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6 IN THE UNITED STATES DISTRICT COURT  
7 FOR THE DISTRICT OF ARIZONA

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9 M.B. a minor (by the mother, Deborah  
Beymer),

10 Plaintiff,

11 v.

12 Carolyn W. Colvin, Acting Commissioner  
13 of Social Security,

14 Defendant.

No. CV-12-00188-TUC-BPV

**ORDER**

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16 Plaintiff's mother filed this action for review of the final decision of the  
17 Commissioner of Social Security pursuant to 42 U.S.C. § 405(g). The United States  
18 Magistrate Judge presides over this case pursuant to 28 U.S.C. § 636 (c) and Fed.R.Civ.P.  
19 73, having received the written consent of both parties.

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21 **I. PROCEDURAL HISTORY**

22 Plaintiff's mother protectively filed an application for Supplemental Security  
23 Income ("SSI") on January 11, 2008, alleging an onset of disability beginning January  
24 11, 2008 due to mental problems: learning difficulties; behavioral impairments; difficulty  
25 taking care of personal needs; and difficulty paying attention and sticking to a task.  
26 Transcript/Administrative Record ("Tr.") 106-12, 113, 117-128. The application was  
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1 denied initially and on reconsideration. Tr. 69-71, 72-74. A hearing before an  
2 Administrative Law Judge (“ALJ”) was held on January 22, 2010. Tr. 57-68. The ALJ  
3 issued a decision on June 4, 2010, finding Plaintiff, 9 years old on the date of the ALJ’s  
4 decision, had severe impairments of attention deficit hyperactivity disorder (ADHD;  
5 learning disorder; and explosive disorder, but was not disabled within the meaning of the  
6 Social Security Act. Tr. 18-38. This decision became the Commissioner’s final decision  
7 when the Appeals Council denied review. Tr. 1-4.  
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10 Plaintiff’s mother then commenced this action for judicial review pursuant to 42  
11 U.S.C. § 405(g). (Doc. 1) For reasons that follow, the Court reverses the decision of the  
12 Commissioner and remands for an immediate award of benefits.  
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## 14 **II. STANDARD OF REVIEW**

15 A person under the age of 18 will be considered disabled and eligible for  
16 Supplemental Security Income (SSI) if he has a “medically determinable physical or  
17 mental impairment, which results in marked and severe functional limitations, and which  
18 can be expected to result in death or which has lasted or can be expected to last for a  
19 continuous period of not less than 12 months.” 42 U.S.C. § 1382c(a)(3)(C)(i). The  
20 Commissioner employs a three-step sequential process to evaluate SSI claims for minors.  
21 First, if the claimant is engaged in substantial gainful activity, he is not disabled. 20  
22 C.F.R. § 416.924(b). Second, if the claimant does not have a medically determinable  
23 severe impairment(s), in that the impairment does not cause more than minimal  
24 functional limitations, he is not disabled. 20 C.F.R. § 426.924(c). Third, if the claimant’s  
25 impairment does not meet, medically equal, or functionally equal an impairment in the  
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1 listings, he is not disabled. 20 C.F.R. § 924(d). There are six areas the Commissioner  
2 assesses for functional equivalence: acquiring and using information; attending and  
3 completing tasks; interacting and relating with others; moving about and manipulating  
4 objects; caring for yourself; and health and physical wellbeing. 20 C.F.R. § 416.926a(b).

6 The findings of the Commissioner are meant to be conclusive if supported by  
7 substantial evidence. 42 U.S.C. § 405(g). Substantial evidence is “more than a mere  
8 scintilla but less than a preponderance.” *Tackett v. Apfel*, 180 F.3d 1094, 1098 (9<sup>th</sup> Cir.  
9 1999) (quoting *Matney v. Sullivan*, 981 F.2d 1016, 1018 (9<sup>th</sup> Cir. 1992)). The court may  
10 overturn the decision to deny benefits only “when the ALJ’s findings are based on legal  
11 error or are not supported by substantial evidence in the record as a whole.” *Aukland v.*  
12 *Massanari*, 257 F.3d 1033, 1035 (9<sup>th</sup> Cir. 2001). This is so because the ALJ “and not the  
13 reviewing court must resolve conflicts in the evidence, and if the evidence can support  
14 either outcome, the court may not substitute its judgment for that of the ALJ.” *Matney*,  
15 981 F.2d at 1019 (quoting *Richardson v. Perales*, 402 U.S. 389, 400 (1971)); *Batson v.*  
16 *Comm’r of Soc. Sec. Admin.*, 359 F.3d 1190, 1198 (9<sup>th</sup> Cir. 2004). The Commissioner’s  
17 decision, however, “cannot be affirmed simply by isolating a specific quantum of  
18 supporting evidence.” *Sousa v. Callahan*, 143 F.3d 1240, 1243 (9<sup>th</sup> Cir. 1998) (citing  
19 *Hammock v. Bowen*, 879 F.2d 498, 501 (9<sup>th</sup> Cir. 1989)). Reviewing courts must consider  
20 the evidence that supports as well as detracts from the Commissioner’s conclusion. *Day*  
21 *v. Weinberger*, 522 F.2d 1154, 1156 (9<sup>th</sup> Cir. 1975).

