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UNITED STATES DISTRICT COURT
CENTRAL DISTRICT OF CALIFORNIA

FRANCISCA MORENO,

Plaintiff,

v.

NANCY A. BERRYHILL, Acting
Commissioner of Social Security,¹

Defendant.

Case No. CV 16-9145-KK

MEMORANDUM AND ORDER

Plaintiff Francisca M. Moreno (“Plaintiff”) seeks review of the final decision of the Commissioner of the Social Security Administration (“Commissioner” or “Agency”) denying her application for Title XVI Supplemental Security Income (“SSI”). The parties have consented to the jurisdiction of the undersigned United States Magistrate Judge, pursuant to 28 U.S.C. § 636(c). For the reasons stated below, the Commissioner’s decision is REVERSED and this action is REMANDED for further proceedings consistent with this Order.

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¹ Pursuant to the request of the parties, the Court substitutes Nancy A. Berryhill, the current Acting Commissioner of Social Security, as Defendant in this action. Fed. R. Civ. P. 25(d).

1 I.

2 **PROCEDURAL HISTORY**

3 On August 20, 2013, Plaintiff filed an application for SSI, alleging a disability
4 onset date of December 15, 2007. Administrative Record (“AR”) at 160-68.
5 Plaintiff’s application was denied initially on December 18, 2013. Id. at 93-97. On
6 January 14, 2014, Plaintiff requested a hearing before an Administrative Law Judge
7 (“ALJ”). Id. at 98.

8 On June 22, 2015, Plaintiff appeared with counsel and testified at a hearing
9 before the assigned ALJ (the “ALJ Hearing”). Id. at 47-74. A medical expert
10 (“ME”), vocational expert (“VE”), and Plaintiff’s mother also testified at the
11 hearing. Id. at 50-58, 66-70, 71-74. On August 5, 2015, the ALJ issued a decision
12 denying Plaintiff’s application for SSI. Id. at 6-37.

13 Plaintiff filed a request with the Agency’s Appeals Council to review the
14 ALJ’s decision. Id. at 5. On October 14, 2016, the Appeals Council denied
15 Plaintiff’s request for review. Id. at 1-4.

16 On December 9, 2016, Plaintiff filed the instant action. ECF Docket No.
17 (“Dkt.”) 1, Compl. This matter is before the Court on the Parties’ Joint
18 Stipulation (“JS”), filed on July 24, 2017. Dkt. 18, JS.

19 II.

20 **PLAINTIFF’S BACKGROUND**

21 Plaintiff was born on August 1, 1996, and her alleged disability onset date is
22 December 15, 2017. AR at 79. She was eleven years old on the alleged disability
23 onset date and eighteen years old at the time of the ALJ hearing. Id. at 74, 79. As
24 of the date of the ALJ hearing, Plaintiff was in the eleventh grade at a special
25 education high school. Id. at 64. Plaintiff alleges disability based on learning
26 disability, bipolar disorder, and asthma. Id. at 79.

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1 III.

2 **STANDARD FOR EVALUATING DISABILITY**

3 **A. DISABILITY IN A CHILD**

4 A child (i.e., individual under eighteen years of age) claiming disability for
5 SSI must suffer from a “medically determinable physical or mental impairment,
6 which results in marked and severe functional limitations, and which can be
7 expected to result in death or which has lasted or can be expected to last for a
8 continuous period of not less than [twelve] months.” 42 U.S.C. §
9 1382c(a)(3)(C)(i). An impairment satisfies this requirement if it meets or equals in
10 severity any impairment that is listed in Title 20 of the Code of Federal
11 Regulations, Part 404, Subpart P, Appendix 1 (the “Listings”). 20 C.F.R. §
12 416.924(d).

13 To decide if a child is disabled for SSI, an ALJ conducts a three-step inquiry:

- 14 1. Is the child engaged in substantial gainful activity? If so, the ALJ finds the
15 child is not disabled. If not, the ALJ proceeds to step two.
- 16 2. Does the child have a severe impairment? If an impairment “is a slight
17 abnormality or a combination of slight abnormalities that causes no more
18 than minimal functional limitations,” the ALJ finds the impairment is not
19 severe and denies the child’s claim. If the ALJ finds the child has a severe
20 impairment, the ALJ proceeds to step three.
- 21 3. Does the child’s severe impairment meet, medically equal, or functionally
22 equal an impairment in the Listings? If so, the ALJ finds the child is
23 disabled, assuming the twelve-month duration requirement is also met. If
24 not, the ALJ finds the child is not disabled.

