SUPERIOR COURT OF NEW JERSEY
LAW DIVISION: MIDDLESEX COUNTY
DOCKET NO. L-029802-85MM

CHRISTIAN FRAGOSO, et al.,

Plaintiff,

vs.

LEE M. ROSENBAUM, M.D., DANIEL SCHWARTZ, M.D., WILLIAM L. LUPATKIN, M.D., and MARTIN L. COHEN, M.D.,

Defendants.

DEPOSITION OF:

EDMOND PROVDER

B E F O R E: NANCY J. GILMARTIN, a Certified Shorthand Reporter and Notary Public of the State of New Jersey at the office of Blume, Vazquez, Goldfaden, Berkowitz, Oliveras & Donnelly, Esqs., 5 Commerce Street, Newark, New Jersey, on Thursday, July 7, 1988, commencing at 2:05 p.m., Pursuant to Notice.

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BY: STEPHANIE J. BRIODY, ESQ.
For the Defendant Rosenbaum

CONNELL, FOLEY & GEISER, ESQS.
BY: JUDITH A. WAHRENBERGER, ESQ.
For the Defendant Schwartz

DUGHI & HEWIT, ESQS.
BY: MICHAEL J. KEATING, ESQ.
For the Defendants Cohen and Lupatkin

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MS. FORTE: Before we get started, Mr. Provder indicated to me there are a couple typos and some changes he would like to make to his report before we get into that.

MS. BRIODY: Why don't you do that now.

THE WITNESS: On the first page, the third line where it says, "He was employed," should be, "She was employed," speaking of the child's mother.

MS. BRIODY: Which paragraph?

THE WITNESS: First page, last paragraph.

MS. BRIODY: She?

THE WITNESS: Yes.

MS. WAHRENBERGER: She has been a crane mechanic?

THE WITNESS: No last line. "She was employed as an administrative assistant."

MS. BRIODY: Okay.

THE WITNESS: Page 2 last paragraph should be Christian's mother provided that information, gives the following regarding Christian.

Page 3 under the Purdue Pegboard which is in the middle of the page, one, two,

three, four, five, the sixth line first word on the line is "the". That should be eliminated, "on the four-part assembly section of this task when compared to his age norm group."

The same paragraph, fourth line from the bottom of the paragraph, "He used," should be, "He..." The "used" should be eliminated. He favored his right hand.

Under the McCarron Assessment of Development, that first paragraph, "This score was consistent with his IQ of 101." That's his full scale IQ.

MR. KEATING: As opposed to 105?

THE WITNESS: Yes. That's his overall IQ as reported.

MR. KEATING: It's 101 overall?

THE WITNESS: It's the full scale. I also report the full scale.

Page 4, the second -- under "Employability Opinion," the second paragraph under that heading, those two sentences basically mean the same, his functional academic capability was significantly below his IQ level." And the second sentence

basically says the exact same thing.

MS. WAHRENBERGER: Are you saying you want the first portion of the first sentence to be removed?

THE WITNESS: Yes.

MS. WAHRENBERGER: So take out "actual grade level"?

THE WITNESS: The whole thing is just a repetitive sentence. It should read "...IQ level."

MS. BRIODY: Period?

THE WITNESS: And that's the same level that's below it.

MS. BRIODY: Is that it?

THE WITNESS: That's it. Let me just make sure.

That's it. I'm sorry for the corrections.

E D M O N D P R O V D E R,

377 Park Street, Hackensack, New Jersey,

having been duly sworn, testified as follows:

DIRECT EXAMINATION BY MS. BRIODY:

Q Mr. Provder, my name is Stephanie Briody. I'm an attorney with McDonough, Murray & Korn. We represent Dr. Rosenbaum in this action. We're here to take your deposition. Have you had a deposition taken before?

A Yes.

Q On how many occasions?

A I believe seven.

Q I'll just give you a few preliminary rules to refresh your memory.

The Court Reporter seated to your left is taking everything down stenographically. Only one person can talk at once. Please wait for me to finish the question before you start your answer. Likewise, she can't take down a shake of the head or other gestures. You have to give your responses verbally.

If you don't understand one of my questions, ask me to rephrase it and I'll be happy to do that. You have to make sure you understand the question before you answer it. She's taking down everything that is said in

the room. Although we're in this blue room as it is, this proceeding has the same force as if we were in court right now testifying before a judge and jury.

Do you understand those instructions?

A I do.

Q Of the seven times you've given deposition testimony before now, in what cases have you given them for plaintiffs, how many?

A I believe they've all been for plaintiffs.

Q And how many cases have you reviewed for Mr. Blume or his office?

A Guesstimate would be seven to 10.

Q And how many are pending?

A I have no idea.

Q More than this one?

A I wouldn't know that information.

Q Have you testified in court before?

A Yes.

Q How many times?

A I believe I've testified this year three or four times.

Q And have you testified in any case for Mr. Blume this year?

A No. I've never testified in any case for Mr. Blume.

Q And are you including compensation cases in that total?

A No. I'm just including personal injury cases. I'm sorry. Wait. In the total of what?

Q The cases that you testified in court.

A No. I'm not including those, no.

Q In the last year how many cases, personal injury cases, have you reviewed?

A I average about 10 to 12 a month.

Q And what's the percentage of that breakdown, plaintiffs versus defendants?

A 65 percent plaintiff, 35 percent defense.

Q And in what area do you give expert testimony?

A Rehabilitation counseling.

Q We began this deposition by your making a few correction on your written report dated May 11, '88.

A Yes.

Q Is this final report the product of a word processing machine or some type of typewriter that prints out a printed form?

A Yes.

Q And do all of your reports come off the same type word processor?

A I don't know what you mean by the same type word

processor.

Q Are they all printed in the same format?

A I still don't understand the question.

Q Can you go to your word processor and pull up this report and then make changes to it if you wanted to?

