

1 United States Magistrate Judge. (Docket Entry Nos. 17, 18). On
2 June 19, 2017, the parties filed a Joint Stipulation ("Joint Stip.")
3 setting forth their respective positions on Plaintiff's sole claim.
4 (Docket Entry No. 25).

5
6 **SUMMARY OF ADMINISTRATIVE DECISION**
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8 On October 3, 2013, an application for SSI was filed on behalf
9 of Plaintiff, a child under age 18,² alleging disability beginning on
10 June 19, 2013. (AR 161-70). On March 19, 2015, the ALJ examined
11 the record and heard testimony from Plaintiff's father. (AR 35-47).
12 On April 16, 2015, the ALJ denied Plaintiff benefits in a written
13 decision. (AR 11-27).
14

15 The ALJ applied the three-step sequential evaluation in
16 determining whether Plaintiff, as an individual under the age of 18,
17 was disabled. (AR 12-16). At step one the ALJ must determine
18 whether the Plaintiff has engaged in substantial gainful activity
19 since the date of application; at step two the ALJ must determine
20 whether Plaintiff had a medically determinable severe impairment or
21 combination of severe impairments; at step three the ALJ must
22 determine whether Plaintiff had an impairment or combination of
23 impairments that meets or medically equals the severity of a
24 Listing, or that functionally equals a Listing. See 20 C.F.R. §
25 416.924. At step one, the ALJ determined that Plaintiff had not
26 engaged in substantial gainful activity after the alleged onset date

27 ² Plaintiff was sixteen years old in October 2013 when the
28 application was filed and seventeen years old at the time the
decision was issued.

1 of October 3, 2013. (AR 14). At step two, the ALJ found that
2 Plaintiff had the following impairments: attention deficit
3 hyperactivity disorder, depression, spina bifida and was overweight.
4 (AR 14). At step three, the ALJ determined that Plaintiff's
5 impairments or combination of impairments did not meet, medically
6 equal or functionally equal the severity of a Listed Impairment as
7 found in 20 C.F.R. Part 404, Subpart P, Appendix 1. (AR 14-26).
8 This determination was based on the ALJ's finding that Plaintiff did
9 not have a marked or extreme limitation in any of the applicable six
10 functional domains. Specifically, the ALJ found that Plaintiff had
11 (1) moderate or less than marked limitation in acquiring and using
12 information; (2) moderate or less than marked limitation in
13 attending and completing tasks; (3) mild to moderate or less than
14 marked limitation in interacting and relating with others; (4) no
15 limitation in moving and manipulating objects; (5) mild or less than
16 marked limitation in the ability to care for himself; and (6) mild
17 or less than marked limitation in health and physical well-being.
18 (AR 20-26). Accordingly, the ALJ concluded that Plaintiff had not
19 been disabled, as defined in the Social Security Act, since October
20 3, 2013, the application date. (AR 27).

21
22 The ALJ noted that Plaintiff had regularly been seeing his
23 treating psychiatrist, Elsa Cruz, M.D., from June 2013 through 2015.
24 (See AR 303-19, 322-28, 406-15, 453-58, 467-71, 525-533). During an
25 initial assessment dated June 25, 2013, Dr. Cruz found that
26 Plaintiff had difficulty concentrating and poor focus and diagnosed
27 him with Major Depressive Disorder and Attention Deficit
28 Hyperactivity Disorder ("ADHD"). (AR 303-11). In a letter dated

1 March 11, 2015, Dr. Cruz found that while Plaintiff had "some
2 improvement with medications," "his overall clinical presentation
3 demonstrate[d] significant problems in the area of inattention,
4 focus, and concentration," (AR 533) and opined that Plaintiff had
5 "marked and severe limitations in his ability to acquire and use
6 information and in attending and completing tasks." (Id.). The ALJ
7 rejected this opinion finding it to be inconsistent with Dr. Cruz's
8 own treatment notes.³ (See AR 15-18).