25 See id. § 416.924.

26 With respect to the third step, a child’s impairment “is medically equivalent
27 to a listed impairment . . . if it is at least equal in severity and duration to the criteria
28 of any listed impairment.” Id. § 416.926(a). To establish medical equivalence, the

1 child “must establish symptoms, signs and laboratory findings ‘at least equal in
2 severity and duration’ to the characteristics of a relevant listed impairment.”
3 Tackett v. Apfel, 180 F.3d 1094, 1099 (9th Cir. 1999) (quoting 20 C.F.R. §
4 404.1526).

5 In addition, to determine whether a child’s severe impairment functionally
6 equals a listed impairment, the ALJ assesses functional limitations the child’s
7 impairment caused in six domains:

- 8 1. Acquiring and using information;
- 9 2. Attending and completing tasks;
- 10 3. Interacting and relating with others;
- 11 4. Moving about and manipulating objects;
- 12 5. Caring for self; and
- 13 6. Health and physical well-being.

14 See 20 C.F.R. § 416.926a(a), (b). To functionally equal a listed impairment, a
15 child’s impairment must result in “marked” limitations in two domains or an
16 “extreme” limitation in one domain. Id. § 416.926a(a). A “marked” limitation is
17 one that “interferes seriously with [the child’s] ability to independently initiate,
18 sustain, or complete activities.” Id. § 416.926a(e)(2)(i). It is “‘more than
19 moderate’” but “‘less than extreme.’” Id. An “extreme” limitation “interferes
20 very seriously with [the child’s] ability to independently initiate, sustain, or
21 complete activities.” Id. § 416.926a(e)(3)(i). The ALJ reserves the extreme rating
22 for “the worst limitations.” Id.

23 **B. DISABILITY IN AN ADULT**

24 For an adult to qualify for SSI, the claimant must demonstrate a medically
25 determinable physical or mental impairment that prevents her from engaging in
26 substantial gainful activity, and that is expected to result in death or to last for a
27 continuous period of at least twelve months. Reddick v. Chater, 157 F.3d 715, 721
28 (9th Cir. 1998). The impairment must render the claimant incapable of performing

1 the work she previously performed and incapable of performing any other
2 substantial gainful employment that exists in the national economy. Tackett, 180
3 F.3d at 1098.

4 To decide if an adult claimant is disabled, and therefore entitled to benefits,
5 an ALJ conducts a five-step inquiry. 20 C.F.R. §§ 404.1520, 416.920. The steps
6 are:

- 7 1. Is the claimant presently engaged in substantial gainful activity? If so, the
8 claimant is found not disabled. If not, proceed to step two.
- 9 2. Is the claimant's impairment severe? If not, the claimant is found not
10 disabled. If so, proceed to step three.
- 11 3. Does the claimant's impairment meet or equal one of the specific
12 impairments described in 20 C.F.R. Part 404, Subpart P, Appendix 1? If so,
13 the claimant is found disabled. If not, proceed to step four.²
- 14 4. Is the claimant capable of performing work she has done in the past? If so,
15 the claimant is found not disabled. If not, proceed to step five.
- 16 5. Is the claimant able to do any other work? If not, the claimant is found
17 disabled. If so, the claimant is found not disabled.

18 See Tackett, 180 F.3d at 1098-99; see also Bustamante v. Massanari, 262 F.3d 949,
19 953-54 (9th Cir. 2001); 20 C.F.R. §§ 404.1520(b)-(g)(1), 416.920(b)-(g)(1).