A Yes.

Q And are those reports retained on that word processor?

A No.

Q Do you retain them in the files?

A Yes. A copy is made.

Q Do you have personal notes from which you make up this report?

A Yes.

Q And may I see those?

A You want to see my whole file?

Q If it's on Mr. Fragoso, yes.

A I don't think I'd bring anybody else's file.

Q Is the Vocational Interview Work Sheet something that's completed when the client is in your office?

A Yes.

Q On Page 6, the Psychological Symptoms, you have circled difficulty concentrating and short attention span. Are these circled because that's the history the

mother gave you or did you test those yourself?
A No. Those are all the history given by the mother.
Q Am I correct that the only written documents prepared as a result of your meeting with the client are this WRAT test, W-R-A-T, test form, this MAND, M-A-N-D, test form and the Vocational Interview Test Sheet?
A Well, the work sheet is one that I prepare. The rest of them are report -- well, the WRAT work sheet is one that Mr. Fragoso completed. And the MAND work sheet is something that I completed based on my evaluation of him.
Q And the only other materials in this file are documents that you received from Mr. Blume. Is that right?
A Correct.
Q Did you review those documents that are contained in this file before you saw Mr. Fragoso?
A Yes.
MS. FORTE: Mr. Fragoso you mean the child?
MS. BRIODY: Yes. He's the Plaintiff, the infant.
Q Did you have a conversation with Mr. Blume about the case before you reviewed the file?
A No.

Q How did you happen to review this file and meet with this gentleman?

A I believe either a telephone call -- I believe a telephone call was made to my office indicating they wanted me to evaluate a child. An appointment was set up. Client was evaluated.

Q Do you evaluate clients of all attorneys that call your office or did you know Mr. Blume before this one?

A Well, we already discussed this; that I have done a number of cases for Mr. Blume.

MS. BRIODY: For the record, I'd like to mark those three documents that were prepared at that meeting, the MAND test, M-A-N-D, the W-R-A-T and the Vocational Interview Work Sheet.

(MAND test, marked Exhibit DR-1 for IDentification. WRAT test, marked Exhibit DR-2 for Identification. Vocational Interview Work Sheet, marked Exhibit DR-3 for Identification.)

Q You mentioned before that you do about 10 to 12 reviews per month?

A That's correct.

Q How many years have you been doing that type of review?

A I started out as a vocational expert for the Social Security Administration in 1977. I was involved in a number of cases with them. And then in 1981 I started getting involved in doing personal injury work.

MS. WAHRENBERGER: What year was that, please?

THE WITNESS: '81.

Q What percentage of your reviews involve or your evaluations involve doing assessment of six-year-olds or that age group?

A I can't be specific, but I believe I've done -- well, you're talking only since 1981 personal injury cases?

Q Sure.

A Because I did a number of Social Security cases in that prior period of time.

MR. KEATING: In that category?

THE WITNESS: Yes. Well, I don't know six-year-olds, children cases.

MR. KEATING: Infants?

THE WITNESS: Yes.

Q Children cases is what I want to know.

A Yes.

Q You can even include the Social Security experience.

A Well, I'd say during the time I evaluated Social Security cases maybe 25 or 35 children cases.

Q And that was between the years '77 and '81?

A Well, no. I was involved also with Social Security up to the present time, but between '77 and '81 was when most of the cases were involved.

Q 25 children cases?

A Approximately.

Q How about from '81 to the present?

A I'd say anywhere from 35 to 50.

Q And is there a different evaluation you perform when it's a child you're evaluating as opposed to an adult?

A Yes.

Q What's different?

A The difference is that in an adult's case there are quite a number of different tests that are administered. The test battery goes anywhere from 10 to maybe 17 or 18 different tests. The types of tests are different also in that I'm looking at the person as an adult. I'm looking at the person's ability to do actual jobs, actual job tests in that, say, for example, I wanted to see if a client had the capability of working as an automobile

mechanic. I would give them a variety of different tests to do as an automobile mechanic. But because of the limited amount of norms available for children, I'm limited to the tests which I administered to Mr. Fragoso.

Q And why do you choose these particular tests, specifically the WRAT and MAND tests?

A Well, the WRAT test -- well, again there are limited tests for children that provide norm groups for children. The WRAT Test, Wide Range Achievement Test, is the definitive test in measuring an individual's functional academic capability, and I give a higher level of this version to adults at times. So that's one reason I gave the WRAT.

The MAND test, again, the norm groups provided are age norm groups so I can measure the child's performance up against his own age group.

Q In your report, specifically Page One of the report -- just for the record, does your report not consist of five pages?

A Correct.

Q Dated May 11, 1988?

A Yes.

Q And is this the only report you've written in this case?

A Yes.

Q Does it contain your opinions concerning the vocational assessment of this child?
A Yes.
Q You indicate that you met with the child for a total of two-and-a-half hours. He was evaluated at your office?
A Yes.
Q Did that include getting a history from the mother?
A Yes.
Q How much time did you actually spend speaking to Christian Fragoso?
A Speaking to him or evaluating him?
Q Evaluating him.
A Because he was present during parts of the interview portion because I tried to elicit information from him.
Q So while you're questioning the mother he's sitting there?
A He was sitting there for part of the evaluating, part of the interview.
Q Do you know what time of day it was when you had the interview?
A In the afternoon.
For example, there is, if I could point to that

interview work sheet, when you're flipping through on the first page you'll see there is a notation next to his birth date and his address. I had asked him those questions. He was unable to respond to them. I tried to see what kind of fund of knowledge he had just as a general assessment because almost all of the information came from his mother.

I believe I didn't answer your question, how much time was spent in the actual evaluation.

Q Of the child.

A Where I did the testing, approximately about an hour-and-a-half.

Q The functional limitations in this work sheet, how did you test those?

A That work sheet history sheet.

