provide a disincentive for children to obtain experience in the workforce.

Social Security benefits paid to a child because of a child’s disability are generally paid because of extraordinary needs of the child and should not be included as income to either parent or be used to reduce the child support obligation. Because the benefits paid by the Social Security Administration are intended to defray the additional costs associated with a child’s disability, an upward deviation from the guideline amount may not be necessary. The facts of each case must be considered to determine whether the receipt of such benefit impacts the needs of the child. On a related but distinctly different issue, please see OAR 137-050-0405 for the treatment of Social Security benefits received on behalf of a child due to a parent’s disability.

**Section (1)(h):** “Working less than full time to fulfill the role of parent and homemaker” may be considered as a reason to rebut the presumptively correct support amount. These guidelines have always included as a rebuttal criterion “the desirability of the custodial parent remaining in the home as a full-time parent”. To increase the support order based on this factor, it would presumably be demonstrated that both the custodial parent’s failure to work full time (or at all) was justified by the compelling desirability of remaining at home with the child(ren) and that the custodial parent’s failure to produce the expected income should be compensated for by increased payments on the part of the noncustodial parent. In considering an argument that this criterion stand as the reason for a rebuttal, the trier will probably have to be persuaded both on the merits of the custodial parent remaining at home, the noncustodial parent’s ability to pay an increased amount and the equities of such an order.

The above discussion is not intended to suggest that application of this criterion is appropriate only to facts

similar to those recited.

**Section (1)(i)** The language, “determination of which parent will name the child as a dependent”, has raised questions about how to handle the dependency exemption. The formula and scale presumes that the parent with primary physical custody of the child will receive the dependency exemption. This presumption is stated in OAR 137-050-0490. If this presumption is correct, no further consideration need be given to this issue. If in a particular case, however, this exemption goes to the parent who does not have primary physical custody, there may be a reason to adjust the calculation. For further discussion, see commentary to OAR 137-050-0490.

The consideration of child tax credits or the earned income tax credit received by either parent was added to the rule in 2003. The scale does not take into account the additional child tax credits adopted in the Economic Growth and Tax Relief Reconciliation Act of 2001 nor does it consider that the parent may receive an earned income tax credit. In some circumstances, the income of the party may increase substantially as a result of these credits. The fact finder may use actual evidence of the tax credit in these scenarios.

**Section (1)(k):** The “benefits of employment” could be any benefit not counted as “gross income” which provided a financial advantage. Those benefits may include, but are not limited to those which provide or subsidize housing, transportation, food, clothing, health benefits and the like. The trier, in allowing a rebuttal based on this criterion, must assign a dollar value to the benefit and make a decision about how that amount affects the need for, or the ability to pay, child support.

**Section (1)(l):** The guidelines assume that a child who is a beneficiary of the support award is in the physical custody of one, or both parents as a result of a parenting time arrangement. When that is not true, the guidelines do not provide for a formalistic solution to the problem of child support. Rather, it is left in those situations for the trier to determine whether the presumptive amount of support should be ordered, given the living arrangements for the child, or whether a departure from the guidelines is appropriate.

Application of these guidelines is often difficult in those situations where an 18-21 year old child is a “child attending school” as defined in ORS 107.108. The scale itself is based on the average expenses of children in the home from ages 0-17. (For further discussion, see commentary to OAR 137-050-0490.) A child attending school may continue to live with the parent, live with a roommate, or form a domestic partnership. These situations may call for a rebuttal of the presumptive amount of child support.

**Section (1)(m):** If previous orders regarding child support varied from the presumptively correct amount because of other property, debt or financial awards, and those facts remain relevant to any subsequent proceeding (i.e., a modification proceeding), then those facts should be allowed to support rebuttal argument to any support award contemplated.

**Section (1)(n):** Upon separation, one party may assume financial responsibility for significant obligations incurred jointly. If this obligation relieves one parent of a significant financial burden while reducing the available resources of the other, it may be appropriate to increase or reduce the income of the parent accordingly.

**Section (1)(o):** The guidelines assume that income will be taxed as earnings and that there is a standard net income for each gross income level specified in these guidelines. That is, even though the guidelines provide for calculations using gross income amounts, the child support awards produced by the guidelines are, in fact, based upon the net income resulting from that particular gross income amount, assuming a tax deduction claim for only one person, i.e., the person whose income is being determined.

Therefore child support for one child based on a gross income of \$2000, and filing as described above, is \$245. What is transparent to the user is that \$245 is really the child support for net disposable income of \$1477, which is \$2000 minus \$237 federal income taxes, \$133 state income tax and \$153 in Social Security

deductions.

This is not to imply that a parent who claims more or less than one deduction, and whose net income is therefore more or less than would result from one deduction, should be treated differently by this process. The method of deriving net income from gross as explained here is simply a method of “leveling the playing field”, so that when we deal with people with similar gross earnings we will also be attributing to them similar net incomes regardless of the number of exemptions they may claim.

It is true, however, that if the nature of the income or benefit received by the parent is such that it is subject to either more or less taxes than earned income then consideration should be given to both the parent’s before tax and after tax income. If the trier finds that the income or benefit is not taxable as assumed by the guidelines or taxed at a lower than normal rate, then the presumptively correct support award is probably not correct and should be subject to rebuttal under this rule.

**Section (1)(p):** In 1994, we proposed including “return of capital” in the definition of gross earnings. Comments received persuaded us not to do that, but rather to provide for a rebuttal of the presumptively correct support amount based on return of capital. Users of these guidelines should not confuse “return of capital” with “return on capital”, which has always been considered gross income pursuant to OAR 137-050-0340 and remains so. “Return on capital” can be, for instance, interest earnings on investments. “Return of capital,” on the other hand, could be that part of a payment received on a land sale contract in payment for real property which represents the principal and not the interest. In other words, in this example, “return of capital” is income derived from conversion of the real property (capital) into monthly income, but would not include the interest payment, which would be “return on capital”.

Generally, it is not intended that an obligated parent should be required to spend down an asset in order to pay support. However, it may be appropriate to increase the parent’s income in certain scenarios, such as where a parent has opted to live off of the sale of an asset rather than earning income.

## **137-050-0335**

### **Implementation of Changes to Child Support Guidelines**

(1) Changes to these rules (OAR 137-050-0320 through 137-050-0490) shall apply to all judicial and administrative actions initiated or pending after the effective date of any new, amended, or repealed rule included in this series.

(2) Rule changes do not constitute a substantial change in circumstances for purposes of modifying a child support order.

(3) As used in this rule, “pending” means any matter that has been initiated before the effective date of a rule change but requires amendment or hearing before a final judgment can be entered.

Stat. Auth.: ORS 180.340 & ORS 25.270 – ORS 25.290

Stats. Implemented: ORS 25.270 – ORS 25.290

### **COMMENTARY TO OAR 137-050-0335 - IMPLEMENTATION OF CHANGES TO CHILD SUPPORT GUIDELINES**

This rule was amended in 2003 to clarify that the changes to the guidelines will apply to all administrative or judicial actions that are initiated, amended or have a hearing after the effective date of the changes. Previously, OAR 137-050-0335 stated that the guidelines applied to any administrative or judicial action

initiated after the effective date of the rules. Given the difficulties and confusion of using two sets of guidelines during this same time period, the drafters researched whether the new rules may be applied to those actions that are still pending when the new rules become effective.