20 The claimant has the burden of proof at steps one through four, and the
21 Commissioner has the burden of proof at step five. Bustamante, 262 F.3d at 953-
22 54. Additionally, the ALJ has an affirmative duty to assist the claimant in
23 developing the record at every step of the inquiry. Id. at 954. If, at step four, the
24 claimant meets her burden of establishing an inability to perform past work, the

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26 ² “Between steps three and four, the ALJ must, as an intermediate step, assess
27 the claimant's [residual functional capacity],” or ability to work after accounting
28 for her verifiable impairments. Bray v. Comm'r of Soc. Sec. Admin., 554 F.3d
1219, 1222-23 (9th Cir. 2009) (citing 20 C.F.R. § 416.920(e)). In determining a
claimant's residual functional capacity, an ALJ must consider all relevant evidence
in the record. Robbins v. Soc. Sec. Admin., 466 F.3d 880, 883 (9th Cir. 2006).

1 Commissioner must show that the claimant can perform some other work that
2 exists in “significant numbers” in the national economy, taking into account the
3 claimant’s residual functional capacity (“RFC”), age, education, and work
4 experience. Tackett, 180 F.3d at 1098, 1100; Reddick, 157 F.3d at 721; 20 C.F.R.
5 §§ 404.1520(g)(1), 416.920(g)(1).

6 IV.

7 THE ALJ’S DECISION

8 At the time Plaintiff filed her application, she was under the age of eighteen.
9 However, Plaintiff turned eighteen prior to the date of the hearing before the ALJ.
10 Thus, the ALJ employed the three-step sequential evaluation process for
11 determining disability of claimants under the age of eighteen, in addition to the
12 five-step sequential evaluation process for determining disability of adult claimants.

13 A. CHILD DISABILITY ANALYSIS

14 1. Step One

15 At step one, the ALJ found Plaintiff has not engaged “in substantial gainful
16 activity since the date the application was filed” on August 20, 2013. AR at 14.

17 2. Step Two

18 At step two, the ALJ found that before attaining age eighteen, Plaintiff “had
19 the following severe impairments: disruptive mood dysregulation disorder,
20 borderline intellectual functioning, and mild episodic asthma.” Id.

21 3. Step Three

22 At step three, the ALJ found that before attaining age eighteen, Plaintiff did
23 “not have an impairment or combination of impairments that meets or medically
24 equals the severity of one of the listed impairments in 20 CFR Part 404, Subpart P,
25 Appendix 1, Part A or B.” Id. at 15.

26 The ALJ also found that prior to attaining age eighteen, Plaintiff “did not
27 have an impairment or combination of impairments that functionally equaled the
28 listings.” Id. at 17. The ALJ assessed the functional limitations Plaintiff’s

1 impairments caused and found less than marked limitations or no limitations in
2 each of the six domains. Id. at 17-27.

3 **B. ADULT DISABILITY ANALYSIS**

4 **1. Step One**

5 At step one, the ALJ found Plaintiff has not engaged “in substantial gainful
6 activity since the date the application was filed” on August 20, 2013. Id. at 14.

7 **2. Step Two**

8 At step two, the ALJ found Plaintiff “has not developed any new impairment
9 or impairments since attaining age eighteen. The [Plaintiff] has the following
10 severe impairments: unspecified mood disorder and mild episodic asthma.” Id. at
11 28.

12 **3. Step Three**

13 At step three, the ALJ found that since attaining age eighteen, Plaintiff “has
14 not had an impairment or combination of impairments that meets or medically
15 equals a listed impairment.” Id.

16 **4. RFC Determination**

17 The ALJ found that since attaining age eighteen, Plaintiff has had the RFC
18 “to perform a full range of work at all exertional levels but with the following
19 nonexertional limitations: non-complex routine tasks, no interaction with the
20 public, no task requiring hypervigilance, only occasional tasks requiring teamwork,
21 and no concentrated exposures to pulmonary irritants such as fumes, odors, dust,
22 and gases.” Id. at 30.

23 **5. Step Four**

24 At step four, the ALJ found Plaintiff “has no past relevant work.” Id. at 31.

25 **6. Step Five**

26 At step five, the ALJ found “[s]ince attaining age 18, considering [Plaintiff’s]
27 age, education, work experience, and residual functional capacity, jobs have existed
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1 in significant numbers in the national economy that [Plaintiff] has been able to
2 perform.” Id.

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4 **V.**

5 **PLAINTIFF’S CLAIMS**

6 Plaintiff presents two disputed issues: (1) whether the ALJ properly
7 considered the criteria for listing 112.05D; and (2) whether the ALJ properly
8 considered the criteria for listing 12.05C. JS at 2.