Q When it indicates, and you have this in your report, that he fatigues from walking after 10 to 15 minutes that's history?

A His mother reported that, correct.

Q You didn't test that in the office?

A Did not.

Q Did you observe him walking?

A I did, yes.

Q And did you make any observations about his gait?

A I believe there are some observations noted about his gait on the interview sheet itself.

Q Likewise, the activities of daily living, was that information gathered from the mother?

A From the mother, yes. As I indicated, the child was extremely limited in his fund of knowledge.

Q When you asked him his birthday, for example, and he didn't respond, how did you determine he did not have that knowledge as opposed to he didn't feel like telling you?

A Well, at that point in time I couldn't tell you whether I could tell whether he had the fund of knowledge or not. But from my observation of the way his mother answered it it was my understanding and opinion that he didn't have this fund of knowledge. I think I even wrote down, if I could see the interview sheet, I even wrote down what he did know and what he didn't know.

Q It says did not know day or month. Is that correct?

A Correct, yes. I did have good rapport with him during the evaluation.

Q And you are aware that it took him an hour and 15 minutes just to get to your office?

A Yes.

Q What was your understanding of his school

situation at the time of your evaluation?

A He was in what's -- let's see, what's called the perceptual -- he's classified as a percep -- strike that.

He is in a perceptually impaired class, a transition, ungraded class.

Q The Deerfield School, that the school he's enrolled in?

A Yes.

Q What's your understanding of the type of school that is? Is it a regular school?

A I don't know. I have to take a look at my notes.

Q Your interview sheet are you referring to?

A Yes.

Q Maybe we can get a copy and we won't have to --

MS. FORTE: I'll make a copy.

(Pause)

(Last question is read by the Reporter.)

A The actual school level or the class?

Q The actual school.

A The actual school appears to be -- from my reading of the records that were sent to me as well as what was told to me, it appears to be a regular school with a special education division, but that's just my opinion. Impression I should say.

Q Based on your evaluation did you not find or conclude that his fine and gross motor abilities were average, in the average range? Page 3, second to last paragraph.

A His controlled eye/hand coordination was average compared to individuals. On tasks that require muscle power his score was average. His score was also average on tasks of bi-manual dexterity.

Q So you would agree with that statement I made, that his fine and gross motor abilities were average? It's your sentence, the first sentence, McCarron Assessment of Development, Page 3?

A Well, his fine -- I'd say regarding fine dexterity overall they were average to a little below average if I look at each individual test that measured fine dexterity.

Q I'm looking at your report on Page 3. Can you turn to Page 3. "The McCarron Assessment of Development is a standardized comprehensive test battery that measures children's development in the area of fine and gross motor abilities." Then the next sentence, "The test battery consists of the administration of a representative sample of five fine motor tasks and five gross motor tasks."

A Right.

Q His overall score placed him in the average

group?

A His overall score of when you look at all the fine motor tasks together, fine and gross tasks together, when you look at all the tasks in the battery, his score was average.

Q Which was better? Are you qualifying it to say fine was better or gross was better when you look at the individual tasks?

A They're scattered. Some of the fine tasks were average to below average. Some of the gross tasks, specifically his area of body control and perceptual orientation, which was significantly below average.

Q I'm just talking about motor abilities.

A These are all subgroups of that fine motor.

Q Okay. He has at least an average IQ. Would you agree with that?

A That's what the IQ tests show.

Q You didn't retest his IQ, did you?

A I'm not a psychologist.

Q And you would defer to the pediatric neurologist, I think his name is Minarcik, about the neurological impairments that he tested?

A I don't know who you're having me defer to.

MS. WAHRENBERGER: Dr. Minarcik?

A Yeah, okay. What specifically are you noting that

he says that I should --

Q In general you would defer to his --

A Well, I'm not a neurologist or a pediatric neurologist, so I'm not going to debate what he says. That's not my area of expertise.

Q If he says he has a mild to moderate impairment, would you agree with that?

A I'm not -- where, his upper or lower extremities? I don't know what he's talking about. His cognitive function --

Q Well, let me ask you this: What did you base your opinion on in terms of your vocational evaluation?

A Based on my evaluation of him, the test scores and the observations that were made as well as my knowledge of my review of the school records and the test scores provided by the neuropsychologist.

Q You have on Page 2 of your report that you reviewed Dr. Minarcik's report dated 9/16/87. Was there anything in his report that you used as a basis for your opinion?

A I can't base my opinions on medical reports. I'm not a physician and only physicians can interpret medical reports.

Q I think you testified before you'd agree that the tasks requiring bi-manual dexterity and coordination

were average. Is that correct?

A On the MAND test, yes.

The reason I qualify it, it was also measured on the Purdue Pegboard.

Q To be average?

A Well, they were again slightly below to average on the use of the right hand and the left hand and using both hands together. He had difficulty in doing more complex things.

Q But if he has average bi-manual dexterity and an average IQ how do you make the jump to your opinion that he's precluded from performing any occupation existing in the local and national labor market?

A That's not his problem. His problem is his behavior, and there are significant problems.

Q What are the -- what's the basis for -- first of all, why don't you state your opinion for the record concerning his vocational assessment? What's your opinion?

A I don't understand the question.

Q His employability.

A Well, as you read my statement into the record, basically I found that he was unemployable for any occupation.

MR. KEATING: Because of behavior

problems?

THE WITNESS: It's not -- the behavioral -- the behavior problems.

Q Okay. Why don't we get into that.

A I'm not talking psychological problems. I'm talking behavioral problems.

Q What exactly is the basis for your opinion?

A He's got a short attention span. He's easily distractible. He has memory impairment and he needs much support and structure.

Q Those things, short attention span and easily distracted, were those something that the mother gave you by way of history?

A Those were some information gained in the history, but they were observed during the evaluation, and they're all consistently seen throughout the psychological tests.