While the law generally disfavors retroactivity (Landgraf v USI Film Products, 114 S CT 1483 (1994)), retroactivity may be overcome if there is clear legislative intent to do so and the retroactivity does not take away a substantive right or impose an additional or unforeseeable obligation or new duty.

Applying these principles, the drafters conclude that the new rules can be made applicable to pending cases. The changes in the rules do not take away a substantive right or impose an unforeseeable obligation. Application of the law in effect at the time of the determination does not offend general principles of fairness, especially in light of the continuous review granted to support awards and the fact that de novo review allows the court to consider new intervening facts.

## **137-050-0340**

### **Gross Income**

(1) Except as excluded below, gross income includes income from any source including, but not limited to, salaries, wages, commissions, advances, bonuses, dividends, severance pay, pensions, interest, honoraria, trust income, annuities, return on capital, social security benefits, workers' compensation benefits, unemployment insurance benefits, disability insurance benefits, gifts, prizes, including lottery winnings, and alimony or separate maintenance received.

(2) Expense reimbursements or in-kind payments received by a parent in the course of employment, self-employment, or operation of a business shall be counted as income if they are significant and reduce personal living expenses.

(3) Gross income may be calculated on either an annual or monthly basis. Weekly income shall be translated to monthly income by multiplying the weekly income by 4.33.

(4) If the parent of a joint child is a recipient of Temporary Assistance for Needy Families (TANF), the gross income attributed to that parent shall be the amount which could be earned by full-time work (40 hours a week) at the state minimum wage.

(5) Excluded and not counted as income is any child support payment. It is a rebuttable presumption that adoption assistance payments, guardianship assistance payments and foster care subsidies are excluded and not counted as income.

Stat. Auth.: ORS 180.340 & ORS 25.270 – ORS 25.290

Stats. Implemented: ORS 25.270 – ORS 25.290

#### **COMMENTARY TO OAR 137-050-0340 - GROSS INCOME**

As explained at length in the commentary to OAR 137-050-0333(1)(o), the guideline scale amounts are based on the combined net incomes of the parent, taking into account one deduction for each parent. The income figures are then converted back to gross income figures in order to avoid inconsistency between the number of exemptions taken by a particular parent. Note that the assumption of using one deduction per parent takes a conservative approach to gross income.

The drafters recognize that some employers contribute to medical benefits beyond the cost of health care coverage. This employer contribution (i.e., payment of medical premium by the employer) should be included as gross income to the person. Any cash benefits a person may receive from not enrolling in, or “opting out” of, a health care coverage plan are considered income.

Employer contributions to profit sharing, such as unexercised stock options, should be treated as gross income only if such contributions are capable of ready conversion into cash (i.e., considered liquid assets).

Parents often question the fairness of including overtime in gross income. While overtime is clearly “income” to the parent, the drafters believe that flexibility should be exercised in determining whether the overtime will continue. If a parent is working overtime for a short period of time to “catch up” or an employer can verify that overtime will not continue in the future, it may not be appropriate to include overtime in gross income for purposes of the child support calculation or rebuttal.

**Section (3):** After reviewing accounting formulas, the drafters agreed that the most accurate way to determine an average monthly income when wages are paid weekly is to multiply the weekly earnings by 4.33. This method of converting weekly earnings captures all 52 pay periods per year. This language is included in the rule so that wage computations will be consistent among practitioners and tribunals.

**Section (4):** The recipient of Temporary Assistance to Needy Families (TANF) is imputed an amount of income equal to that earned for full-time work at the state minimum wage. Even though TANF recipients are presumed to be unable to pay support (ORS 25.245), it is necessary and reasonable to impute some income to all parties (even parents who receive public assistance). Income is imputed for purposes of calculating the relative responsibility of each parent and not to order a TANF recipient to pay support.

**Section (5):** A rebuttable presumption was added in 2003 to state that adoption assistance payments, foster care subsidies and guardianship subsidies are excluded and not included in a parent’s gross income. In the case of adoption assistance, these payments are intended to cover the cost of care for children who may have extraordinary education, emotional or physical needs. The parents are still obligated to provide for the basic needs of the child. In the case of foster care or guardianship subsidies, these payments are intended for the care of the child for whom they are paid. It would be inequitable to use these payment to reduce the support award for another child. However, the drafters acknowledge that special circumstances exist that may lead the trier of fact to conclude that such payments should be included in whole or in part in a parent’s gross income. The specific facts of a case allow the presumption to be rebutted.

## 137-050-0350

### **Income from Self-Employment or Operation of a Business**

For income from self-employment, rent, royalties, proprietorship of a business, or joint ownership of a partnership or closely held corporation, gross income is defined as gross receipts minus costs of goods sold minus ordinary and necessary expenses required for self-employment or business operation. Specifically excluded from ordinary and necessary expenses for purposes of OAR 137-050-0320 to 137-050-0490 are amounts allowable by the Internal Revenue Service for the accelerated component of depreciation expenses, investment tax credits, or any other business expenses determined by the Administrator, Court, or Hearings Officer to be inappropriate or excessive for determining gross income for purposes of calculating child support.

Stat. Auth.: ORS 180.340 & ORS 25.270 – ORS 25.290

Stats. Implemented: ORS 25.270 – ORS 25.290

## **COMMENTARY TO OAR 137-050-0350 - INCOME FROM SELF-EMPLOYMENT OR OPERATION OF A BUSINESS**

Expense reimbursements or in-kind payments are not addressed in this rule, but can be found in OAR 137-050-0340.

Undistributed corporate income is included in determining the gross income of the parties (see Perlenfein and Perlenfein, 316 Or 16 (1993)). However, the gross income thus calculated may be rebutted in whole or in part if there is evidence that such income is not actually available to the parent.

The drafters are aware that in certain cases determining gross income for persons involved in the operation of a business is difficult. The problem is best addressed by the discovery process and by the fact finding authority of the decision maker.

### **137-050-0360**

#### **Potential Income**

(1) If a parent is unemployed, employed on less than a full-time basis or there is no direct evidence of any income, child support shall be calculated based on a determination of potential income. For purposes of this determination, it is rebuttably presumed that a parent can be gainfully employed on a full-time basis.

(2) Determination of potential income shall be made according to one of three methods, as appropriate:

(a) The parent's probable earnings level based on employment potential, recent work history, and occupational qualifications in light of prevailing job opportunities and earnings levels in the community; or

(b) If a parent is receiving unemployment compensation or workers' compensation, that parent's income may be calculated using the actual amount of the unemployment compensation or workers' compensation benefit received; or

(c) Notwithstanding any other provision of this section, the amount of income a parent could earn working full-time at the current state minimum wage.

(3) This presumption does not apply to a parent who is unable to work full-time due to a verified disability or to an incarcerated obligor as defined in OAR 461-200-3300.

(4) As used in this rule, "full-time" means forty hours of work in a week except in those industries, trades or professions in which most employers due to custom, practice or agreement utilize a normal work week of more or less than 40 hours in a week.