9 **VI.**

10 **STANDARD OF REVIEW**

11 Pursuant to 42 U.S.C. § 405(g), a district court may review the
12 Commissioner’s decision to deny benefits. The ALJ’s findings and decision should
13 be upheld if they are free of legal error and supported by substantial evidence based
14 on the record as a whole. Richardson v. Perales, 402 U.S. 389, 401, 91 S. Ct. 1420,
15 28 L. Ed. 2d 842 (1971); Parra v. Astrue, 481 F.3d 742, 746 (9th Cir. 2007).

16 “Substantial evidence” is evidence that a reasonable person might accept as
17 adequate to support a conclusion. Lingenfelter v. Astrue, 504 F.3d 1028, 1035 (9th
18 Cir. 2007). It is more than a scintilla but less than a preponderance. Id. To
19 determine whether substantial evidence supports a finding, the reviewing court
20 “must review the administrative record as a whole, weighing both the evidence that
21 supports and the evidence that detracts from the Commissioner’s conclusion.”
22 Reddick, 157 F.3d at 720 (citation omitted); see also Hill v. Astrue, 698 F.3d 1153,
23 1159 (9th Cir. 2012) (stating that a reviewing court “may not affirm simply by
24 isolating a ‘specific quantum of supporting evidence’” (citation omitted)). “If the
25 evidence can reasonably support either affirming or reversing,” the reviewing court
26 “may not substitute its judgment” for that of the Commissioner. Reddick, 157
27 F.3d at 720-21; see also Molina v. Astrue, 674 F.3d 1104, 1111 (9th Cir. 2012)
28 (“Even when the evidence is susceptible to more than one rational interpretation,

1 we must uphold the ALJ’s findings if they are supported by inferences reasonably
2 drawn from the record.”).

3 The Court may review only the reasons stated by the ALJ in his decision
4 “and may not affirm the ALJ on a ground upon which he did not rely.” Orn v.
5 Astrue, 495 F.3d 625, 630 (9th Cir. 2007). If the ALJ erred, the error may only be
6 considered harmless if it is “clear from the record” that the error was
7 “inconsequential to the ultimate nondisability determination.” Robbins, 466 F.3d
8 at 885 (citation omitted).

9 **VII.**

10 **DISCUSSION**

11 **THE ALJ DID NOT PROPERLY DETERMINE**
12 **PLAINTIFF’S IMPAIRMENTS DO NOT MEET**
13 **OR EQUAL LISTINGS 112.05D AND 12.05C**

14 Plaintiff argues “there is ample evidence to show that Plaintiff meets”
15 Listings 112.05D and 12.05C. JS at 3, 14. Plaintiff specifically argues she meets
16 both Listings 112.05D and 12.05C because (1) Plaintiff’s Full Scale IQ score of 70 is
17 within the required range of the Listings; and (2) Plaintiff was diagnosed with
18 bipolar disorder, learning disorder, disruptive mood dysregulation disorder, and
19 asthma – all of which manifested during her developmental period and impose an
20 additional and significant limitation of function. Id. at 3-4, 14-15.

21 As set forth below, while the ALJ concluded Plaintiff does not suffer from
22 “marked limitations with respect to social functioning, personal functioning, or
23 difficulties in maintaining concentration, persistence, or pace,” he failed to
24 properly consider whether Plaintiff has deficits in adaptive functioning. See AR at
25 14, 16.

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1 **A. APPLICABLE LAW**

2 Listings 12.05 and 112.05 define intellectual disability in adults and children,
3 respectively. See 20 C.F.R. § Pt. 404, Subpt. P, App. 1. §§ 12.00, 112.00 (2015).³
4 “The structure of the mental disorders listings for children under age 18 parallels
5 the structure for the mental disorders listings for adults but is modified to reflect
6 the presentation of mental disorders in children.” Id. §§ 12.00A, 112.00A. To
7 meet Listings 12.05 and 112.05, the regulations require a claimant satisfy “the
8 diagnostic description in the introductory paragraph and any one of” the four
9 additional sets of criteria for Listing 12.05 (A through D) and six sets of criteria for
10 Listings 112.05 (A through F). Id.