9
10 In determining the severity of Plaintiff's limitations, the ALJ
11 gave substantial weight to the opinion of Ashak Khushalani, M.D., an
12 impartial medical expert. (AR 18). In response to an interrogatory
13 dated January 1, 2015, Dr. Khushalani found Plaintiff had (1) a
14 severe limitation in the ability to do complex cognitive activity;
15 (2) a mild limitation in responding appropriately to supervision and
16 authority and in responding appropriately to others; and (3) no
17 limitation in understanding simple instructions, remembering and
18 carrying out simple instructions, making simple age related
19 decisions, responding to usual situations and handling changes in
20 routine daily activity settings. (AR 516-24). Therefore, Dr.
21 Khushalani found Plaintiff "capable of handling simple tasks
22 involving occasional contact with the general public[.]" (AR 18)

23
24 On June 1, 2015, Plaintiff requested the Appeals Council to
25 review the ALJ's Decision. The Appeals Council denied Plaintiff's
26 request on August 24, 2016. (AR 1). The ALJ's decision then became

27 ³ "Because of the inconsistencies noted between the most
28 recent opinion and the previous progress/treating notes from the
same medical source, I reject the opinion of Dr. Cruz." (AR. 18).

1 the final Decision of the Commissioner, allowing this Court to
2 review the Decision. See 42 U.S.C. §§ 405(g), 1383(c).

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4 **STANDARD OF REVIEW**

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6 This court reviews the Administration's decision to determine
7 if it is free of legal error and supported by substantial evidence.
8 See Brewes v. Comm'r of Soc. Sec. Admin., 682 F.3d 1157, 1161 (9th
9 Cir. 2012). "Substantial evidence" is more than a mere scintilla,
10 but less than a preponderance. Garrison v. Colvin, 759 F.3d 995,
11 1009 (9th Cir. 2014). To determine whether substantial evidence
12 supports a finding, "a court must consider the record as a whole,
13 weighing both evidence that supports and evidence that detracts from
14 the [Commissioner's] conclusion." Aukland v. Massanari, 257 F.3d
15 1033, 1035 (9th Cir. 2001). As a result, "[i]f the evidence can
16 reasonably support either affirming or reversing the ALJ's
17 conclusion, [a court] may not substitute [its] judgment for that of
18 the ALJ." Robbins v. Soc. Sec. Admin., 466 F.3d 880, 882 (9th Cir.
19 2006).

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21 **PLAINTIFF'S CONTENTION**

22
23 Plaintiff asserts that the ALJ improperly rejected the opinion
24 of the treating physician, Dr. Cruz. (See Joint Stip. at 4-9, 17).

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1 Defendant asserts that the ALJ properly rejected Dr. Cruz's
2 opinion for the following reasons: (1) her opinion conflicted with
3 other medical opinions in the record and was the only medical
4 opinion that suggested such severe limitations; (2) her opinion was
5 unsupported by the record as a whole; and (3) her opinion was not
6 supported by her own treatment records. (Joint Stip. at 10-15).⁴
7

8 Social Security regulations require the Agency to "evaluate
9 every medical opinion we receive," giving more weight to evidence
10 from a claimant's treating physician. 20 C.F.R. § 404.1527(c). If
11 the treating or examining physician's opinions are not contradicted,
12 they can only be rejected with clear and convincing reasons. Lester
13 v. Chater, 81 F.3d 821, 830 (9th Cir. 1995). Where a treating or
14 examining physician's opinion is contradicted by another doctor, an
15 ALJ may only reject it by providing specific and legitimate reasons
16 that are supported by substantial evidence. Id. at 830-831. While
17 the opinion of a non-examining physician cannot by itself constitute
18 substantial evidence that justifies rejecting the opinion of a
19 treating physician, id. at 831, it may serve as substantial evidence
20 when it is consistent with "independent clinical findings or other
21 evidence in the record." Thomas v. Barnhart, 278 F.3d 947, 957 (9th
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23 ⁴ Although Defendant asserts multiple reasons the ALJ's
24 rejection of Dr. Cruz's opinion (see Joint Stip. at 10-15), the only
25 reason that the ALJ provided for rejecting Dr. Cruz's opinion was
26 the "inconsistencies" between Dr. Cruz's treatment notes and her
27 opinion. Therefore, in determining whether the ALJ erred in failing
28 to provide a specific and legitimate reason for rejecting the
opinion of Dr. Cruz, the Court will only consider the ALJ's stated
basis for rejecting Dr. Cruz's opinion. See Stout v. Comm'r Soc.
Sec. Admin., 454 F.3d 1050, 1054 (9th Cir. 2006) (citing Pinto v.
Massanari, 249 F.3d 840, 847 (9th Cir. 2001)); Trevizo v. Berryhill,
No. 15-16277, 2017 WL 2925434, at *6, *n.4 (9th Cir. July 10, 2017).

