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6 **UNITED STATES DISTRICT COURT**  
7 **CENTRAL DISTRICT OF CALIFORNIA**  
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9 S.C.L.C., by and through ) Case No. EDCV 12-0409-JPR  
his guardian ad litem, )  
10 SANDRA GREENE, )  
Plaintiff, ) MEMORANDUM OPINION AND ORDER  
11 vs. ) REVERSING COMMISSIONER AND  
12 ) REMANDING FOR FURTHER  
MICHAEL J. ASTRUE, ) PROCEEDINGS  
13 Commissioner of the Social )  
Security Administration, )  
14 Defendant. )  
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16 **I. PROCEEDINGS**

17 Plaintiff seeks review of the Commissioner's final decision  
18 denying his application for Supplemental Security Income ("SSI").  
19 The parties consented to the jurisdiction of the undersigned U.S.  
20 Magistrate Judge pursuant to 28 U.S.C. § 636(c). This matter is  
21 before the Court on the parties' Joint Stipulation, filed  
22 December 17, 2012, which the Court has taken under submission  
23 without oral argument. For the reasons stated below, the  
24 Commissioner's decision is reversed and this action is remanded  
25 for further proceedings consistent with this memorandum opinion.

26 **II. BACKGROUND**

27 Plaintiff was born on June 24, 1996. (Administrative Record  
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1 ("AR") 72.) At the time of the hearing in this matter, he was a  
2 13-year-old eighth-grader. (AR 40.) On June 11, 2008, through  
3 his mother, Plaintiff Sandra Greene, he filed an application for  
4 SSI, alleging a disability onset date of June 1, 2008. (AR 154.)  
5 The application was denied on September 15, 2008. (AR 74-77.)

6 Plaintiff then requested reconsideration (AR 79), which was  
7 denied on March 11, 2009 (AR 80-83). Plaintiff next requested a  
8 hearing before an Administrative Law Judge ("ALJ"). (AR 88.) A  
9 hearing was held on May 11, 2010, at which Plaintiff, who was  
10 represented by counsel, and his mother testified. (AR 37-71.)  
11 Plaintiff did not request that a medical expert testify, and none  
12 did. (See generally id.) Plaintiff submitted new documentary  
13 evidence at the hearing. (AR 36.) On June 25, 2010, the ALJ  
14 issued a written decision finding that Plaintiff was not  
15 disabled. (AR 17-33.) Plaintiff then sought review by the  
16 Appeals Council. (AR 13.) On January 17, 2012, the Appeals  
17 Council denied Plaintiff's request for review after considering  
18 his newly submitted evidence. (AR 1-5.) This action followed.

### 18 **III. STANDARD OF REVIEW**

19 Pursuant to 42 U.S.C. § 405(g), a district court may review  
20 the Commissioner's decision to deny benefits. The ALJ's findings  
21 and decision should be upheld if they are free of legal error and  
22 are supported by substantial evidence based on the record as a  
23 whole. § 405(g); Richardson v. Perales, 402 U.S. 389, 401, 91 S.  
24 Ct. 1420, 1427, 28 L. Ed. 2d 842 (1971); Parra v. Astrue, 481  
25 F.3d 742, 746 (9th Cir. 2007). Substantial evidence means such  
26 evidence as a reasonable person might accept as adequate to  
27 support a conclusion. Richardson, 402 U.S. at 401; Lingenfelter

1 v. Astrue, 504 F.3d 1028, 1035 (9th Cir. 2007). It is more than  
2 a scintilla but less than a preponderance. Lingenfelter, 504  
3 F.3d at 1035 (citing Robbins v. Soc. Sec. Admin., 466 F.3d 880,  
4 882 (9th Cir. 2006)). To determine whether substantial evidence  
5 supports a finding, the reviewing court "must review the  
6 administrative record as a whole, weighing both the evidence that  
7 supports and the evidence that detracts from the Commissioner's  
8 conclusion." Reddick v. Chater, 157 F.3d 715, 720 (9th Cir.  
9 1996). "If the evidence can reasonably support either affirming  
10 or reversing," the reviewing court "may not substitute its  
11 judgment" for that of the Commissioner. Id. at 720-21.