11 Pursuant to the introductory paragraphs of Listings 12.05 and 112.05, an
12 intellectual disability is “[c]haracterized by significantly subaverage general
13 intellectual functioning with deficits in adaptive functioning.” Id. §§ 12.05, 112.05.
14 Listing 12.05, however, additionally requires that “adaptive functioning initially
15 manifest[] during the developmental period; i.e., the evidence demonstrates or
16 supports onset of the impairment before age 22.” Id. § 12.05.

17 As to the “additional sets of criteria,” Subsection C of Listing 12.05 and
18 Subsection D of Listing 112.05 both require “[a] valid verbal, performance, or full
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20 ³ A revised Listing of Impairments went into effect on January 17, 2017.
21 Where, as here, the ALJ’s decision is the final decision of the Commissioner, the
22 reviewing court generally applies the law in effect at the time of the ALJ’s decision.
23 See Lowry v. Astrue, 474 Fed. Appx. 801, 805 n.2 (2d Cir. 2012) (applying version
24 of regulation in effect at time of ALJ’s decision despite subsequent amendment);
25 Garrett ex rel. Moore v. Barnhart, 366 F.3d 643, 647 (8th Cir. 2004) (“We apply
26 the rules that were in effect at the time the Commissioner’s decision became
27 final.”); Spencer v. Colvin, No. 15-05925, 2016 WL 7046848, at *9 n.4 (W.D.
28 Wash. Dec. 1, 2016) (“42 U.S.C. § 405 does not contain any express authorization
from Congress allowing the Commissioner to engage in retroactive rulemaking”);
cf. Revised Medical Criteria for Determination of Disability, Musculoskeletal
System and Related Criteria, 66 Fed. Reg. 58010, 58011 (Nov. 19, 2001) (“With
respect to claims in which we have made a final decision, and that are pending
judicial review in Federal court, we expect that the court’s review of the
Commissioner’s final decision would be made in accordance with the rules in effect
at the time of the final decision.”). Accordingly, unless otherwise noted, the Court
applies the versions of 20 C.F.R. Pt. 404, Subt. P, App. 1 that were in effect at the
time of the ALJ’s August 5, 2015 decision.

1 scale IQ of 60 through 70 and a physical or other mental impairment imposing an
2 additional and significant” work-related limitation of function, for adults, or
3 general limitation of function, for children. Id. §§ 12.05C, 112.05D.

4 Thus, to meet Listings 12.05C and 112.05D, a claimant must generally satisfy
5 “three main components:” (1) subaverage intellectual functioning with deficits in
6 adaptive functioning; (2) an IQ score of 60 to 70; and (3) a physical or other mental
7 impairment causing an additional and significant limitation of function. Kennedy v.
8 Colvin, 738 F.3d 1172, 1175–76 (9th Cir. 2013).

9 **B. RELEVANT FACTS**

10 In evaluating Plaintiff’s limitations, the ALJ relied on three physician
11 opinions, as well as the opinion of Plaintiff’s special education teacher. The ALJ
12 additionally relied on Plaintiff’s testimony, her Individualized Education Plan, and
13 her treatment records at Kedren Community Health Center.

14 **1. Plaintiff’s Testimony**

15 On the date of the ALJ hearing, Plaintiff testified she was eighteen years old,
16 “still in 11th [grade],” and did not have a drivers’ license. AR at 59. Plaintiff stated
17 she “get[s] frustrated a lot” and has anger outbursts about “twice a day.” Id. at
18 62. As for her education, Plaintiff testified she had to repeat ninth grade and a
19 portion of tenth grade. Id. at 64. She stated she has an Individualized Education
20 Program (“IEP”) and is not in “regular classes.” Id. Plaintiff testified her classes
21 are small – sometimes only four students. Id. Plaintiff claimed she tried to attend
22 larger classes, where there were about twenty to thirty students, but “[i]t didn’t
23 really work out” because “it’s only one staff, it gets frustrating because they can
24 only help one person at a time.” Id. at 65. As for her work history, Plaintiff
25 testified she had a part-time job during one summer where she was responsible for
26 “wav[ing] the flag” on the street corner for Liberty Taxes. Id. at 60.