Stat. Auth.: ORS 180.340 & ORS 25.270 – ORS 25.290

Stats. Implemented: ORS 25.270 – ORS 25.290

## **COMMENTARY TO OAR 137-050-0360 - POTENTIAL INCOME**

When either one of the parents is unemployed or working less than full time or there is no direct evidence of employment, this rule creates a presumption that the parent's income can be based on a demonstrated ability to earn. If there is no evidence which demonstrates the level of earning ability, income may be based upon full time work at the minimum wage or the amount of unemployment or worker's compensation benefits received by a parent.

**Section (2):** Language was added in 2003 to clarify that when analyzing a parent's earning ability, the parent's employment potential, recent work history and occupational qualifications must be analyzed in light of prevailing job opportunities and earning levels within the community. If job opportunities are currently not available in the same field in which the party was previously employed, it may not be appropriate to use this method to determine a parent's earning ability.

A provision was also added in 2003 to provide that potential income may be based on the amount of unemployment or worker's compensation benefits received by a party. This amendment is in response to a repeal of the temporary income rule. The temporary income rule provided that a calculation may be based on temporary income (such as UC/WC) or potential income. Temporary income was defined as income that was not anticipated to continue for more than six months. This rule was often misinterpreted to allow a modification of support only if the income change was not temporary. This was not the intent and the addition of UC/WC to the potential income rule should eliminate this confusion.

Both of these changes are intended to address the following fact pattern: A parent formerly worked as a computer programmer. The parent earned \$80,000 or more a year for several successive years. The computer company went out of business and the parent became unemployed. The parent now receives \$1200 per month in unemployment compensation. Job opportunities and wage levels in the community are such that this parent without retraining and without experience in some other comparably paid field, will probably not earn \$80,000 per year again in the foreseeable future.

It would not seem appropriate, given these facts, to impute \$80,000 per year in earnings to this parent. It would seem more appropriate to attribute actual income (i.e., \$1200 per month unemployment compensation). In such a case, any order entered based upon this level of income could be modified as the parent's job situation improved.

**Section (3):** The potential income rule does not apply to a parent who is unable to work due to a verified disability or an incarcerated obligor. In these scenarios, the actual income of the party should be used, even if this amount is less than minimum wage. A parent who is unable to work due to a verified disability is not defined, but rather, is left to the trier of fact. Disability may be verified through a doctor's letter or the receipt of Social Security Disability benefits.

**Section (4):** The drafters have adopted the definition of "full time work" used by the Employment Department, i.e., forty hours of work in a week except in those industries, trades or professions in which most employers due to custom, practice or agreement utilize a normal work week of more or less than 40 hours in a week. The term "underemployed" is not contemplated by this rule. The drafters agree with the reasoning in La Favor and La Favor, 151 Or App 257 (1997), that the question of whether a person is employing his or her abilities on a full-time basis must be determined on a case-by-case basis. The drafters also note that ORS 107.135(3)(b) and the analysis found in Hogue and Hogue, 115 Or App 697 (1992), adequately address the issue of intentional underemployment.

**137-050-0370**

## **Income Verification**

Income statements of the parents shall be verified with documentation of both current and past income where available. Suitable documentation of current earnings includes pay stubs, employer

statements, the records of the Oregon Employment Department, or receipts and expenses if self-employed. Documentation of current income shall be supplemented with copies of the most recent tax return to provide verification of earnings over a longer period.

Stat. Auth.: ORS 180.340 & ORS 25.270 – ORS 25.290

Stats. Implemented: ORS 25.270 – ORS 25.290

**COMMENTARY TO OAR 137-050-0370 - INCOME VERIFICATION**

Income verification should be done in every case where doubt exists about the amount of a parent's earnings. As in OAR 137-050-0340, however, disputes and uncertainty about income are best resolved by the discovery process provided for by the statute governing the judicial or administrative action in process.

**137-050-0390**

**Spousal Support**

The amount of any pre-existing or concurrently entered court-ordered spousal support shall be deducted from the gross income of the parent obligated to pay such spousal support whether the spousal support is to be paid to the other parent or any other person. The amount of any pre-existing or concurrently entered court-ordered spousal support to be received by a parent from the other parent or any other person shall be added to the gross income of the parent entitled to receive such spousal support.

Stat. Auth.: ORS 180.340 & ORS 25.270 – ORS 25.290

Stats. Implemented: ORS 25.270 – ORS 25.290

**COMMENTARY TO OAR 137-050-0390 - SPOUSAL SUPPORT**

Spousal support is deducted from the gross income of the parent ordered to pay it and added to the income of any recipient of spousal support. In any proceeding (such as a dissolution) in which both child support and spousal support are being determined, spousal support must be determined first, so that the gross incomes of the parents may be adjusted accordingly to allow for a correct determination of child support under these guidelines.

This rule applies equally to spousal support to or from a third party as it applies to spousal support paid between parents of joint children. The adjustment made under this rule requires the order of a specific amount of money as spousal support. Property received in lieu of cash spousal support is not an adjustment to the gross income of the party receiving the property but may be considered as a rebuttal to the presumed Guidelines amount pursuant to OAR 137-050-0333(1)(m).

**137-050-0400**

**Nonjoint Children**

(1) When either or both parents of the joint child subject to this determination are legally responsible

for a nonjoint child who resides in that parent's household, or a nonjoint child to whom or on whose behalf a parent owes an ongoing child support obligation under a court or administrative order, a credit for this obligation shall be calculated pursuant to this rule. The credit does not apply to parents receiving TANF if that parent's gross income is calculated using OAR 137-050-0340(4).

(2) Subtract from a parent's gross income the amount of any spousal support a court orders that parent to pay, and add to a parent's gross income any spousal support the parent is entitled to receive as allowed by OAR 137-050-0390.

(3) Determine the number of nonjoint children in the parent's immediate household, and the number of nonjoint children to whom the parent has been ordered to pay support by prior court or administrative order. The result is "total nonjoint children."

(4) Using the scale as established in OAR 137-050-0490, determine the basic child support obligation for the nonjoint child or children by using the income of the parent for whom the credit is being calculated and adjusting that income for spousal support, if applicable, according to subsection (2) of this rule, and using the number of "total nonjoint children" in subsection (3) of this rule.

(5) Subtract the amount calculated in subsection (4) of this rule from the parent's gross income.

Stat. Auth.: ORS 180.340 & ORS 25.270 – ORS 25.290

Stats. Implemented: ORS 25.270 – ORS 25.290

#### **COMMENTARY TO OAR 137-050-0400 - NONJOINT CHILDREN**

For a parent who owes child support to obtain a nonjoint child credit, the parent must have an ongoing child support obligation. The payment of arrears only does not qualify for a nonjoint credit. Practitioners have also questioned whether the nonjoint child credit applies to a parent who provides support for a "child attending school" as defined in ORS 107.108. The drafters believe that while a parent who is ordered to pay support for a child attending school is entitled to a nonjoint child credit, a parent who has a "child attending school" residing in their household is not. This interpretation is based solely on the legal obligation to provide support. After the child turns 18, the parent who is not ordered to pay support, is no longer legally obligated to support the child. The circumstance may, however, be appropriate for a rebuttal under OAR 137-050-0333(1)(e).