Q Whose tests are you referring to?

A Both psychologicals, Dr. Rothermel, his report of June 2, '87, and in the psychological that was done -- let me say in the total -- well, here, there are more than one psychological that was done. In the records contained in his evaluation done by the Rutgers Medical School Department of Pediatrics they did a psychological. There were two psychologicals I believe done there as well as his most recent class records I have all indicate those

problems.

Q And his class records you mean his school records?

A Yes.

Q Aren't they working with him on his attention span and his memory deficit?

A Of course.

Q And don't they expect it to improve?

A I don't know whether they expect it to improve or not. I see it and he's had the problem for a while and this is consistent throughout the records I reviewed and does not appear to be improving at this point in time.

Q Even in the next decade you feel comfortable projecting that he'll never be able to have any type job in the national or local workplace?

A Unless there is a change in those areas, considerable change.

Q And you don't have that expertise to project as to whether there will be a change in what will be required to make a change, do you?

A I think you're asking for a medical opinion which I'm not going to give you.

Q How did you test the distractibility or how did you elicit that?

A Well, by just observation of him during his

performance during the testing.

Q And have you tested six-year-old males before for that age group?

A We talked about this already, yes, I did.

MR. KEATING: She means for distractibility.

MS. FORTE: That wasn't in the question.

Q I'll reask it. For distractibility. Take them separately.

A I don't test specifically for distractibility. I administer a test battery and make observation during that battery.

Q So distractibility is something a psychologist would pick up and you would just be an observer of it. Is that what you're saying?

A I don't know if it needs a psychologist to evaluate distractibility. I mean, he's got teachers that are observing distractibility.

Q You yourself observed it though while he was taking his test. Is that what you're saying?

A Yes.

Q How long did it take for him to complete these, the WRAT test and the MAND evaluation?

A As I said, the entire evaluation was about an

hour-and-a-half.

Q And was that after listening to his mother give a history for an hour?

A Yes.

Q And after an hour-and-a-half car ride?

A An hour and 15 minutes was the car ride.

Q Did you factor fatigue or anything like that into his performance?

A No.

MS. BRIODY: I don't have anything else.

CROSS-EXAMINATION BY MR. KEATING:

Q Mr. Provder, my name is Mike Keating, and I represent some of the other defendants in the case, just so that you know, Drs. Cohen and Lupatkin. I have a few follow-up questions and I want to get into some other areas as well.

We've been given a copy of your CV, and can you tell me, confirm for me, if it's a current CV? Does it contain all your training and experience?

A Yes.

Q Are there any additions to it that you'd like to make?

A No.

Q Did you ever receive a Ph.D.?
A No.
Q I'm going to assume then you discontinued participation in the doctoral program that's on the CV or are you still in it?
A I mean, it has not been totally discontinued but I'm not officially in it. The problem that I've had is that my adviser has retired.
Q Like lots of graduate work it's done over the course of many years?
A Yes. That's the problem. I've completed the course work. The dissertation is a problem.
Q What's the subject matter of the dissertation?
A I have had four topics and four advisers and we haven't gotten to that point yet.
Q You don't have a topic?
A It all depends on your adviser. I've had four of them. It all depends on your --
Q I take it you don't have a current planned topic?
A I have to decide who I'm going to be working with at the university.
Q And just so that we know is that at NYU?
A Correct.

Q The CV contains all your other education?
A Yes.
Q You are an expert in rehabilitative service? You used the term before.
A Rehabilitation counseling.
Q Did you recommend any rehabilitation for Christian Fragoso as part of your assessment?
A I did not recommend any rehabilitation in regard to any special needs or device or anything that he would need because I didn't -- I don't believe that he needs any special needs or device. He's receiving speech and occupational therapy twice a week at school currently. That's as far as I would go.
Q He's receiving occupational therapy?
A Yes.
Q Do you consider that inconsistent with your opinion that he's not employable?
A No. Do you know what occupational therapy is?
Q Maybe you better tell me.
A Because it's a misnomer. It doesn't have anything to do with work. It's a misnomber because -- I believe I understand you went to England, so we'll use them as a guideline. Occupational therapists in England do what I do. They deal with vocational rehabilitation aspects. Occupational therapy here in the United States deals with

they're basically physical therapists who work with upper extremity problems. They also may work with perceptual problems, too, and I believe they're doing both with him. So it has nothing to do with jobs per se.

Q Let me ask you this: Would it be fair to say that he is receiving that therapy, the speech and occupational therapy, for the specific problems that you contend make him unemployable?

A Well, I don't contend speech -- as far as I know, the speech does not render him unemployable if that was just one significant problem. I could communicate with him and understand what he told me. So and that's a, you know, that's my gross way of deciding whether he understood what was going on whether it would be a problem. I don't think it would be a problem.

In regards to the other areas, I think everybody is working on these problems. He's in a classroom with a teacher and two aides and he's receiving occupational therapy which appears to be somewhat perceptual, somewhat dealing with balancing and some is physical muscle weakness and tone. I don't believe that by itself is any limiting factor in his capability of working.

Q Have you had the opportunity to, in reviewing the records, see any or document or evaluate for us any program that he's made some response to the therapy he has

been getting?

First of all, do you recall any of that from reviewing the --

A Reviewing the records. He continues to meet goals that have been set aside in his individual educational prescription or report program that they did advise for him. It's just that, you know, you're talking about progress that is very, very slow.

Q But he's made progress nevertheless, at least according --

A Well, we're talking about the difference between moving one inch where he has to move the whole length of this table which is about six feet.

Q Would you agree with me though that in your evaluation of this case that for a child who is six years old that it's early, isn't it, to make a prediction about his vocational potential for the rest his life?

A I can only make an assessment of what his vocational assessment is by using as a given that the way I see him now will not be significantly altered by the time he reaches 18.