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1 **2. Dr. David Glassmire’s Opinion**

2 The ALJ relied on and gave great weight to the opinion of David Glassmire,
3 Ph.D., a clinical psychologist who testified as a medical expert at the hearing before
4 the ALJ. Id. at 14. Dr. Glassmire reviewed all the evidence in the record except for
5 Plaintiff’s IEP. Id. at 51-52. Ultimately, Dr. Glassmire opined Plaintiff does not
6 meet or medically equal Listing 112.04 or 112.05. Id. at 51-52.

7 **3. Dr. R.E. Brooks’s Opinion**

8 The ALJ relied on and gave great weight to the opinion of Dr. R.E. Brooks,
9 MD, the State agency medical psychiatrist, who reviewed Plaintiff’s medical
10 records to assist in the disability determination. Id. at 87. Dr. Brooks evaluated
11 Plaintiff’s functionality in the six domains and opined Plaintiff’s impairments do
12 not meet or medically equal a Listing. Id. at 86-87.

13 **4. Dr. Avazeh Chehrazi’s Opinion**

14 The ALJ relied upon and gave some weight to the opinion of consultative
15 examiner, Dr. Avazeh Chehrazi, Ph.D. Id. at 21. Dr. Chehrazi is a clinical
16 psychologist who examined Plaintiff for purposes of her disability claim on
17 November 11, 2013. Id. at 21, 317-22. Dr. Chehrazi noted Plaintiff “was
18 hospitalized on a psychiatric basis in 2008 due to severe behavioral problems and
19 aggression” and “is currently receiving outpatient psychiatric care and
20 psychotherapy and has been diagnosed with bipolar disorder and ADHD.” Id. at
21 318. Additionally, Dr. Chehrazi reported Plaintiff “repeated kindergarten,” was
22 enrolled “in a special education 9th grade class” which she also repeated, “began
23 receiving special education services in 6th grade,” and “receives average to below
24 average grades.” Id. at 319.

25 Dr. Chehrazi performed a complete psychological evaluation, the Wechsler
26 Adult Intelligence Scale IV test, and the Vineland Adaptive Behavior Scales test.
27 Id. at 317. Dr. Chehrazi concluded Plaintiff’s cognitive ability falls within the
28 borderline range. Id. at 321-22. Further, Dr. Chehrazi opined Plaintiff “would be

1 able to understand, remember and carry out short, simplistic instructions with no
2 difficulty. She also would have moderate difficulty to understand, remember and
3 carry out detailed and complex instructions. She would have mild difficulty to
4 comply with school rules such as safety and attendance. She would have no
5 difficulty to respond to change in a normal classroom setting. She would have
6 moderate difficulty to maintain persistence and pace in a normal school setting.”
7 Id. at 322. Finally, Dr. Chehrazi found Plaintiff “would have moderate difficulty to
8 interact appropriately with teachers, adults and peers on a consistent basis and in
9 an age-appropriate manner.” Id.

10 **5. Stephanie Gomez’s Opinion**

11 The ALJ also considered the opinion of Plaintiff’s special education teacher,
12 Stephanie Gomez, who teaches at Hawthorne Academy, a non-public, special
13 education school. Id. at 307. Ms. Gomez has known Plaintiff for two years, and
14 spent time with her on a daily basis. Id. at 307-14. Ms. Gomez noted significant
15 improvement in Plaintiff during the 2013 school year, but also noted continued
16 areas of impairment in interacting and relating with others, including “slight
17 problem[s]” “expressing anger appropriately” and “following rules.” Id. at 310.

18 **6. Plaintiff’s Individualized Education Program**

19 The ALJ also considered notes from Plaintiff’s Individualized Education
20 Program, which tracks Plaintiff’s behavior, social, emotional, and academic records
21 at school. Id. at 450-550. While Plaintiff’s most recent IEP reflected an
22 improvement in her functioning at school, it noted areas where Plaintiff continued
23 to struggle. Id. at 19. For example, the IEP noted Plaintiff still struggles in
24 “[m]aintaining her emotions in the home setting,” and she continues to need help
25 in “managing anger, frustration, and other difficult feelings.” Id. at 453. Although
26 Plaintiff’s attendance has improved, Plaintiff “is still averaging at least one absence
27 a week.” Id. Additionally, the IEP noted Plaintiff’s impairments require Plaintiff
28 “to have instruction broke[n] up into parts, instruction to be repeated and/or

1 clarified, one-on-one assistance when needed as well as extra time to complete
2 assignments.” Id. Furthermore, the IEP reported Plaintiff “benefits from
3 constant reminders of standard school policies, frequent checks for understanding
4 of expectations, and verbal recognition for her endeavors and accomplishments.”
5 Id. Lastly, Plaintiff’s academics in 2012 indicated average scores in reading
6 fluency, below average comprehension skills, low average math fluency, and
7 average spelling skills. Id. at 583. A report from 2012 also indicates Plaintiff suffers
8 from “issues of distractibility” and a “lack of focus and attention.” Id. at 523.