Prior to 1994, this rule provided a separate formula for calculating a nonjoint child credit when the nonjoint child(ren) resided in the parent's household. The effect was to slightly reduce the amount of the support order being established in consideration of the parent's other (nonjoint) children. The rule was rewritten to give the same level of credit for nonjoint children regardless of whether those nonjoint children reside with the parent or are children for whom the parent owes child support.

### **137-050-0405**

#### **Social Security or Veteran's Benefit Payments Received on Behalf of the Child**

(1) The amount of the monthly Social Security benefits or apportioned Veteran's benefits received on behalf of the child shall be added to the gross income of the parent for whom the disability or retirement benefit was paid.

(2) If the benefits are paid on behalf of Parent B, and are received by Parent A as a representative payee for the child, then the amount of the benefits shall also be subtracted from Parent B's net child support obligation as calculated pursuant to OAR 137-050-0330.

Stat. Auth.: ORS 180.340, ORS 25.270 – ORS 25.290

Stats. Implemented: ORS 25.270 – ORS 25.290, ORS 107.135

**COMMENTARY TO OAR 137-050-0405 - SOCIAL SECURITY OR VETERAN'S BENEFIT PAYMENTS RECEIVED ON BEHALF OF THE CHILD**

While Social Security benefits (based upon the parent's retirement or disability) received on behalf of the joint child(ren) was previously a permissible consideration under rebuttal OAR 137-050-0333(1)(g) (see Lawhorn and Lawhorn, 119 Or App 225, 850 P2d 1126 (1993)), the drafters concluded that a systematic treatment of this kind of household income would be helpful to practitioners and produce a more equitable result for families.

Social Security death/survivor benefits are not addressed under this rule because such benefits are not derived from either party to the support order. Death benefits should be treated as income to the child only and should be considered, when appropriate, as a rebuttal under OAR 137-050-0333(1)(g). Due to 1999 amendments to ORS 25.275 and ORS 107.135, Veteran's benefits are also included in this rule and should be treated in the same manner that Social Security benefits received on behalf of a child are treated. However, only apportioned Veteran's benefits are considered because only such benefits are actually distinct from the award received by the veteran and disbursed directly to the child or his or her representative payee. Veteran's benefits that are not apportioned should be treated as income to the veteran parent. These benefits should further be differentiated from Chapter 35, Survivors and Dependents' Educational Assistance (38 USC). These are educational benefits that a child of a veteran may apply for and receive specifically for education. The benefits do not reduce the amount of benefits to the parent and are paid directly to the child. While these benefits may be appropriate for a rebuttal under OAR 137-050-0333(1)(g) as other resources of the child, they are not "apportioned Veteran's benefits" within the meaning of this rule.

The rule was amended in 2003 to change the calculation from a pro rata credit to a dollar-for-dollar credit against child support owed by Parent B. The pro rata credit included the amount of the benefits in the combined income of the parties. The total basic child support was then reduced by the amount of benefits without regard to whether the obligated parent was the parent who was disabled or retired. This produced inequitable results. These circumstances prompted the drafters to change the way benefits were included in the calculation. If the benefits are received because of Parent A's disability or retirement, the benefit amount will be included in the Parent's income but will not affect the child support obligation. If the benefits are received (by Parent A) as a result of Parent B's disability or retirement, the benefit amount will be included in Parent B's income and subtracted dollar-for-dollar from Parent B's obligation.

**137-050-0410**

**Health Care Coverage**

(1) The child support obligation shall be adjusted for health care coverage provided for the joint child if:

(a) The parent is or will be required to provide such coverage pursuant to a court or administrative order and such insurance is available to the parent at a reasonable cost;

(b) Health care coverage is not provided pursuant to (1)(a) of this rule and the parent having primary

physical custody is providing health care coverage for the joint child and is incurring out-of-pocket costs for such coverage; or

(2)(a) If a parent is required to provide health care coverage as provided in subsection (1)(a) of this rule, determine whether health care coverage is available to the parent on a group basis or through his or her employer or union at reasonable cost. Health care coverage is considered reasonable in cost if it is employment related insurance or other group health care coverage, regardless of service delivery mechanism unless the group insurance is not accessible to the child and the cost to cover the subject child or children does not exceed the monthly child support obligation determined under the formula provided by ORS 25.275 and 25.280.

(b) The child support obligation may be adjusted without regard to whether the child is currently enrolled if the child will be enrolled upon finalization of the order to provide health care coverage and the cost of the health care coverage is determinable at the time the order is entered.

(3) Determine the cost to the parent of carrying health care coverage for only the parent's joint children. If family coverage is provided for joint child(ren) and other family members, prorate the out-of-pocket cost of health care coverage for joint children only.

(4) If a parent has elected to provide health care coverage as provided in subsection (1)(b) of this rule, out-of-pocket costs are only allowed to the extent they do not exceed the monthly child support obligation determined under the formula provided by ORS 25.275 and 25.280.

(5) When the support obligation of a parent is determined for a child who is not in the custody of either parent, and assuming that only the income of the parent against whom support is ordered is considered, the entire out-of-pocket cost of any insurance for that child provided by the obligated parent shall be allowed with respect to that parent.

(6) Out-of-pocket health coverage costs to insure the joint child(ren) and incurred by a parent's spouse or domestic partner may be attributed to the parent.

(7) Health care coverage may include, but is not limited to, coverage for hospital, surgical, dental, optical, prescription drugs, office visits, counseling or any combination of these or any other comparable health care expenses.

Stat. Auth.: ORS 180.340 & ORS 25.270 – ORS 25.290

Stats. Implemented: ORS 25.270 – ORS 25.290

#### **COMMENTARY TO OAR 137-050-0410 - HEALTH CARE COVERAGE**

The amendment allows credit prior to enrollment if costs are determinable at the time. The amendment also allows credit when costs are incurred by a spouse or domestic partner. Health care coverage is defined for the purposes of this rule.

This rule implements the provisions of ORS 25.255 in adjusting the child support obligation in consideration of health care coverage costs incurred by either parent. The language is also consistent, inasmuch as possible, with the proposed statutory changes in HB 2095 introduced in the 2003 legislative session. HB 2095 replaces ORS 25.255 and implements the medical support provisions required by federal law at 45 CFR

303.31 and 303.32.

Practitioners have questioned why the election of health care coverage may be made by the obligee. In some circumstances, the obligor may have less expensive health care coverage available than that provided by the obligee. Practitioners argue that the fact finder should be able to choose who carries the coverage. However, the statute does not give the court or administrator that authority. This policy decision reflects the belief that the choice of health care coverage should generally be with the parent who has the primary physical custody of the child(ren). Choice of health care coverage is often based on more than cost and may include location of preferred providers, extent of coverage, and the particular needs of the child(ren). As the parent with primary physical custody is the parent who will most frequently address these concerns, the statute allows that parent to choose the health care coverage that best meets the child(ren)'s needs.