### 27 **III. DISCUSSION**

28 Plaintiff argues that the ALJ failed to give controlling weight to his treating

1 psychiatrist's opinion. In May, 2006, Plaintiff underwent a psychiatric intake evaluation  
2 with psychiatric nurse practitioner Karen Van Wie of Providence Service Corp., because  
3 of worsening temper tantrums and aggressive behavior towards others. Tr. 355. Ms. Van  
4 Wie assessed generalized anxiety disorder and post-traumatic stress disorder, as well as  
5 victim of neglect and rule out attention deficit hyperactivity disorder (ADHD). Ms. Van  
6 Wie assigned Plaintiff a GAF score of 45 to 50.<sup>1</sup> She prescribed medication and  
7 recommended an evaluation to rule out dyslexia, learning disorder, and color blindness.  
8 Tr. 359.

11 In November 2006, Plaintiff's care was transferred to treating psychiatrist Michael  
12 Mardis, M.D., at Providence, who conducted an initial exam of Plaintiff and diagnosed  
13 him with ADHD, Intermittent Explosive Disorder, and Anxiety Disorder, and considered  
14 a diagnosis of Pervasive Developmental Disorder Syndrome. Tr. 393. The administrative  
15 record contains medical records from Dr. Mardis dated from the initial evaluation  
16 through October 2009. Tr. 345-47, 361-64, 367-80, 383-86, 388-89, 391-95, 407-21, 423,

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19 <sup>1</sup> GAF Scores range from 1-100. American Psychiatric Association, *Diagnostic*  
20 *and Statistical Manual of Mental Disorders*, (4th ed.) (*DSM-IV*), at 32. "A GAF score is a  
21 rough estimate of an individual's psychological, social, and occupational functioning used  
22 to reflect the individual's need for treatment." *Vargas v. Lambert*, 159 F.3d 1161, 1164 n.  
23 2 (9<sup>th</sup> Cir. 1998). In arriving at a GAF Score, the clinician considers psychological, social,  
and occupational functioning on a hypothetical continuum of mental health illness. *DSM-*  
*IV*, at 34. In children, a GAF, or Children's Global Assessment Scale score of 41-50  
indicates:

24 Moderate degree of interference in functioning in most social areas or  
25 severe impairment of functioning in one area, such as might result from, for  
26 example, suicidal preoccupations and ruminations, school refusal and other  
27 forms of anxiety, obsessive rituals, major conversion symptoms, frequent  
28 anxiety attacks, poor to inappropriate social skills, frequent episodes of  
aggressive or other antisocial behaviour with some preservation of  
meaningful social relationships.

1 454-59, 462, 482-84. During the course of treatment, Dr. Mardis prescribed numerous  
2 medications for Plaintiff's various symptoms, summarized in Dr. Mardis's psychiatric  
3 update containing a detailed medication report and description of each medication's  
4 efficacy, dated October 30, 2009.<sup>2</sup> Tr. 482. In October 2009, Dr. Mardis diagnosed  
5 Plaintiff with Asperger's disorder, ADHD not otherwise specified, mood disorder not  
6 otherwise specified, generalized anxiety disorder, and multiple learning disorders, and  
7 noted:  
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10 [Plaintiff] has shown some improvement with his ADHD symptoms with  
11 medications, however he continues to have difficulties in that area. Some of  
12 the ADHD symptoms may actually be related to anxiety. The aggression  
13 has been a continual problem, and has shown some improvement with  
14 medications. Anxiety has not improved at all in the past few years. Even  
15 with the recent addition of an anti-anxiety agent. Social skills have shown  
16 some improvement with time, as he now has one good friend that he gets  
together with fairly often and expresses a desire to be with. He has not  
required any psychiatric hospitalizations or residential treatment  
placements.