9 **7. Treatment Records From Kedren Community Health Center**

10 The ALJ also relied upon Plaintiff’s medical records from Kedren
11 Community Health Center between January 2013 and February 2015. Id. at 18,
12 234-60, 381-45. According to the record, Plaintiff visited Kedren on various
13 occasions seeking mental health services. Id. at 404-35. The initial assessment
14 report indicated Plaintiff sought treatment due to anger spells, loss of sleep, and
15 crying spells. Id. at 245. The initial assessment also reported issues with Plaintiff’s
16 developmental milestones during her early years – noting that she had to repeat
17 kindergarten, lacked impulse control, and fought with her peers. Id. at 248. It
18 further reported Plaintiff was receiving Ds and Fs during her tenth grade year at
19 Hawthorne. Id. at 249. Although notes from Kedren reflect Plaintiff’s mental
20 health symptoms have improved with medication, a treating physician opined
21 Plaintiff’s “symptoms impair her from functioning in daily living activities.” Id. at
22 413.

23 **C. ANALYSIS**

24 Here, the ALJ failed to properly consider whether Plaintiff has deficits in
25 adaptive functioning, particularly in light of the fact that (1) Plaintiff is been
26 enrolled in special education classes, (2) has been required to repeat grade levels in
27 the past, and (3) Plaintiff’s reported improvements were both recent and relative to
28 her past impairments.

1 Adaptive functioning⁴ refers to a claimant’s “[]ability to cope with the
2 challenges of ordinary everyday life.” Novy v. Astrue, 497 F.3d 708, 710 (7th Cir.
3 2007). It evaluates a claimant’s “effectiveness in areas such as social skills,
4 communication skills, and daily-living skills.” Hayes v. Comm’r of Soc. Sec., 357
5 F. App’x 672, 677 (6th Cir. 2009) (quoting Heller v. Doe, 509 U.S. 312, 329, 113 S.
6 Ct. 2637, 125 L. Ed. 2d 257 (1993)). “The term ‘adaptive functioning’ refers to the
7 individual’s progress in acquiring mental, academic, social and personal skills as
8 compared with other unimpaired individuals of his/her same age. Indicators of
9 adaptive behavior include . . . educational and social achievements.” Lyons v.
10 Colvin, No. 7:13-CV-00614, 2014 WL 4826789, at *10 (N.D.N.Y. Sept. 29, 2014)
11 (citing POMS DI 24515.056D2). Examples of evidence supporting a finding of
12 deficits in adaptive functioning can include “special education classes, dropping
13 out of high school prior to graduation, difficulties in reading, writing or math, and
14 low skilled work history.” Campbell v. Astrue, No. 1:09-CV-00465 GSA, 2011 WL
15 444783, at *17 (E.D. Cal. Feb. 8, 2011).

16 Plaintiff has been diagnosed with ADHD and suffers from mood disruptive
17 disorders, including bipolar disorder. AR at 408, 572, 582-83. Plaintiff’s
18 documented history of resulting impairment and treatment has spanned at least
19 thirteen years. Id. at 248. At one point, Plaintiff’s mood disorders became so
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21 ⁴ The 2017 regulations define adaptive functioning as “how [a claimant]
22 learn[s] and use[s] conceptual, social, and practical skills in dealing with common
23 life demands. It is [her] typical functioning at home, at school, and in the
24 community, alone or among others.” 20 C.F.R. § Pt. 404, Subpt. P, App. 1, §§
25 12.05, 112.05 (2017). The regulations note that “[t]he fact that [a claimant]
26 engage[s] in common everyday activities, such as caring for [her] personal needs,
27 preparing simple meals, or driving a car, will not always mean that [she] do[es] not
28 have deficits in adaptive functioning . . .” Id. Additionally, a conclusion on
adaptive functioning can “rest on whether [a claimant] do[es] [her] daily activities
independently, appropriately, effectively, and on a sustained basis. If [a claimant]
receive[s] help in performing your activities, [the ALJ] need[s] to know the kind,
extent, and frequency of help [the claimant] receive[s] in order to perform them.
[It] will not [be] assume[d] that [a claimant’s] ability to do some common everyday
activities, or to do some things without help or support, demonstrates that [her]
mental disorder does not meet the requirements” Id.