**Section (2)(b):** This section was added in 2003 in contemplation of the Medical Support Notice in HB 2095 and to avoid the needless modification of orders. If an obligee does not have satisfactory health care coverage, an order must require the obligor to provide health care coverage if it is available through his or her employment at a reasonable cost. An obligor may have such coverage available and will enroll the child(ren) in such coverage as soon as the order is finalized (the order may be necessary to allow enrollment of the child(ren) outside of a normal enrollment period), yet cannot get credit for the cost of the coverage in the child support calculation. This provision clarifies that credit may be given if coverage will be provided by the obligor once the order is finalized and the cost of coverage for the child(ren) is readily determinable at the time the order is entered. If the obligor does not follow through with enrollment, the National Medical Support Notice will force enrollment and the withholding of premiums from the obligor's wages.

**Section (3):** The rule was amended in 2001 to allow for a credit based upon the cost to cover all the parent's dependents divided by the number of dependents covered, regardless of whether there is any "additional" cost to include the joint child(ren). Previously, credit could only be given for adding the joint children if the addition increased the support amount.

**Section (5):** When the child is not in the custody of either parent (e.g., child is in foster care) and only one parent is subject to the determination, health care coverage costs incurred by the parent subject to the action will cause the support order to be reduced by an amount equal to those costs. In a more typical case, where both parents are parties, the child support obligation is adjusted so that the costs of health care coverage are shared. Where there is only one parent, however, and that one parent assumes full responsibility for health care coverage costs, then the support order is reduced by the full amount of the coverage costs because there is no other parent with whom to share responsibility.

**Section (6):** Many health care plans allow stepchildren to be added to the health care coverage of the stepparent. At times, this may be the most efficient means of providing adequate health care coverage to the child(ren). This section clarifies that the child support obligation may be adjusted for the costs of coverage incurred by a spouse or domestic partner as if those costs were incurred by the parent.

**137-050-0420**

### **Child Care Costs**

(1) The child support obligation shall be adjusted for child care costs for a joint child under the age of 13 or a disabled child in an amount equal to the annualized monthly child care costs, including government child care subsidies, less the estimated federal and state child care credit payable on behalf of a joint child.

(2) Child care costs are those costs incurred by either parent which are due to the parent's employment, job search, or training or education necessary to obtain a job.

(3) Child care costs are allowable only to the extent that they are reasonable and do not exceed the level required to provide quality care for the child(ren) from a licensed source.

(4) Child care costs incurred by a parent include any amounts paid by government subsidies for that parent.

(5) As used in this rule, “disabled child” means a child who has a physical or mental disability that substantially limits one or more major life activities (self-care, walking, seeing, speaking, hearing, breathing, learning, working, etc.).

Stat. Auth.: ORS 180.340 & ORS 25.270 – ORS 25.290

Stats. Implemented: ORS 25.270 – ORS 25.290

#### **COMMENTARY TO OAR 137-050-0420 - CHILD CARE COSTS**

In 2003, the shared custody calculation was eliminated and replaced with a parenting time credit for the parent who has custody of the children less than 50% of the time. This credit recognizes that both parents incur costs for the child(ren) while the child(ren) is in the parent’s care. Likewise, either parent may incur child care costs for the child(ren). The child support calculation should reflect the costs incurred by either or both parents so long as those costs meet the criteria set out in this rule.

Prior to 2003, the child care credit computation worksheet (S-4) limited the allowance of child care costs to those for a child who is under the age of 13 or qualifies as a disabled child as defined in federal tax law. As the worksheets are not binding, the drafters have moved to incorporate these provisions in the rule. Some practitioners have commented that the federal tax law definition of a “disabled child” is too narrow and a child may have other disabilities which would require child care over the age of 12. The drafters have chosen to adopt the definition from the American Disabilities Act, 42 USC 12101, which recognizes that many disabled children may require extra or longer term child care as compared to other children of the same age. Note, however, that due to the narrow definition of a disabled child in federal tax law, it may not be appropriate in these circumstances to reduce the child care costs by an estimated tax credit.

This rule has changed several times since its adoption in 1989 as to whether the calculation should take into account only the out-of-pocket costs incurred by the parent or whether the calculation should also incorporate any subsidized cost of child care. In 1999, the rule was amended in its current form to clarify that government subsidies should be included in the cost of child care.

For example, if the obligee is receiving job skills training through the Department of Human Services Jobs Program, he or she may be paying \$100 per month in out-of-pocket child care costs and the state may be paying the day care provider the remaining \$200 through the Employer Related Day Care (ERDC) program. In this scenario, the figure that should be used in the guidelines calculation is the full \$300.

This policy was adopted because ERDC is an income based program. Once child support is received, the obligee’s eligibility for day care assistance is reduced. If government subsidies are not included in the calculation, a disproportionate share of the cost of child care is transferred to the obligee. It is the goal of DHS to decrease assistance as other resources to the parent increase, eventually eliminating the need for assistance altogether. This policy only applies to government subsidized day care costs. There is no like rationale to include subsidies received through a private plan provided by an employer or insurance policy.

Although the worksheets provided by the Division of Child Support are not part of the official child support guidelines, they are widely used by Oregon child support practitioners for calculating child support obligations. On Supplemental Worksheet S-4, Federal and Oregon tax credit tables for child care credit are given as a reference for calculating the child care credit. The tax credit tables are based on federal adjusted gross income, including exemptions and deductions. The worksheet directs the user to calculate the tax

credit using modified gross monthly income (gross monthly income plus or minus spousal support). Other factors such as the income of a spouse or the earned income of the parent may affect the amount of the tax credits. Note further that a tax credit for child care may only be obtained by the “custodial” parent. Custodial parent is defined in tax law as the parent having the child(ren) greater than 50% of the time. If child care costs are incurred by the noncustodial parent, child care costs should not be reduced by an estimated tax credit.

## **137-050-0430**

### **Medical Expenses**

(1) The child support obligation shall be adjusted for recurring medical expenses incurred on behalf of a joint child to the extent the medical expenses exceed \$250 per year per child and are not eligible for payment by health care coverage or other insurance.

(2) Recurring medical expenses are defined as those expenses which are reasonably expected to occur regularly and periodically in the future based on documented past experience or on substantial evidence of future need and include, but are not limited to, hospital, surgical, dental, optical, prescription drugs, office visits, counseling or any combination of these of any other comparable health care expenses.

Stat. Auth.: ORS 180.340 & ORS 25.270 – ORS 25.290

Stats. Implemented: ORS 25.270 – ORS 25.290

#### **COMMENTARY TO OAR 137-050-0430 - MEDICAL EXPENSES**

This rule allows adding to the basic child support obligation an amount which recognizes recurring medical costs which are not covered by health care coverage. That is, if the child’s health is such, or the health care coverage is such that there are uninsured costs which can be anticipated, then the basic support may be increased to recognize this fact. Out-of-pocket costs incurred by the Oregon Health Plan shall be treated like the costs incurred for any other health care coverage under this rule.

A support order would not be increased to cover an unexpected minor medical event, which could not be planned for because of its unexpected nature. This provision should not be confused with the courts’ authority to order parents to share future medical costs on some equitable basis (e.g., share any and all future costs 50/50) whether or not those costs are recurring costs as that term is defined in this rule. That issue is not dealt with in these guidelines and nothing in the guidelines gives or precludes authority for such an order.

The term “eligible” was added to this section in 2001 to reflect that medical costs may be “eligible” for payment by health care coverage but may not be paid for a period of time. This lag in payment does not make the costs uninsured costs.