17 Tr. 482, 484. Dr. Mardis completed a Childhood Disability Evaluation Form and  
18 opined that Plaintiff had marked limitations in acquiring and using information, with  
19 "some difficulties with learning disabilities – with reading and math, as well as writing";  
20 marked limitations with attending and completing tasks, with "significant difficulties  
21 with sustaining his attention in tasks, and in focusing on relevant stimuli, leading to  
22 difficulties in school and poor follow through at home" extreme limitations in interacting  
23 and relating with others, with "frequent episodes of aggression to family members,  
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27 <sup>2</sup> These medications included, in various dosages and combinations: Vyvanse;  
28 Dexedrine; Risperdal; BuSpar; Strattera; Metadate CD; Adderall; Prozac; Tenex; Abilify;  
and Lithium Carbonate. Tr. 483. At the time of the report, Plaintiff's medication regimen  
included Vyvanse, Dexedrine, Risperdal and BuSpar. Tr. 482.

1 leading to extreme disruption at home”; marked limitations in health and physical well-  
2 being, “due to aggressive incidents, anger, and significant anxiety over timing of events,  
3 contamination fears.” Tr. 485-86.  
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5 The ALJ acknowledged Dr. Mardis as Plaintiff’s treating psychiatrist but gave Dr.  
6 Mardis’s opinion minimal weight, finding the opinion and evaluation over-restrictive  
7 based on Dr. Mardis’s own treatment notes and other evidence of record. Tr. 26. The ALJ  
8 further discounted Dr. Mardis’s opinion because of the possibility that Dr. Mardis  
9 submitted his opinion in an effort to assist Plaintiff because Dr. Mardis sympathized with  
10 the Plaintiff. Tr. 26. The ALJ gave great weight to the opinions of reviewing State  
11 Agency psychologist Jocelyn Fuller, Ph.D., and the other State Agency reviewing  
12 physicians who affirmed Dr. Fuller’s assessment.<sup>3</sup> Tr. 26. Reviewing psychologist Dr.  
13 Fuller’s opinion contradicted Dr. Mardis’s opinion. Dr. Fuller found no limitation in  
14 health and physical well-being, and less than marked limitations in all other functional  
15 equivalence categories. Tr. 447-452. Plaintiff was examined by State Agency  
16 psychologist and speech pathologist Judith Kroese, Ph.D., who concluded that, with  
17 regard to intellectual functioning, “his overall score was within the Borderline range” and  
18 his “verbal intellectual functioning was within the Low Average range as well as his  
19 working memory.” Tr. 436. Plaintiff’s speed of processing and nonverbal intellectual  
20 functioning were also within the Borderline range. *Id.* His scores in the area of math  
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27 <sup>3</sup> Because the State Agency reviewing psychologist and physician who reviewed  
28 Dr. Fuller’s assessment did not indicate what records they reviewed and failed to provide  
any explanation for the conclusions they reached, (Tr. 468-76) their assessments carry no  
additional weight and merit no further discussion in this order.

1 calculation and writing were significantly lower than would be expected for his overall  
2 level of intellectual functioning, and his behavior during the one-to-one evaluation was  
3 consistent with a diagnosis of ADHD. *Id.*

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5 Where a treating doctor's ultimate conclusion is contradicted, as in this case by  
6 Dr. Fuller, it may be rejected only for specific and legitimate reasons that are supported  
7 by substantial evidence in the record. *Carmickle v. Comm'r Soc.Sec. Admin.*, 533 F.3d  
8 1155, 1164 (9<sup>th</sup> Cir. 2008)(citing *Murray v. Heckler*, 722 F.2d 499, 502 (9<sup>th</sup> Cir. 1983));  
9 *see also Embrey v. Bowen*, 849 F.2d 418, 422 (9<sup>th</sup> Cir. 1988) (detailed, reasoned, and  
10 legitimate rationales required to reject treating doctor's ultimate conclusions). When  
11 rejecting the opinion of a treating physician, the ALJ can meet this "burden by setting out  
12 a detailed and thorough summary of the facts and conflicting clinical evidence, stating his  
13 interpretation thereof, and making findings." *Tommasetti v. Astrue*, 533 F.3d 1035, 1041  
14 (9<sup>th</sup> Cir. 2008)(quoting *Magallanes v. Bowen*, 881 F.2d 747, 751 (9<sup>th</sup> Cir. 1989)). The  
15 Social Security Administration has explained that an ALJ's finding that a treating source  
16 medical opinion is not well-supported by medically acceptable evidence or is inconsistent  
17 with substantial evidence in the record means only that the opinion is not entitled to  
18 controlling weight, not that the opinion should be rejected. *Orn v. Astrue*, 495 F.3d 625,  
19 632 (9<sup>th</sup> Cir. 2007) (citing 20 C.F.R. § 404.1527). Treating source medical opinions are  
20 still entitled to deference and, "[i]n many cases, will be entitled to the greatest weight and  
21 should be adopted, even if it does not meet the test for controlling weight." *Orn*, 495 F.3d  
22 at 632; *see also Murray*, 722 F.2d at 502 ("If the ALJ wishes to disregard the opinion of  
23 the treating physician, he or she must make findings setting forth specific, legitimate  
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1 reasons for doing so that are based on substantial evidence in the record.")