1 Cir. 2002). An ALJ satisfies the "substantial evidence" requirement
2 by "setting out a detailed and thorough summary of the facts and
3 conflicting evidence, stating his interpretation thereof and making
4 findings." Garrison, 759 F.3d at 1012 (citations omitted).

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6 Since Dr. Cruz's opinion was contradicted by the opinion of Dr.
7 Khushalani, the ALJ was required to provide specific and legitimate
8 reasons to reject Dr. Cruz's opinion. See Ghanim v. Colvin, 763
9 F.3d 1154, 1161 (9th Cir. 2014).

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11 The ALJ erred in rejecting Dr. Cruz's opinion on the grounds
12 that it was inconsistent with her own treatment notes. As set forth
13 below, the treatment notes cited by the ALJ (see AR 16-18, citing AR
14 303-19, 322-28, 406-15, 453-58, 467-71, 525-533) did not *contradict*
15 Dr. Cruz's opinion that Plaintiff had marked and severe limitations
16 in the ability to acquire and use information and in attending and
17 completing tasks. Dr. Cruz's initial assessment of Plaintiff on
18 June 25, 2013 was that Plaintiff had difficulty concentrating and
19 focusing, did not understand the questions posed to him, and was
20 receiving school counseling for his academic impairments. (AR 303-
21 11). A treatment note from July 22, 2013 concluded that Plaintiff
22 had difficulty concentrating, was hyperactive, highly distractible
23 and anxious. (AR 312-13). A September 10, 2013 treatment note
24 found that Plaintiff appeared disinterested, poorly focused,
25 fidgety, anxious, depressed and that his symptoms mild to moderately
26 interfered with his daily social functioning. (AR 319). A
27 treatment note from November 6, 2013 noted that Plaintiff was
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1 anxious, fidgety, giggling and could not focus or concentrate. (AR
2 324-28). A treatment note from December 3, 2013 stated that
3 Plaintiff had reported that his grades in school were getting
4 better, and that he was fidgety, anxious and needed encouragement to
5 talk about his symptoms. (AR 468). A treatment note from April 1,
6 2014 noted that Plaintiff acted silly, giggled often, had low
7 interest and low motivation. (AR 408-09). A treatment note from
8 April 22, 2014 described Plaintiff as poorly focused, easily
9 distracted, and giggling with rapid and pressured speech. (AR 410-
10 11). A treatment note from October 30, 2014 stated that Plaintiff
11 was more interested in academics, was focusing poorly with poor
12 concentration and was fidgety. (AR 529-30). A treatment note from
13 December 1, 2014 found that Plaintiff was noticeably less giggly,
14 less anxious, had poor focus and attention and that his ADHD
15 symptoms mild to moderately interfered with his daily social
16 functioning. (AR 527-28). Finally, a January 1, 2015 treatment
17 note showed that Plaintiff's grades were improving, he had fair eye
18 contact, was fidgety and restless, had poor focus and concentration
19 and a good response to medication. (AR 525-26).