1 severe she required hospitalization “on a psychiatric basis” because of her
2 “behavior problems and aggression.” Id. at 318. Not surprisingly, Plaintiff has
3 been enrolled in highly structured, special education classes since the Sixth Grade.
4 Id. at 319. In addition, the severity of Plaintiff’s limitations have also warranted an
5 IEP. Id. at 450-584. Moreover, despite her enrollment in special education classes
6 with an IEP, Plaintiff has continued to struggle. For example, Plaintiff was required
7 to repeat Ninth Grade and a portion of Tenth Grade. Id. at 64. Additionally, the
8 record reflects Plaintiff obtained grades which were below average and suffered
9 from “issues of distractibility” and a lack of focus and attention. Id. 523, 583.
10 Furthermore, notes from Ms. Gomez during the 2012-2013 school year indicate
11 Plaintiff went through periods of time where she was absent frequently and would
12 not make up assignments or complete her homework. Id. at 307, 309-10. Notably,
13 Ms. Gomez is one of the few individuals who interacts with Plaintiff on a daily
14 basis, and thus has the opportunity to observe Plaintiff in her day to day functions.
15 Id. at 307. Once again, all of these continued challenges and difficulties have
16 occurred despite the structure, resources, and individualized attention that special
17 education and an IEP provide.

18 The ALJ largely focused on improvements in Plaintiff’s impairments. See
19 id. at 18-20, 27, 29, 30. While the record reflects Plaintiff has experienced
20 substantial improvement in managing her emotions and performing at school, the
21 record also supports a finding that Plaintiff’s improvement occurred relatively
22 recently and, once again, in the highly-structured setting of a special education
23 school, with the guidance of an IEP. See Lyons v. Colvin, No. 7:13-CV-00614,
24 2014 WL 4826789, at *9 (N.D.N.Y. Sept. 29, 2014) (“[A]ttendance in special
25 education classes and an education pursuant to an IEP have been construed as
26 factors indicative of deficits in adaptive functioning.”); Forsythe v. Astrue, No.
27 1:10-CV-01515 AWI, 2012 WL 217751, at *7 (E.D. Cal. Jan. 24, 2012) (“Courts
28 have found that circumstantial evidence can infer a deficit in adaptive

1 of benefits where no useful purpose would be served by further administrative
2 proceedings and the record has been thoroughly developed.” Id. (citation
3 omitted). “Remand for further proceedings is appropriate where there are
4 outstanding issues that must be resolved before a determination can be made, and it
5 is not clear from the record that the ALJ would be required to find the claimant
6 disabled if all the evidence were properly evaluated.” Id. (citations omitted); see
7 also Reddick v. Chater, 157 F.3d 715, 729 (9th Cir. 1998) (“We do not remand this
8 case for further proceedings because it is clear from the administrative record that
9 Claimant is entitled to benefits.”).

10 **B. ANALYSIS**

11 In this case, the record has not been fully developed. The ALJ failed to
12 consider whether Plaintiff suffers from deficits in adaptive functioning, particularly
13 in light of her special education history. Accordingly, remand for further
14 proceedings is appropriate.

15 **IX.**
16 **CONCLUSION**

17 For the foregoing reasons, IT IS ORDERED that judgment be entered
18 REVERSING the decision of the Commissioner and REMANDING this action for
19 further proceedings consistent with this Order. IT IS FURTHER ORDERED that
20 the Clerk of the Court serve copies of this Order and the Judgment on counsel for
21 both parties.

22
23 Dated: September 14, 2017

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25 _____
26 HONORABLE KENLY KIYA KATO
27 United States Magistrate Judge
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