2 As a non-examining physician, Dr. Fuller's opinion, cannot, by itself "constitute  
3 substantial evidence that justifies the rejection of the opinion of either an examining  
4 physician or a treating physician." *Lester v. Chater*, 81 F.3d 821, 831 (9<sup>th</sup> Cir. 1995).  
5 Further, while it is not clear what medical evidence of record Dr. Fuller reviewed, Dr.  
6 Fuller's notes indicate that, if she in fact reviewed the entirety of the record, she ignored  
7 or failed to discuss in any detail treatment notes by Plaintiff's primary mental health  
8 provider Dr. Mardis. (*See* Tr. 449-50.)

9 The ALJ's finding that "Dr. Mardis's opinion and evaluation of the claimant's  
10 limitations in each domain is over-restrictive based on Dr. Mardis's own treatment notes  
11 and other evidence of record" (Tr. 26) does not set forth the specific detail necessary, nor  
12 does it achieve the level of specificity required to reject a treating physician's conclusion.  
13 *See Embrey*, 849 at 421-422 ("To say that medical opinions are not supported by  
14 sufficient objective findings or are contrary to the preponderant conclusions mandated by  
15 the objective findings does not achieve the level of specificity our prior cases have  
16 required... .") The ALJ states that, "[a]s **discussed more fully below**, Dr. Mardis reports  
17 on a number of occasions that the claimant's behavior at school has improved, and that  
18 the medication is helping the claimant's symptoms." Tr. 26 (emphasis added). The ALJ,  
19 however, does not discuss Dr. Mardis's report more fully in the rest of the opinion, and,  
20 in fact, does not discuss Dr. Mardis's report, or Dr. Mardis's treatment notes consisting of  
21 nearly three years of treatment, in any more detail at all. *See* Tr. 26-34. While the  
22 Commissioner attempts to substantiate the ALJ's conclusion by referring to Dr. Mardis's  
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1 treatment notes, in opposition to Plaintiff's opening brief, (*see* Doc. 20, at 15-17), this  
2 Court reviews only the reasons provided by the ALJ in the disability determination and  
3 may not affirm the ALJ on a ground upon which he did not rely. *Orn*, 495 F.3d 625 at  
4 630 (citing *Connett v. Barnhart*, 340 F.3d 871, 874 (9<sup>th</sup> Cir. 2003)). *See Pinto v.*  
5 *Massanari*, 249 F.3d 840, 847-48 (9<sup>th</sup> Cir. 2001)(the district court may not affirm the  
6 ALJ's decision "on a ground not invoked by the Commissioner in denying the benefits  
7 originally"); *Accord Varney v. Sec'y Health & Human Serv.*, 859 F.2d 1396, 1399 (9<sup>th</sup>  
8 Cir. 1988) ("there may exist valid grounds on which to discredit a claimant's pain  
9 testimony.... But if grounds for such a finding exist, it is both reasonable and desirable to  
10 require the ALJ to articulate them in the original decision.") (internal quotes and citation  
11 omitted). For example, Dr. Mardis's opined that Plaintiff had marked limitations in health  
12 and physical well-being. Tr. 486. Examining consultative physician Dr. Kroese opined  
13 that Plaintiff's difficulties with attention, hyperactivity, and aggression had greatly  
14 interfered with his well-being. Tr. 438. Despite these two physician's opinions, the ALJ  
15 concluded, with no reference to the record at all, that Plaintiff had no limitations in health  
16 and physical well-being. Tr. 34. The ALJ's errs by rejecting both the treating and  
17 examining physicians' opinions without stating a reason, much less a specific and  
18 legitimate reason for doing so, based on substantial evidence in the record.