21
22 These treatment notes did not reflect Plaintiff's ability to
23 acquire and use information and attend and complete tasks. Although
24 the ALJ provided an extensive history of Plaintiff's medical
25 records, the ALJ failed to specify in what respect Dr. Cruz's notes
26 were inconsistent with her opinion about Plaintiff's ability to
27 acquire and use information and attend and complete tasks. Thus,
28 the ALJ failed to set out "a detailed and thorough summary of the

1 facts and conflicting clinical evidence, stating his interpretation
2 thereof, and making findings." Magallanes v. Bowen, 881 F.2d 747,
3 751 (9th Cir. 1989) (quoting Cotton v. Bowen, 799 F.2d 1403, 1408
4 (9th Cir. 1986)). See Reddick v. Chater, 157 F.3d 715, 725 (9th
5 Cir. 1998) ("The ALJ must do more than offer his conclusions. He
6 must set forth his own interpretations and explain why they, rather
7 than the doctor's, are correct") (quoting Embrey v. Bowen, 849 F.2d
8 418, 421-22 (9th Cir. 1988)). Therefore, the ALJ erred in failing
9 to provide a specific and legitimate reason for rejecting the
10 opinion of Dr. Cruz.

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12
13 To the extent that the ALJ relied on treatment notes reflecting
14 occasional periods of improvement and positive response to
15 medication (see AR 16-17, citing AR 321-29, 525-531), these must be
16 "read in context of the overall diagnostic picture" the treating
17 physician describes. Holohan v. Massanari, 246 F.3d 1195, 1205 (9th
18 Cir. 2001). Although those treatment notes indicated some
19 improvement in Plaintiff's condition, they also consistently
20 revealed that Plaintiff had difficulties concentrating, focusing and
21 maintaining attention. See Ghanim, 763 F.3d at 1161 (treatment
22 notes that consistently reflected recurring symptoms did not support
23 the ALJ's conclusion that the treating physician's opinion was
24 inconsistent with treatment notes); Trevizo, 2017 WL 2925434, at *8
25 (the ALJ's rejection of treating physician's opinion for
26 inconsistencies between treatment notes and opinion was not a
27 specific and legitimate reason where no interpretation of
28 inconsistencies was proffered).

1 **B. The Court Cannot Conclude That The ALJ's Error Was Harmless**

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3 "[H]armless error principles apply in the Social Security . . .
4 context." Molina v. Astrue, 674 F.3d 1104, 1115 (9th Cir. 2012)
5 (citing Stout, 454 F.3d at 1054). Generally, an ALJ's error is
6 harmless where it is "inconsequential to the ultimate nondisability
7 determination." Stout, 454 F.3d at 1055.

8
9 The Court cannot conclude that the ALJ's error was harmless.
10 The ALJ's rejection of Dr. Cruz's opinion was integral to the ALJ's
11 determination that Plaintiff did not functionally equal a Listed
12 Impairment. Because the Court cannot determine that the ALJ's error
13 was "inconsequential to the ultimate nondisability determination,"
14 the error cannot be deemed harmless. See id.

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16 **C. Remand Is Warranted**

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18 The decision whether to remand for further proceedings or order
19 an immediate award of benefits is within the district court's
20 discretion. Harman v. Apfel, 211 F.3d 1172, 1175-78 (9th Cir.
21 2000). Where no useful purpose would be served by further
22 administrative proceedings, or where the record has been fully
23 developed, it is appropriate to exercise this discretion to direct
24 an immediate award of benefits. Id. at 1179 ("[T]he decision of
25 whether to remand for further proceedings turns upon the likely
26 utility of such proceedings."). However, where the circumstances of
27 the case suggest that further administrative review could remedy the
28 Commissioner's errors, remand is appropriate. McLeod v. Astrue, 640

1 F.3d 881, 888 (9th Cir. 2011); Harman, 211 F.3d at 1179-81.

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3 Here, the Court remands because the ALJ failed to support his
4 stated reason for rejecting Dr. Cruz opinion - that the opinion was
5 inconsistent with the treatment notes - with citations to the
6 record. The record does not affirmatively establish what weight the
7 ALJ was required to Dr. Cruz's opinion, nor does it establish that
8 the ALJ would necessarily be required to find Plaintiff disabled if
9 these deficiencies were remedied. Remand is therefore appropriate.

10

11 **CONCLUSION**

12

13 For the foregoing reasons, the decision of the Commissioner is
14 REMANDED.

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16 LET JUDGMENT BE ENTERED ACCORDINGLY.

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18 Dated: August 1, 2017.

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_____/s/_____
ALKA SAGAR
UNITED STATES MAGISTRATE JUDGE

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