Q You don't think that he will be or that these factors which you've listed for us will change very much by the time he's 18?

A They will change some, but I don't think to the

employment that it will make him employable. We're talking about somebody who has an average IQ, but that's not the problem. The problem is that his functional academic capability is so limited, and as he gets older the spread becomes greater because he's not going to get much better and his learning becomes more difficult for him.

Q Let me stop you there a moment. I understand that based on your training you can look at a child who has these impairments and then you can project what the vocational limitation may be.

A Correct.

Q Do you have any expertise though in looking at a child with these learning disabilities and offering an opinion as to whether or not they're going to improve over time?

A Learning disabilities?

Q Right.

A As I indicated, I'm assuming they're not going to alter significantly. I'm not a learning disability specialist.

Q Can you tell us, please, on what basis you've assumed the learning disabilities wouldn't improve?

A They're of such severities now. We're talking about his functional academic level or his -- that's the

problem, his functional academic level.

Q And you're assuming that's not going to improve?

A He's going to be able to learn different things, but it's going to be increasingly difficult. He's going to fall further and further behind as time goes on.

Q Let me stop you there. What in your background or training allows us to form that?

A Past experience working with children who had this type problem, with people with normal IQs.

Q In rehabilitation settings?

A Yes.

Q What is the Occupational Assessment Services, Inc.?

A That's my own company.

Q And professionally, can you tell us what it is primarily that you do within that company?

A Provides evaluation of basically litigation cases about 85 percent.

Q What is the balance of your professional time spent doing?

A You'll have to repeat the question.

Q Would it be fair to say that 85 percent of your professional time is devoted to evaluating legal matters?

A No.

Q What is the 85 percent figure that you gave?

A That is the amount of time devoted to legal matters through Occupational Services.

Q That's your time through Occupational Services?

A That's my time that I spend evaluating legal matters through Occupational Assessment Services, correct.

Q Do you do any other kinds of rehabilitation work or evaluation work other than for compensation cases or liability cases?

A Yes.

Q Tell us the scope of that, what it involves.

A Direct rehabilitation, getting involved in direct palcement of people who become injured.

Q What portion of your professional time do you spend doing that?

A About 50 percent of my time.

Q And who is that done through? Is that a private practice or is that --

A I have another company that is involved in that, National Rehab Specialists.

Q Now, I'm a little confused and it's my own fault. Let me clear it up.

50 percent of -- let's talk about your

professional time for the moment. 50 percent of it is involved in actual rehabilitation through the other company?

A Correct.

Q What's the other 50 percent of your professional time devoted to?

A Occupational Assessment Services.

Q Where does the 85 percent fit?

A 85 percent of the cases seen in Occupational Assessment Services deal with litigation. The other 15 percent are basically change of career evaluations, counseling service to people that are non-disabled.

Q How do these cases come to you, the last category?

A Basically word of mouth.

Q Now, of the litigation side of work that you do through the -- I'm going to call it the OAS, what percentage of it is Workers' Compensation cases?

A I'd say maybe five to ten percent.

Q And is the balance of it -- you tell me what the balance of it is in terms of what types of cases?

A Maybe another five or ten percent Social Security. The balance would be personal injury.

Q Now, in the Workers' Comp case do you traditionally review it on behalf of one side or the

other? In the setting of a compensation case, I think it's respondent and claimant.

A I don't know if I understand the question.

Q Traditionally when you review or make a vocational assessment in a comp case is it traditionally made on behalf of one side or the other?

A Yes. Made a majority of time for the respondent. I'm sorry?

MS. BRIODY: The injured person?

THE WITNESS: For the petitioner. I'm sorry.

Q Your understanding of that is the worker injured is making a claim for disability?

A Yes.

Q Have you reviewed compensation cases before for Blume, Vazquez, the plaintiff's firm in this case, if you know?

A Twice.

Q And the SSI evaluations that you --

A Social Security Disability. I don't do any SSI.

Q Social Security Disability evaluation, who are those done for? Is that for an agency for the carrier?

A Initially was done exclusively for the agency, for the Social Security Administration hearings and appeals.

Now I do a few for them, more for the claimants, the attorneys, the claimant.

Q So I know, that's a person -- a claimant is a person in that setting making some sort of claim for disability, and you may come in to evaluate whether or not they're entitled to benefits from being disabled?

A That's correct.

Q And then in the liability cases, you're about 65 percent plaintiffs, 35 percent defendant?

A Correct.

Q The prior cases that you reviewed for Mr. Blume's office, am I to understand that they've been both comp and liability cases?

A Yes.

Q Do you recall if you've ever reviewed a case for this office where you found no disability?

A I don't know what you mean by no disability. The person had no -- I don't know what you mean by no disability. I don't deal in disability. I deal in loss of earning capacity or employability.

Q In those cases that you reviewed for this office do you ever recall reviewing a case where you found no such impairment?

MS. FORTE: Then we wouldn't have a case.

A I cannot recall.

Q What is your fee for doing an assessment like this?

A This assessment was $1,000.

Q Is that based on an hourly figure or is that a flat fee?

A It's a flat rate that's somewhat based on hourly rates.

Q Now, if you testify in court what is your fee for a court appearance?

A $800.

Q Is that a flat fee or hourly?

A Flat fee.

Q And how many liability cases would you estimate you review in a year?

A Say this again.

Q Liability cases where you make a projection about lost earning or vocational inability, how many cases a year do you review?

A I don't do any projections as to total dollar bottom line figures. That's not my area of expertise. I'm not an economist. I believe I already provided that information. I get about 10 to 12 cases a month.

Q I was under the impression that was for this year.

A It's about pretty consistent.

Q Since how long have you been doing this liability work?

A Well, as I said I started 1981, but I didn't really do much personal injury work until about '82, '83.

Q Now, just so that we're sure, you have no formal medical training. Is that right?