#### 12 **IV. THE EVALUATION OF DISABILITY**

13 "An individual under the age of 18 shall be considered  
14 disabled . . . if that individual has a medically determinable  
15 physical or mental impairment, which results in marked and severe  
16 functional limitations, and which can be expected to result in  
17 death or which has lasted or can be expected to last for a  
18 continuous period of not less than 12 months." 42 U.S.C.  
19 § 1382c(a)(3)(C)(i).

##### 20 A. The Three-Step Evaluation Process

21 In determining eligibility for SSI based on a childhood  
22 disability, the Commissioner follows a three-step evaluation  
23 process. 20 C.F.R. § 416.924(a).

24 At step one, the Commissioner considers whether the child  
25 has engaged in substantial gainful activity. § 416.924(b). If  
26 so, the claimant is not disabled. Id. If not, step two requires  
27 the Commissioner to consider whether any impairment or  
28 combination of impairments is severe. § 416.924(c). If not, the

1 claimant is not disabled. Id. If so, then at step three the  
2 Commissioner must determine whether the impairment meets,  
3 medically equals, or functionally equals in severity any  
4 impairment listed in 20 C.F.R. Part 404, Subpart P, Appendix 1  
5 (the "Listings"). § 416.924(d). Only if so is the claimant  
6 disabled. Id.

7 An impairment "functionally equals" a Listing if the child  
8 has marked limitations in at least two of six functional domains  
9 or an extreme limitation in at least one domain.<sup>1</sup> § 416.926a(a).  
10 The six functional domains are (1) acquiring and using  
11 information; (2) attending and completing tasks; (3) interacting  
12 and relating with others; (4) moving about and manipulating  
13 objects; (5) caring for oneself; and (6) health and physical  
14 well-being. § 416.926a(b)(1)(i)-(vi).

15 B. The ALJ's Application of the Three-Step Process

16 At step one, the ALJ found that Plaintiff had not engaged in  
17 substantial gainful activity since the application date. (AR  
18 23.) At step two, the ALJ found that Plaintiff had the severe  
19 impairments of Tourette Syndrome and attention deficit  
20 hyperactivity disorder. (Id.) At step three, the ALJ found that  
21 Plaintiff did not have an impairment or combination of  
22 impairments that met or medically or functionally equaled one of  
23 the Listings. (Id.) Specifically, the ALJ found that Plaintiff

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25 <sup>1</sup>A marked limitation "interferes seriously with [the child's]  
26 ability to independently initiate, sustain, or complete  
27 activities." 20 C.F.R. § 416.926a(e)(2). An extreme limitation  
28 "interferes very seriously" with those things. § 416.926a(e)(3).

1 had "less than marked limitation" in each of the six functional  
2 domains. (AR 26-32.)

3 **V. DISCUSSION**

4 Plaintiff raises only one issue: the Commissioner did not  
5 comply with the requirements of Howard ex rel. Wolff v. Barnhart,  
6 341 F.3d 1006, 1014 (9th Cir. 2003), or the Social Security  
7 ruling designed to implement its holding, Acquiescence Ruling 04-  
8 01(9), 69 Fed. Reg. 22578 (Apr. 26, 2004).<sup>2</sup> Howard requires an  
9 ALJ presiding over a minor's claim to "make a reasonable effort  
10 to obtain a case evaluation, based on the record in its entirety,  
11 from a pediatrician or other appropriate specialist, rather than  
12 simply constructing his own case evaluation from the evidence in  
13 the record." 341 F.3d at 1014 (interpreting 42 U.S.C.  
14 § 1382c(a)(3)(I)). Ruling 04-01(9) states that under Howard, an  
15 ALJ may "rely on case evaluation made by a State agency medical  
16 or psychological consultant that is already in the record," as  
17 long as the record demonstrates the qualifications of the State  
18 agency physician, or "on the testimony of a medical expert." 69  
19 Fed. Reg. at 22579.