Uninsured or out-of-pocket medical costs include co-payments, premiums, deductibles, over-the-counter medications and other medical costs not covered by the family health care coverage. The guidelines scale amounts include ordinary unreimbursed medical costs of \$250 per child per year. Economic Basis for Updated Child Support Schedule, prepared by Policy Studies Inc., December 31, 2001. Recurring uninsured costs as defined by this rule, that exceed \$250 per child per year may be added to the basic support obligation. Uninsured costs that exceed \$250 per child per year and that are not predictable or anticipated are not addressed in this rule. This has always been an underlying assumption of the child support scale, even though this provision was not adopted formally in the rule until 2003.

## 137-050-0450

### Parenting Time

(1) If there is a written parenting time agreement or court order providing for parenting time, the percentage of overall parenting time for each parent shall be calculated as follows:

(a) Multiply the number of joint children by 365 to arrive at a total number of child overnights. Add together the total number of overnights the parent is allowed with each joint child and divide the parenting time overnights by the total number of child overnights.

(b) Notwithstanding the calculation provided in (1)(a), the percentage of parenting time may be determined using a method other than overnights if the parents have an alternative parenting time schedule in which a parent has significant time periods where the child is in the parent's physical custody but does not stay overnight.

(2) If the court determines actual parenting time exercised by a parent is different than what is provided in a written parenting plan or court order, the percentage of parenting time may be calculated using the actual parenting time exercised by the parent.

(3) If there is no written parenting time agreement or court order providing for parenting time, the parent having primary physical custody shall be treated as having 100 percent of the parenting time.

Stat. Auth.: ORS 180.340 & ORS 25.270 – ORS 25.290

Stats. Implemented: ORS 25.270 – ORS 25.290

#### **COMMENTARY TO OAR 137-050-0450 - PARENTING TIME**

This rule and the Parenting Time Credit rule (OAR 137-050-0455) were adopted in 2003 to replace the shared physical custody rule. This rule provides a formula for determining the percentage of parenting time for each parent regardless of whether the custody of the children is shared or split. If no agreement or court order for parenting time exists, the parent having primary physical custody of the child is presumed to have the child 100% of the time.

Relative percentages of parenting time can only be calculated under this rule if the parties have a current written parenting time agreement or a court order providing for parenting time. Many practitioners have suggested that the actual parenting time exercised by the parent may vary from that provided by a court order. We acknowledge that this may occur. In such circumstances, the court may calculate the percentage of parenting time based on what is actually occurring without changing the parenting time to which the parties are entitled. This authority is not provided to the Administrator. The drafters believe that determinations regarding parenting time that vary from a court order or a current written agreement are beyond the administrator's authority and should be made by a court.

This rule applies equally to those situations where the child is in the care of a third party who is not the parent or in the care of the state. If an agreement or court order provides for parenting time for that parent, it is appropriate to calculate their percentage of parenting time.

The drafters recognize in (1)(b) that an obligor may be responsible for significant periods of parenting time during the day that does not involve overnights. For example, the parents may have an agreement where the obligor has parenting time during the day in lieu of the obligee obtaining day care. Such a situation

should not prevent an obligor from getting credit for parenting time, even though the child is not with the parent overnight. A suggested methodology used by other states to account for this time might be to count 12 continuous hours as one day, and 4-12 hour blocks as a half-day. This methodology should only be used when the parents have an alternative parenting time schedule that is out of the ordinary. That is, if a parent has a normal overnight schedule, half days should not be added on to the parenting time days in order to increase the amount of parenting time credit.

**137-050-0455**

**Parenting Time Credit**

(1) This rule shall apply when the parents have agreed in writing or by court order that both parents have overall parenting time more than 20 percent of the time as calculated pursuant to OAR 137-050-0450.

(2) Parent B shall be entitled to a parenting time credit calculated as follows:

(a) Find the adjustment percentage corresponding to the percentage of parenting time allowed to Parent B below;

	<b>Percentage Range of Parenting Time</b>	<b>Adjustment Percentage</b>
(A)	20% through 23.8%	10.5%
(B)	23.9% through 31.5%	16.1%
(C)	31.6% through 35.3%	19.5%
(D)	35.4% through 38.9%	25.3%
(E)	39% through 41.6%	30.7%
(F)	41.7% through 44.4%	36.2%
(G)	44.5% through 47.1%	42.2%
(H)	47.2% through 49.9%	48.6%

(b) Multiply the adjustment percentage by the “Basic Child Support Obligation” to arrive at the parenting time credit.

(3) If the parenting time credit is greater than Parent B's prorated share of the basic child support obligation, subtract Parent B's basic child support obligation from the parenting time credit. The result is Parent A's obligation after parenting time credit.

(4) If the parenting time credit is less than Parent B's prorated share of the basic child support obligation, subtract the parenting time credit from Parent B's basic child support obligation. The result is Parent B's obligation after parenting time credit.

(5) If the parenting time is equal, the expenses for the children are equally shared and the adjusted gross incomes of the parents also are equal, no support shall be paid.

(6) If the parenting time is equal but the parents adjusted gross incomes are not equal, the parent having the greater adjusted gross income shall be obligated for the amount of basic child support needed to equalize the basic child support to each parent, calculated as follows:

(a) After the basic child support obligation has been prorated between the parents, subtract the lower amount from the higher amount and divide the balance in half.

(b) The resulting figure is the obligation after parenting time credit for the parent with the greater adjusted gross income.

(7) This parenting time credit reflects the presumption that while exercising parenting time, a parent is responsible for and incurs the costs of caring for the child, including but not limited to, food, clothing, transportation, recreation and household expenses.

Stat. Auth.: ORS 180.340 & ORS 25.270 – ORS 25.290

Stats. Implemented: ORS 25.270 – ORS 25.290

#### **COMMENTARY TO OAR 137-050-0455 - PARENTING TIME CREDIT**

This rule, along with OAR 137-050-0450, replaced the previous Shared Physical Custody rule directing how to calculate support when both parents had custody of the child greater than 35% of the time. The drafters recognized two major drawbacks of the Shared Physical Custody rule. One, due to the 35% threshold for determining shared custody, there was a significant difference in the amount of support ordered against an obligor who had custody of the child(ren) 34% of the time versus the obligor who had custody of the child(ren) 35% of the time. This caused many practitioners and judges to make parenting time decisions based largely upon the amount of support that would be ordered. Second, the regular support calculation did not take into consideration costs the obligor incurs for the child(ren) while the children are in his or her custody.

The drafters reviewed how other states handle shared parenting time in their child support calculations and decided on the “percentage credit” method. This method varies in application, but the basic premise is that the obligated parent is entitled to a credit to the child support obligation depending on the amount of time spent with the child(ren). The credit can be gradually increased with the percentage of parenting time and a major shift in the child support obligation can be avoided.

The parenting time credit method ultimately adopted by the drafters is based primarily on methodology developed in Arizona. The Arizona Supreme Court contracted with the University of Arizona to determine costs associated with visitation. They then contracted with Policy Studies Inc., to review the findings and analyze costs associated with expenditures on children. Although Arizona’s credit starts at 0% parenting time, the drafters have adopted a 20% threshold. For most parents with a parenting time schedule, the 20% threshold will apply. However, the drafters felt that parties exercising less parenting time than this were unlikely to incur the kinds of costs that would justify a credit against the child support obligation.