A We already discussed this. I'm not a physician.

Q And you're not offering any opinions here as to the cause of these limitations. Is that correct?

A That's out of my area of expertise.

Q And would you agree with me that you are placing primary reliance on the records that you reviewed and the history from the mother or the family in terms of documenting these limitations?

A As well as my own testing.

Q Okay. And when you say your own testing, are you referring to the documents that we've marked?

A That's correct.

Q The WRAT test and the MAND?

A The MAND.

Q The MAND?

A Yes. Also the front of that also includes the scores from the Purdue Pegboard which is also reported, the front of the MAND.

Q Would you agree with me you're not an expert in psychology?

A I'm not a psychologist.

Q I take it you've had no formal training in neuropsychology?

A I'm not a neuropsychologist.

Q And would you agree with me that you're not an expert on the subject matter of whether or not this child's disabilities will improve over the years in response to therapy?

A I'm -- that opinion would have to be opined by somebody probably of a medical or a neuropsychological background. It's not my area of expertise.

Q So to answer my question you would agree with me you're not an expert on that subject matter in regards to whether his conditions are going to improve substantially?

A Correct.

Q Now, the standard vocational interview is that form that's part of your office file, correct?

A Yes.

Q Just so I'm sure, is this information that comes from primarily the parent, the parents in the setting like this?

A Depends on the age of the child.

Q Well, with a six-year-old.
A With a six-year-old, from the parents for the most part.
Q Now, in your report I recall your making reference to his condition as congenital. Do you recall that reference?
A That was something -- I don't know if it's ...(no further response)
Q I think it's on Page 2.
A Yes.
Q What did you mean by that?
A Something that occurred at birth.
Q You're not offering any opinion specifically as to what that is?
A You are absolutely correct. I am not.
Q On the average, how often do you go to court to testify?
A I believe I've been in court three times this year. Last year I believe seven or eight times.
Q Do you review matters arising out of states other than New Jersey?
A Yes.
Q Can you tell us what other states?
A Pennsylvania, New York, Massachusetts.
Q Do you advertise at all?

A Yes.

Q Can you tell us where you advertise?

A Massachusetts Law Journal. That's about it at the present time.

Q Do you advertise here in Jersey at all?

A Not yet.

Q Are you going to though?

A I don't know.

Q In the states other than New Jersey, how is the breakdown, plaintiff versus defendant, in your liability cases?

A Massachusetts more defense than plaintiff. New York more plaintiff than defendant.

Q Are you able to recall for us any case that you reviewed that is similar to this one?

A Off the top of my head --

MS. FORTE: What do you mean by similar?

Q I'm afraid that's what it's going to have to be.

MS. FORTE: Similar in what respect?

Q Where you were asked to interview or examine a child and make a profession about future vocational or earnings limitations.

A With the same type of employment impairments?

Q Basically.
A That's what I mean by similar, when I say similar.
Q With the same constellation of problems more or less that this kid has?
A Not off the top of my head.
Q Would you agree with me, or maybe you can't, but let me ask this way, of the infant assessments that you have done, that you told us about, what percentage of them would you say involved limitations that were similar to this child's limitations?
A I couldn't tell you.
Q Have you ever seen a case that was similar to this one before, before you got involved in this case?
A I don't know what you mean by similar.
Q Similar.
A I mean a six-year-old, a person that has neurological deficits, a person who is easily distracted, has difficulty concentrating. We can go on and on. Physical impairments similar in what way? That has the identical exact circumstances?
Q Let me ask you this, as a vocational expert you probably evaluate all kinds of different injuries that can incapacitate people and keep them from working. Isn't that true?
A That's correct.

Q I'm going to categorize this case generally as a case where there are learning disabilities which, in your view, preclude this child from future employability. Is that a fair characterization?

A Well, the learning disabilities are just a part of it. It's the behaviors that are exhibited that are the other part. I don't know if learning disability accounts for that behavior. Learning disability accounts for the scores on the Wide Range Achievement Test being below average with his IQ.

Q Can we say then or characterize this as a case where there are behavioral problems which, in your view, if they continue to manifest will affect the child's employability?

A Yes.

Q Now, accepting that as a characterization generally of this case or at least your end of it, can you tell me have you ever reviewed a case in that category before this one?

A I can't pull up every case that I've done. I can't answer that question.

Q You don't remember?

A That's correct.

Q The documents that have been marked do they contain all the raw data you recorded at the time of the

interview and evaluation that went into your final report?
A Yes.
Q What is in the balance of your file?
A Medical records.
Q And did you review those before you saw the child?
A Yes. They were sent to me before medical and school records.
Q Did you see anything about how he was performing in school academically?
A We discussed this already. I reviewed it, his most recent records from the Deerfield School.
Q How was he doing academically?
A The same as we saw him, as the scores I saw on the WRAT.
Q Which is average intelligence?
A That's not reported in his school records. That's reported in psychological tests done.
Q Are the school records consistent with that?
A Of a person -- if you look at these school records and you knew his IQ. Would they be consistent?
Q Right.
A No. They wouldn't be consistent. His performance is significantly below his IQ level, his actual performance.

Q And that's due to the behavioral problems in your view?

A I can't tell you what they're due from. The limited functional academic capability could be because of the behavioral problems or his learning disability or a combination of both.

Q And what is the learning disability?

A Well, the learning disability is coupled with the behavioral problems. These are blocking his ability to learn.

Q But what are specifically the learning disabilities?

A I don't think they're specifically reported. Let me just take a look at the records. They're reported in such a way such as -- they're not reported. They're reported in behavioral objectives as opposed to specifics from what I see, specific learning disability.

Q Well, from --

A For example, the reporting that his performance is below his age-expected performance.

Q I understand that. But are you able to tell us from the records that you reviewed what the specific nature of the learning disability is?