20 As thorough as the ALJ's decision was and although it  
21 appears to have been supported by substantial evidence, remand is  
22 necessary because the ALJ committed legal error by failing to

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23 <sup>2</sup>A Social Security acquiescence ruling explains how the Social  
24 Security Administration will apply a holding in a decision of a  
25 U.S. Court of Appeals that conflicts with the agency's own  
26 interpretation of a provision of the Social Security Act or  
27 regulations after the Commissioner has decided not to seek further  
28 review of the decision or has been unsuccessful doing so. See SSAR  
04-01(9), 69 Fed. Reg. at 22579.

1 secure a complete case evaluation from an appropriate specialist  
2 based on the record in its entirety. See Vega ex rel. J.G. v.  
3 Astrue, No. ED CV 11-769-SP, 2012 WL 1144407, at \*5 (C.D. Cal.  
4 Apr. 2, 2012) (remanding for compliance with Howard even though  
5 substantial evidence supported ALJ's decision).

6 Defendant contends that the ALJ satisfied Howard and the  
7 acquiescence ruling by crediting the findings of psychologist  
8 Kathy A. Vandenburg and state agency psychiatrists N. Haroun and  
9 S. Khan. (J. Stip. at 6.) Even assuming that these doctors were  
10 qualified to make their assessments, as the record seems to  
11 reflect, and that the ALJ relied on their reports to satisfy  
12 Howard, which the record does not reflect, they necessarily  
13 failed to evaluate Plaintiff based on the "record in its  
14 entirety" because they wrote their reports in early 2009 and did  
15 not take into consideration the evidence Plaintiff presented at  
16 the time of the hearing, in May 2009, or to the Appeals Council  
17 thereafter. See Willmetts ex rel. A.P. v. Astrue, No. 2:10-cv-  
18 01201-KJN, 2011 WL 3816284, at \*4 (E.D. Cal. Aug. 25, 2011)  
19 (noting that ALJ never mentioned Howard or acquiescence ruling in  
20 decision and remanding in part because state agency evaluators  
21 necessarily never saw some record evidence). Some of this  
22 evidence was clearly not material or would not have changed any  
23 of the medical sources' opinions, but the Court cannot say that  
24 about all of it. For instance, on February 26, 2009, the same  
25 day Dr. Vandenburg prepared her report, Plaintiff's treating  
26 doctor, Dr. Chao Hsu, examined Plaintiff and found that  
27 "patient's condition is worsening - more movements - poor  
28 concentration." (AR 328.) On April 23, 2009, Plaintiff's dosage

1 of Concerta was increased because "ADHD . . . no longer appears  
2 to be improved by his current medication." (AR 309.) In May  
3 2010, Plaintiff began taking a new medication, Tenex. (AR 333.)  
4 This information is material to Plaintiff's case and under Howard  
5 should have been reviewed by a state agency psychiatrist or a  
6 medical expert as part of the record in its entirety.<sup>3</sup>

7 Defendant contends that because at the time Plaintiff's  
8 medications were changed the treatment notes also indicated "no  
9 new concerns," his "symptoms appeared well controlled" and the  
10 information was not material. (J. Stip. at 9.) That is not  
11 necessarily true, however, because the notes could simply have  
12 meant that the problems Plaintiff had always had continued and  
13 were no longer controlled by the medications Plaintiff was  
14 taking. See Godwin ex rel. V.E. v. Comm'r of Soc. Sec., CV  
15 09-482-PHX-MHM, 2010 WL 1337745, at \*4 (D. Ariz. Mar. 31, 2010)  
16 (Murguia, J.) (remanding for specialist to review case "in its  
17 entirety" in part because plaintiff's medications had been  
18 changed several times since state agency evaluators reviewed  
19 record). Defendant also argues that the ALJ expressly rejected  
20 Dr. Hsu's earlier findings because he found him not credible and  
21 therefore would have rejected the February 2009 findings as well  
22 (J. Stip. at 9), but that is beside the point; Howard requires  
23 some kind of medical expert to evaluate the record in its

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25 <sup>3</sup>Some of this evidence was submitted to the Commissioner for  
26 the first time before the Appeals Council, and yet nothing in the  
27 record shows that "the Appeals Council made a reasonable effort to  
28 seek a case evaluation based on the entire record," as ruling 04-  
1(9) expressly requires it to do. See Willmetts, 2011 WL 3816284,  
at \*6.