The credit is determined by referencing the amount of parenting time on the parenting time table and obtaining a percentage credit figure. The percentage is multiplied by the basic child support obligation (scale

figure for combined income of the parties) and subtracted from the parent's prorated portion of the basic child support. The resulting figure may be a positive or a negative figure. If negative, this amount is owed by Parent A to Parent B.

The assumption underlying this rule is that there is a direct relationship between child support, the amount of time each parent has physical custody of the child and parental income. Therefore, under this rule, if each parent has the child 50% of the time and parental incomes are equal, then no support would be paid, assuming each parent contributed equally to the needs of the child. However, if each parent has physical custody 50% of the time, and one parent's income is greater than the other parent's, then the parent with the larger income would pay some support.

Section (2): Practitioners question how the parenting time credit should be applied for a child attending school. It is the understanding of the drafters that custody and parenting time orders end at age 18, hence the parenting time credit would not apply. A variety of factors may affect the cost of care for a child attending school. For further guidance, see commentary to OAR 137-050-0333(1)(l).

Section (7): Some commentators suggested the list of items in Section (7) should be more lengthy and expressed concern that this item may be cause for more disagreements between the parties. This statement was added to clarify that the parenting time credit is to recognize those costs associated with the exercise of parenting time and that the more equal the parenting time between the parents, the more likely they will be sharing in the basic expenses for the child. This presumption may be rebutted if this is not the case.

## **137-050-0465**

### **Low Income Adjustment**

(1) The low income adjustment is a calculation to ensure that parents who are at or near the federal poverty level have sufficient income to support themselves after the payment of child support.

(2) To determine if the low income adjustment applies, find each parent's single income obligation by referencing the scale in OAR 137-050-0490 for the appropriate number of joint children and each parent's individual modified gross income as defined in OAR 137-050-0320.

(3) Compare the amounts obtained in subsection (2) of this rule to the prorated basic child support obligation after parenting time credit and apply the lower of the two figures to the remaining calculation for each parent.

Stat. Auth.: ORS 25.275 & ORS 25.280

Stats. Implemented: ORS 25.275 & ORS 25.280

#### **COMMENTARY TO OAR 137-050-0465 - LOW INCOME ADJUSTMENT**

This is a new rule. It was created to ensure that parents who are at or near the poverty level have sufficient income to support themselves after the payment of child support.

A policy decision was made to include this new computation in an attempt to take more appropriate and reasonable orders for low income parents. The lower end of the scale has been adjusted by Policy Studies Inc., to take into account the federal poverty level of income required to support one person (\$2,250 and below, depending on the number of children). Because both parties' incomes are added together prior to referencing the scale, these adjusted scale figures are never utilized. The low income adjustment directs the practitioner to do a comparison of the scale figure using the parent's single income to the prorated amount

of the scale figure for both incomes. In the higher income ranges, the prorated portion will always be lower than the single income figure.

## **137-050-0475**

### **Ability to Pay**

It is a rebuttable presumption that a child support order should not exceed the obligated parent's ability to pay. To determine the amount of child support the obligated parent has the ability to pay, follow the procedure set out in this rule:

(1) Calculate the obligated parent's income available for support by subtracting a self-support reserve of \$884.00 from the obligated parent's "modified gross income" as defined in OAR 137-050-0320.

(2) Compare the obligated parent's income available for support to the amount of support calculated as per OAR 137-050-0330(1) through (13). The amount of child support that is presumed to be correct as defined in OAR 137-050-0333 is the lesser of these two amounts.

(3) This rule does not apply to an incarcerated obligor as defined in OAR 461-200-3300.

Stat. Auth.: ORS 25.275 & ORS 25.280

Stats. Implemented: ORS 25.275 & ORS 25.280

#### **COMMENTARY TO OAR 137-050-0475 - ABILITY TO PAY**

This rule presumes that an obligated parent needs a self support reserve of \$884 in order to meet his or her basic needs. \$884 is a gross income figure and is the self support reserve factored into the current guidelines scale developed in 2001, as a result of the study entitled Economic Basis for Updated Child Support Schedule, prepared by Policy Studies Inc.

Even with the low income adjustment in OAR 137-050-0465, a self support reserve is not always maintained for lower income obligors when other items are factored into the child support calculation such as child care costs, large numbers of nonjoint children, extraordinary medical expenses, or health care costs. The ability to pay calculation provides a further assurance that the obligated parent is left with this basic amount of income in order to support him or herself.

In 2003, this rule was changed to direct that the self support reserve be subtracted from gross income plus or minus spousal support. This rule previously provided that the obligor's ability to pay should be calculated by subtracting the self support reserve from the obligor's modified gross income. This was to provide a measure of relief when the obligor owed support to more than one household. However, with the increased self support reserve, this calculation may result in a nonjoint child credit greater than the amount of support calculated using the obligor's ability to pay. This would create an unintended windfall to the obligor. While a low income obligor owing support to more than one household may qualify for a rebuttal due to limited resources, this determination is better left to the fact finder.

The drafters acknowledge that OAR 137-050-0465 and OAR 137-050-0475 may result in lower child support orders and therefore the potential that an obligee will receive less support for the care of the children. However, it is unreasonable to assume that the an obligor will pay an amount of support that exceeds his or her ability to pay. The drafters agree with federal child support policy interpretation that an obligor is more likely to pay child support if the order is within the obligor's means. A smaller amount of support that is

actually paid to an obligee is better than no support at all.

## **137-050-0490**

### **The Scale Used in Child Support Determinations**

(1) Table 1 (“the scale”) shall be used in any judicial or administrative proceeding to establish or modify a support obligation under ORS Chapters 107, 108, 109, 110, 416, 419B and 419C and determinations pursuant to OAR 137-050-0320 through 137-050-0490.

(2) The basic child support obligation is determined by referencing the scale for the appropriate number of joint children and the combined adjusted gross income of the parents.

(3) Where a child is not in the custody of either parent and a support order is sought against one or both parents, the basic child support obligation is determined by referencing the scale for the appropriate number of joint children and the parent's individual adjusted gross income, not the combined adjusted gross income of the parents.

(4) For combined adjusted gross incomes exceeding \$20,000 per month, the presumed basic child support obligations shall be as for parents with combined adjusted gross income of \$20,000 per month. A basic child support obligation in excess of this level may be demonstrated for those reasons set forth in OAR 137-050-0333.

(5) When the combined income falls between two income amounts on the scale, use the lower income amount on the scale to determine the child support obligation.

(6) The scale below presumes the parent with primary physical custody will take the tax exemption for the joint child(ren) for income tax purposes. When that parent does not take the tax exemption, the rebuttals in OAR 137-050-0333 may be used to adjust the child support obligation.