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24 Finally, the ALJ errs by speculating, without introducing evidence of any actual  
25 improprieties, that Dr. Mardis fabricated his opinion in order to assist Plaintiff to collect  
26 disability benefits. *Lester*, 81 F.3d at 832.

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28 **IV. CONCLUSION**

1           The court has the discretion to make a determination to remand for further  
2 proceedings or to simply award benefits. *Lewin v. Schweiker*, 654 F.2d 631, 635 (9<sup>th</sup> Cir.  
3 1981). At a minimum, the failure to make adequate findings necessitates a remand for a  
4 redetermination of fault. *Id.* "If additional proceedings can remedy defects in the original  
5 administrative proceedings, a social security case should be remanded." *Id.*

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7           Plaintiff requests that the Court award benefits. Defendant requests that the Court  
8 deny relief or, if the Court concludes there was reversible error, remand for further  
9 proceedings. A federal court may affirm, modify, reverse, or remand a social security  
10 case. 42 U.S.C. § 405(g). "[T]he decision whether to remand the case for additional  
11 evidence or simply to award benefits is within the discretion of the court." *Rodriguez v.*  
12 *Bowen*, 876 F.2d 759, 763 (9<sup>th</sup> Cir. 1989) (quoting *Stone v. Heckler*, 761 F.2d 530, 533  
13 (9<sup>th</sup> Cir. 1985)). "Remand for further administrative proceedings is appropriate if  
14 enhancement of the record would be useful." *Benecke v. Barnhart*, 379 F.3d 587, 593 (9<sup>th</sup>  
15 Cir. 2004)(citing *Harman v. Apfel*, 211 F.3d 1172, 1178 (9<sup>th</sup> Cir. 2000)). Conversely,  
16 remand for an award of benefits is appropriate where:

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18           (1) the ALJ failed to provide legally sufficient reasons for rejecting the  
19 evidence; (2) there are no outstanding issues that must be resolved before a  
20 determination of disability can be made; and (3) it is clear from the record  
21 that the ALJ would be required to find the claimant disabled were such  
22 evidence credited.  
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25 *Id.* (citations omitted) Where the test is met, "we will not remand solely to allow the ALJ  
26 to make specific findings ... Rather we take the relevant testimony to be established as  
27 true and remand for an award of benefits." *Benecke*, 379 F.3d at 593 (citations omitted);  
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1 *see also Lester*, 81 F.3d at 834 (same).

2 “Where the Commissioner fails to provide adequate reasons for rejecting the  
3 opinion of a treating or examining physician, we credit that opinion ‘as a matter of law.’”  
4 *Lester*, 81 F.3d at 834 (quoting *Hammock*, 879 F.2d at 502); *Benecke*, 379 F.3d at 594  
5 (“Because the ALJ failed to provide legally sufficient reasons for rejecting Benecke's  
6 testimony and her treating physicians' opinions, we credit the evidence as true.”). The  
7 ALJ failed to provide legally sufficient reasons to reject Dr. Mardis’s opinion. Dr.  
8 Mardis’s opinion established marked limitations in three functional domains, and extreme  
9 limitations in one functional domain of the six areas the Commissioner assesses for  
10 functional equivalence. Adopting Dr. Mardis’s opinion as true results in the conclusion  
11 that Plaintiff’s impairment functionally equaled the listings. Under these circumstances, it  
12 is evident from the record that no outstanding issues must be resolved, and if Dr.  
13 Mardis’s opinion is credited as true, the ALJ would be required to find the Plaintiff  
14 disabled. *See Benecke*, 379 F.3d at 593-595 (remanding for an award of benefits where  
15 no outstanding issues remain and ALJ would be required to find claimant disabled if  
16 evidence is credited); *Regennitter v. Comm’r Soc. Sec. Admin.*, 166 F.3d 1294, 1300 (9<sup>th</sup>  
17 Cir. 1999)(where the court "conclude[s] that ... a doctor's opinion should have been  
18 credited and, if credited, would have led to a finding of eligibility, we may order the  
19 payment of benefits."); *Lester*, 81 F.3d at 834 (remanding for payment of benefits  
20 because, after crediting doctor's opinion as true, inter alia, "the evidence ... demonstrates  
21 that ..." the plaintiff was disabled.);

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28 **VI. Conclusion**