A I'm not a learning disability specialist. We talked about that. I'm not a neuropsychologist.

Q But it's part of your assessment, is it not, that in your view, the learning disability, whatever it is, is contributing to the problem, isn't it?

A What problem?

Q The substandard academic functioning that you find in his records.

A Substandard academic functioning is a combination of whatever is preventing the child from learning. They're terming it a learning disability. That could be a variety of different factors as well as the behavioral areas that we discussed.

Q Would it be important for you to know what type of learning disabilities are involved for you to be able to make accurate projections about the future of this child?

A No.

Q That wouldn't be important?

A No.

Q How would you characterize the attention -- is it attention deficit disorder would you say?

A Oh, he has a limited attention span.

Q How would you characterize that for us in terms of degree?

A What I saw or what is reported? Because what is reported I think is more -- as I said, I had very good

cooperation with him. Good rapport was established and he worked with me one-to-one. Even in his classroom where he's now where he has three teachers and two aides and there is only 10 or 12 kids in a class he has problems in a group setting. So I would say what I saw was the optimum conditions. So I would characterize it as moderate.

Q What you saw?

A What I saw.

Q Can you tell us or give us examples of what types of things you observed that enabled you to say he has limited attention span? Just give us an example.

A Couldn't do particular tests without having to get up to concentrate on them, had to walk around the room. A couple times he had to go out and see his mother, that type of thing.

Q What type tests are these, written tests where he's providing information?

A No. The only test that he had that is written is the WRAT. Other things involved manipulative abilities and apparatus.

Q Is that reflected somewhere on these tests?

A Well, this is the only place his handwriting appears, on the Wide Range Achievement Test.

Q But what type test was he doing?

A Throughout the evaluation.

Q I think before you made reference to structured support or something like that. What does that mean?

A That means providing an individual support structure during the evaluation which means that I basically sat with him. Well, I always sit with a client, but I basically was working with him as he was going along in a more intense manner of constantly reinforcing him positively to have him keep working on the task.

Q Is that or can you characterize that as a one-on-one --

A The evaluation is one-on-one. That's why I'm saying the test results and what I observed was under an ideal situation.

Q How would you characterize the school that he's in now in that context? From what I understand you said, is that structured?

A What's told to me he's in an obviously structured setting but he's in a class. It has 13 children in the classroom, but he's in a classroom run on a token economy. Do you know what that is?

Q Sounds like it's related to the subway.

A It's not. A token economy is a real -- is related to B. F. Skinner's work on positive reinforsement, and

every time somebody does a particular task say, for example, they say Chris, go and put this book back in the book shelf and Chris goes and puts it back in the shelf, they will give him a token. At the end of the week they count out how many tokens they have and usually they can go to a store that the school has and they buy something with the tokens. Now it may be they actually purchase something. It may be a positive reinforcement that Chris gets five minutes extra time with the teacher. He doesn't necessarily have to buy anything, but they're accumulating these tokens. They can be actual tokens or just points. Probably with him they're actual tokens. And this is an environment that traditionally is done with mentally retarded individuals, low function individuals. He's not functioning well in this class.

Q By history in your report you indicate that he's capable of independently washing, dressing and bathing and he apparently takes the bus to school. Is that correct?

A The bus comes for him and he gets on the bus.

Q Sure. That's what usually is done, isn't it?

MS. BRIODY: When you're six.

Q He spends time playing with his brother, and wouldn't you agree with me that by history at least in your report here it indicates that a lot of the things

he's doing appear to be normal childhood activities?
A That is -- he's able to dress and wash himself, you know, bathe himself to an extent that a six-year-old would bathe himself, plays with his brother. Doesn't have any friends outside of school. That's unusual.
Q And you're saying that because of the attention disorder and the memory problem and distractibility that he's never going to be able to hold a job?
A I believe that was what my opinion was and still is.
MR. KEATING: All right. That's all I have.
A You could rephrase it again. It will be the same opinion.
MR. KEATING: That's not necessary.

CROSS-EXAMINATION BY MS. WAHRENBERGER:
Q My name is Judy Wahrenberger. I represent the obstetrician, Dr. Schwartz.
Just back to the question a couple questions ago in which you responded that it was your understanding that Chris only plays with friends at school, he does not have any friends at home. Did you inquire as to the setting in which he lived in terms of the availability of

friends?

A Let me just check my notes. No. The only thing noted was does he have any friends? Does he play with them in school? Well, what does he do after school? That's the question, and what type activities is he involved in? He's involved in watching TV. He likes to watch cartoons. Does he play with friends? No, only at school. He doesn't have any outside friends.

Q And you took that to mean that he was incapable of playing with friends in the neighborhood?

A No.

Q Well, are you suggesting that was a problem?

A No.

Q Okay.

A I'm just saying this is information that was learned.

Q This was given to you by the mother?

A Correct.

Q You testified earlier that Christian has a memory impairment.

A Yes.

Q What is his memory impairment?

A Difficulty remembering and reasoning information. For example, instructions. I gave him an instruction that he had to use his left hand to do a particular thing.

Well, he did it with his right hand and then handed it off to his left hand to put it into the pegboard. I gave him a test that he had to remember four-part steps. He was totally confused despite repetitive information, demonstrative way of instruction, showing him what to do, telling him what until after quite a number of times he was able to do a few and then forgot it.

Q So the memory impairment that you observed related to instruction and failure to follow instruction?

A That's correct.

Q The tests that you used in your evaluation of Chris, are they geared for any particular age level?

A That's why they're used. They are -- all the tests that I administer have norm groups geared to his age. For example, the Purdue Pegboard -- let me use the WRAT. The WRAT, Wide Range Achievement Test, can be given to people age five years oh months to 11 years 11 months.

Q What are -- oh, I see.

A So that's the reason this test specifically was selected because of the age.

Q And Chris was six years old at the time you administered this test to him?