Stat. Auth.: ORS 25.275 & ORS 25.280

Stats. Implemented: ORS 25.275 & ORS 25.280

#### **COMMENTARY TO OAR 137-050-0490 - THE SCALE USED IN CHILD SUPPORT DETERMINATIONS**

The Division of Child Support (DCS) is required by ORS 25.270 and federal law to review the Child Support Guidelines every four years. In particular, DCS must ensure that the formula and scale are in line with the economic conditions in Oregon. To accomplish this, DCS contracts with an independent company to analyze the child support scale and relevant economic indicators. During this review period, DCS contracted with Policy Studies Inc. (PSI), and in December 2001, they completed the study analyzing nationwide data on the cost of raising children. The updated scale is based on current economic research and more recent economic data on household expenditures. It also incorporates changes in federal and state tax rates, price levels, and the federal poverty guideline in the support reserve.

The drafters recognize that Oregon's economic reality may vary somewhat from that of the nation. Therefore, DCS also contracted with an independent company in Oregon, ECONorthwest, to complete a study examining Oregon-specific economic data to determine if Oregon economic conditions were sufficiently different from national conditions as to justify an adjustment to PSI's recommended scale. This study compared all available economic indicators for Oregon to that of the nation as a whole. On average,

ECONorthwest found Oregon's economic situation to be substantially similar to that of the nation and therefore recommended that DCS not make any adjustment to the guidelines scale. The drafters chose to adopt the scale as recommended by PSI.

Practitioners often comment that the scale should be adjusted depending on the age of the child. Parents typically believe that it is more expensive to raise a teenager than a toddler. The Child Support Guidelines Rules Advisory Committee reviewed this matter in depth. The guidelines scale already incorporates an average of expenses for children from 0 - 17 years old. Further, analysts cannot agree on the differences in expenditures at various age levels or that the differences are statistically significant. For these reasons, the drafters have declined to adopt varying standards for children at different age levels.

Prior to 2003, this rule provided a formula for determining the amount of support when support is sought for seven or more children. This formula was developed in 1994 to determine a presumed support amount by using a fixed multiplier of 6.6% to the presumed amount for six children for each additional child thereafter. To make the scale easier to use, the drafters have applied the formula to the scale and continued the scale out to 10 children. The formula has therefore been removed from the rule.

There is no current data to support a specific 6.6% increase for each additional child after six children. PSI's 1998 study discusses adjustments for the number of children, and reports that the multiplier decreases as the number of children increases, because of a reallocation of the adult's share of expenditures to provide for more children, and each child's share of expenditures is reduced to accommodate the needs of additional children. The drafters have extrapolated support figures provided by PSI to go beyond six children, and taken into consideration those adjustments discussed in the study that gradually reduces the "needs factor" for each child after six and recognizes that there is a point at which additional support is not needed or is no longer affordable. Therefore, the current scale adds 5.6% to the figure for six children for the seventh child, and to that adds 4.2% for the eighth child, and to that adds 2.8% for the ninth child, and to that adds 1.4% for the tenth child. There is no further additional support for any child beyond the tenth child.

This rule provides for using the income of one parent only when a child is not in the custody of either parent and a support order is sought against that one parent. In cases where a child is in foster care, it is quite common to be able to locate and serve only one parent. In those situations there was a question as to whether support should have been calculated based upon the known income of the parent whose duty to pay support was being determined combined with the figure which represented the presume income (often minimum wage earnings) of the missing parent, or whether only one income should be used. The drafters have decided that it is more appropriate to use only the income of the parent whose duty is being decided.

DCS is often asked to explain the underlying assumptions to the guidelines scale. In the interest of answering these inquiries, the drafters set out the key assumptions from PSI in their entirety, as taken from the December 31, 2001, "Economic Basis for Updated Child Support Schedule" by Policy Studies Inc., Ch IV, pp. 39-40, as follows:

**(1) Guidelines based on net income, then converted to gross income.** These guidelines are designed to provide child support as a specified proportion of an obligor's net income. As discussed in Chapter III, a table of child support based on obligor net income is developed before converting the tables to gross income. The tables are converted to gross income for three reasons:

- Use of gross income greatly simplifies use of the child support guidelines because it obviates the need for a complex gross to net calculation in individual cases;
- Use of gross income can be more equitable because it avoids non-comparable deductions that may arise in making the gross to net calculation in individual cases; and

- Use of gross income does not cause child support to be increased when an obligor acquires additional dependents, claims more exemptions, and therefore has a higher net income for a given level of gross income.

In converting the schedule to a gross income base, we have assumed that the obligor claims one exemption (for filing, two for withholding) and the standard deduction. This is the most favorable assumption that can be made concerning an obligor's filing status. Obligor with more than one exemption, or with itemized deductions, would have a slightly higher obligation under an equivalent net income guideline.

**(2) Tax exemptions for child(ren) due support.** The Schedule presumes that the noncustodial parent does not claim the tax exemptions for the child(ren) due support. In computing federal tax obligations, the custodial parent is entitled to claim the tax exemption(s) for any divorce occurring after 1984, unless the custodial parent signs over the exemption(s) to the noncustodial parent each year. Given this provision, the most realistic presumption for development of the Schedule is that the custodial parent claims the exemption(s) for the child(ren) due child support.

**(3) Income assumed to be taxable.** Because the Schedule has withholding tables built into it, the design assumes that all income of both parents is taxable.

**(4) Self support reserve.** Incorporated into the Schedule is a "self-support reserve" for obligors. This concept allows low income obligors to retain enough income after payment of taxes and child support to maintain at a least a subsistence level of living (i.e., the self support reserve.) The self support reserve is set at the federal poverty guidelines for one person. We recommend updating the self support reserve in the ability to pay calculation in the guidelines also.

**(5) Schedule does not include expenditures on child care, extraordinary medical, and children's share of health insurance costs.** The Schedule is based on economic data that represent estimates of total expenditures on child-rearing costs up to age 18. The major categories of expenditures include food, housing, home furnishings, utilities, transportation, clothing, education, and recreation. Excluded from these figures are average expenditures for child care, children's extraordinary medical care, and the children's share of health insurance. These costs are deducted from the base amounts used to establish the Schedule because they are added to child support obligations as actually incurred in individual cases. Deducting these expenditures from the base amounts avoids double-counting them in the child support calculation.

**(6) Schedule includes expenditures on ordinary medical care.** Although expenditures for the children's extraordinary medical care and the children's share of health insurance are to be added to the child support obligation as actually incurred in individual cases, it is assumed that parents will make some expenditures on behalf of the children's ordinary (i.e. out-of-pocket expenses not covered by insurance) medical care. The Schedule amounts in this report is based on the assumption that expenditures on ordinary medical care are \$250 per year per child.

**(7) Schedule is based on average expenditures on children 0 - 17 years.** Child-rearing expenditures are averaged for children across the entire age range of 0 - 17 years. Expenditures may be higher for teen-aged children, and lower for pre-teen children. For

various technical reasons, Betson was unable to provide reliable estimates on child-rearing expenditures for teen-aged children. Based on estimates provided by Espenshade, however, the relative cost associated with children aged 12 to 17 is 1.146 above the average.

**(8) Visitation costs are not factored into the schedule.** Since the Schedule is based on expenditures for children in intact households, there is no consideration given for visitation costs. Taking such costs into account would be further complicated by the variability in actual visitation patterns and the duplicative nature of many costs incurred for visitation (e.g. housing, home furnishings).