1 entirety, and the three experts Defendant relies on apparently  
2 never saw Dr. Hsu's February 2009 evaluation or the records  
3 indicating changes in Plaintiff's medications. See Godwin, 2010  
4 WL 1337745, at \*4 ("while it is true that the ALJ did not give  
5 much weight to the medical examinations conducted by [certain  
6 doctors], that medical evidence [from them] was nonetheless in  
7 the record"); Robinson v. Astrue, No. CIV-S-08-2296-DAD, 2010 WL  
8 3733993, at \*4 (E.D. Cal. Sept. 21, 2010) (remanding because to  
9 extent ALJ relied on state agency psychiatrists' evaluations,  
10 they were prepared two years before hearing and doctors did not  
11 consider evidence developed in those two years). Accordingly,  
12 this matter must be remanded so that Howard may be complied  
13 with.<sup>4</sup>

#### 14 **VI. CONCLUSION**

15 When error exists in an administrative determination, "the  
16 proper course, except in rare circumstances, is to remand to the  
17 agency for additional investigation or explanation." INS v.  
18 Ventura, 537 U.S. 12, 16, 123 S. Ct. 353, 355, 154 L. Ed. 2d 272  
19 (2002) (citations and quotation marks omitted); Moisa v.  
20 Barnhart, 367 F.3d 882, 886 (9th Cir. 2004). Remand, not an

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22 <sup>4</sup>The Court notes that in Howard, unlike here, the claimant had  
23 requested having a medical expert testify at the hearing and the  
24 ALJ had declined to do so. 341 F.3d at 1010-11 & n.2. Still, it  
25 was the ALJ's obligation to ensure that § 1382c(a)(3) was followed.  
26 See Howard, 341 F.3d at 1014 (interpreting statute to require ALJ  
27 "to make a reasonable effort to obtain a case evaluation, from a  
28 pediatrician or other appropriate specialist, rather than simply  
constructing his own case evaluation from the evidence in the  
record," and noting "distinction" between having expert evaluate  
claimant based on expert's "particular specialty, and having an  
expert evaluate a claimant's case in its entirety").



1 award of benefits, is the proper course in this case. See  
2 Strauss v. Comm'r of Soc. Sec. Admin., 635 F.3d 1135, 1136 (9th  
3 Cir. 2011) (remand for automatic payment of benefits  
4 inappropriate unless evidence unequivocally establishes  
5 disability). On remand, the ALJ shall obtain a case evaluation  
6 of Plaintiff's entire record by either a state agency  
7 psychiatrist or a medical expert. The ALJ must thereafter  
8 determine, in light of the newly obtained evaluation and all the  
9 other evidence in the record, whether Plaintiff's impairments  
10 medically or functionally equal a Listing. The ALJ must explain  
11 how he considered the state agency evaluator's or medical  
12 expert's report. See Willmetts, 2011 WL 3816284, at \*5.

13 **ORDER**

14 Accordingly, **IT IS HEREBY ORDERED** that (1) the decision of  
15 the Commissioner is REVERSED; (2) Plaintiff's request for remand  
16 is GRANTED; and (3) this action is REMANDED for further  
17 proceedings consistent with this Memorandum Opinion.

18 **IT IS FURTHER ORDERED** that the Clerk of the Court serve  
19 copies of this Order and the Judgment herein on all parties or  
20 their counsel.

21 DATED: January 14, 2013

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24 JEAN ROSENBLUTH  
25 U.S. Magistrate Judge  
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