A Six years, almost -- six years eight months, something like that.

Q At what age should a child be able to tell

his right from his left hand?
A Could be five or six.
Q During your education --
A But he was not verbally told to use his right to his left. His hand was pointed to and he was told to use that hand, specifically do that particular thing, and I even held my hand over his to show him.
Q So you did not determine whether or not he knew right from left?
A That was not. I purposely did not do that because maybe he didn't know his right from his left.
Q Could you define rehabilitation counseling?
A Yes. Rehabilitation counseling is an area that's involved in assisting people of either physical and/or emotional impairments and assisting them with problems involving their impairments, providing evaluation services, counseling services, work adjustment services, planning services, case management services or vocational services to assist them in reaching the fullest potential.
Q Does rehabilitation counseling relate to children or adults only?
A Relates to the whole gamut.
Q And by children did it include six-year-old children?
A Could be newborns if they have a physical

impairment. It would be involved in working with the family to develop case management goals.

Q Did any of the courses that you took either in your bachelors or master degrees or the courses you took for your doctoral degree involve information concerning children?

A They did but there was no specific course. For example, there is no course pediatric rehabilitation.

Q In what way was information concerning children incorporated in the courses that you took?

A Well, dealing with any particular impairment affected the impairment on the person's ability to function was gone over.

Q I'm sorry. I don't understand that.

A For example, if we talked about people who were spinal cord injuries we would talk about the effect of the spinal cord injury on the child and on the adult and various factors that would affect their rehabilitation progress.

Q Would it be fair to say that the focus of rehabilitation counseling would be adult though there might be a child component?

A The majority of work is with adults, correct.

Q You have apparently written eight articles.

A Presentation and articles, yes.

Q Do any of them have anything to do with the evaluation of the vocational potential of a child?

A No.

Q Could you explain what a Purdue Pegboard is?

A Purdue Pegboard is a pegboard that's about 18 inches long and approximately 12 inches wide. At the top of the pegboard on the right-hand side is a cup that contains pin that are approximately three inches high -- three inches in length and about a half-inch in diameter. In the middle part of the pegboard there are -- let's see, on Chris' side, it would be middle part, would be a container of washers. The third part contains some collars and another part is a receptacle of pegs, and what he has to do is place pegs and various assemblies into the holes in the pegboard.

Q My understanding of your assessment of his performance using the Purdue Pegboard was that as to both hands he was at the 50 percentile?

A Yes.

Q Is that considered to be average?

A To be average to slightly below average.

MS. WAHRENBERGER: Thank you. I have no other questions.

MR. KEATING: I have one other thing.

CROSS-EXAMINATION BY MR. KEATING:

Q In your report you conclude that without these problems and the attention disorder and the memory problem, leaving those factors aside, he has the skills or ability to earn -- to be in a job that be would earn about $17,000 a year in 1987 dollars. Is that one of the conclusions of your report?

A 17,000, yes.

Q Now, just tell us briefly and simply, if you're able to, the way that you figured that out. What are the mechanisms of that analysis?

A It's a very conservative figure. I'll explain why. Essentially it's based on his IQ score because we have that. And his IQ score translates into what we call category of attitude called G which is general intelligence. And the IQ score of 101 we could either fit into the G category which is three or into the -- that means he's average, or we can go to the G category II which would mean that he would be slightly above average and possibly could go to college. There are people with 101 IQs that go to college. It's not a thing that it's not unheard of.

Q But it's unusual?

A No. It's not unusual either. You go to college with an IQ of 120 and above. In that average range you

could go to college. But I'm not even considering that. Okay? I'm playing it very conservative saying he has a general capability of three. I entered that information into a computer program that consists of information geared to all 13,000 different jobs that exist in the national ecomony and the requirements in physical and mental requirements of each of those jobs. That was sifted through and for each of those 13,000 there are various categories of jobs that fall into census codes. And there are wages that are reported by the United States Department of Labor based on each of those census codes. I looked at all the jobs that require a G III requirement to get that job, and then sorted through all of those jobs and what the average, meaning the average wage, was for those jobs.

Q In 1987?

A Yes.

Q And that's --

A 1987 dollars, yes.

Q And that's how you arrived at that figure?

A Yes.

Q Do you have any expertise or experience in job opportunities that are available to handicapped --

A Obviously.

Q And would you agree with me that training in

rehabilitation that it's now fairly common, isn't it, for handicapped people to have jobs?

A Well, I'd be out of business if it wasn't common. Yes, it is common.

Q So it is common?

A Yes.

Q That's all I have.

A That's the whole goal.

MR. KEATING: That's all I have.

(Witness excused)

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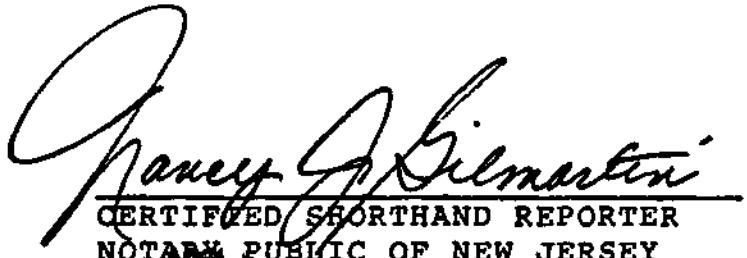
(Whereupon, at 3:30 p.m., the foregoing Deposition Proceeding was concluded.)

* * *

C E R T I F I C A T E

I, NANCY J. GILMARTIN, a Certified Shorthand Reporter and Notary Public of the State of New Jersey, certify that the foregoing is a true and accurate transcript of the testimony of the aforementioned first duly sworn by me.

I further certify that I am neither attorney or counsel for, nor related to or employed by, any of the parties to the action in which the deposition is taken, and further that I am not a relative or employee of any attorney or counsel employed in this case, nor am I financially interested in the action.



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