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**UNITED STATES DISTRICT COURT**  
EASTERN DISTRICT OF CALIFORNIA

JACOBBI J. WILSON,	)	1:08cv01933 GSA
	)	
Plaintiff,	)	
	)	ORDER REGARDING PLAINTIFF’S SOCIAL
v.	)	SECURITY COMPLAINT
	)	
MICHAEL J. ASTRUE, Commissioner	)	
of Social Security,	)	
	)	
Defendant.	)	

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**BACKGROUND**

Plaintiff Jacobbi J. Wilson (“Plaintiff”) seeks judicial review of a final decision of the Commissioner of Social Security (“Commissioner”) denying his application for child’s supplemental security income, pursuant to Title XVI of the Social Security Act. The matter is currently before the Court on the parties’ briefs, which were submitted, without oral argument, to the Honorable Gary S. Austin, United States Magistrate Judge.<sup>1</sup>

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<sup>1</sup> The parties consented to the jurisdiction of the United States Magistrate Judge. (See Docs. 9 & 10.)

1 **FACTS AND PRIOR PROCEEDINGS**<sup>2</sup>

2 Plaintiff filed his application on April 7, 2006. AR 108-113.<sup>3</sup> After being denied both  
3 initially and upon reconsideration, Plaintiff requested a hearing before an Administrative Law  
4 Judge (“ALJ”). AR 74-79, 81-86. A hearing was held on January 8, 2008. AR 25-629. The  
5 ALJ issued a decision denying benefits on March 27, 2008. AR 7-21. On October 13, 2008, the  
6 Appeals Council denied review. AR 2-4.

7 **Hearing Testimony**

8 ALJ Michael J. Haubner held a hearing on January 8, 2008, in Fresno, California.  
9 Plaintiff appeared and testified, and was represented by counsel. Additionally, Willie Wilson  
10 testified as a witness. AR 25-62.

11 Plaintiff testified that his date of birth was October 20, 1989, making him eighteen years  
12 old at the time of the hearing. AR 27. He lives in Fresno with his parents. Two younger  
13 siblings, his older brother and his girlfriend, and their baby, also live in the home. AR 36-37.  
14 His mother works full-time and his father is disabled. AR 34. Plaintiff has his own room at  
15 home and makes his own bed every day and changes the sheets once a week. He has regular  
16 chores that include cleaning the bathroom and living room, taking out the trash, and doing the  
17 dishes. AR 36. He does not do laundry. AR 39.

18 Plaintiff had not yet graduated from high school but is in his senior year. He did not  
19 know his grade point average. AR 31. He has flunked certain courses in the previous two years,  
20 but has not had to repeat an entire year of education. AR 32. He is currently receiving special  
21 education classes (“IEP”) and tutoring. AR 32-33. Plaintiff is a running back on Sunnyside High  
22 School’s football team. AR 33. As a freshman, Plaintiff was suspended for one week for  
23 fighting. AR 33-34.

24 About once a month, Plaintiff will babysit his brother’s one year old daughter. Two  
25 hours in the longest period of time he has spent babysitting. AR 37. Besides playing football, he  
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27 <sup>2</sup> References to the Administrative Record will be designated as “AR,” followed by the appropriate page  
28 number.

<sup>3</sup>Plaintiff reached the age of majority on October 20, 2007.

1 enjoys watching television. He estimates he watches television about three hours a day. AR 37.  
2 While there is a computer in the home, he does not use it. AR 37-38. He also plays video games  
3 for about thirty minutes every day. AR 38.

4 While he does not have a driver's license and never has, Plaintiff admitted driving "every  
5 couple weeks" on average. AR 34-35. When he does drive, he drives a car with an automatic  
6 transmission; he has been driving since the age of fourteen. AR 35. He has a cell phone and  
7 talks on the phone every day. AR 39.

8 Plaintiff has never had a job, nor has he applied for one. AR 35. He gets homework  
9 every day and spends about a half an hour on it. Football practice lasts two hours. AR 38. He is  
10 able to take care of his own personal grooming needs. AR 38. He does not cook meals, but can  
11 make a sandwich or use the microwave. AR 39.

12 For his asthma condition, Plaintiff uses an inhaler. He does not take any medication for  
13 the condition in either pill or syrup form, and does not use a nebulizer. He has been treated in the  
14 emergency room for breathing problems, but had not stayed overnight. AR 40. Plaintiff agreed  
15 that his problems include back problems, asthma, learning disabilities, ADHD and borderline  
16 intellectual functioning. AR 41.

17 When asked how much weight he was capable of lifting and carrying, he estimated he  
18 could lift and carry 100 pounds. He could stand for fifteen minutes at one time, sit for fifteen to  
19 twenty minutes at one time, and walk for about an hour before needing to rest. AR 41. Plaintiff  
20 estimated he could pay attention and concentrate for about ten to fifteen minutes at a time, after  
21 which he would rest his mind for about twenty minutes before being able to focus once again.  
22 AR 42.

23 With regard to the tutoring he receives, Plaintiff indicated it is primarily in the subject of  
24 English. He can read and write; he does not know his current reading level because no one has  
25 told him. He can read a newspaper headline and the sports page. AR 43. His learning disability  
26 involves forgetting instructions given by the teacher after five or ten minutes. He can read  
27 instructions in writing, but cannot follow them on his own. He has to ask his teachers for an  
28 explanation more than once, typically this occurs in math and science classes. AR 44.

1 Economics can also cause him difficulty, but he does not receive tutoring in that subject. AR 45.  
2 His older brother will assist him with his homework. AR 45. He is patient and explains the  
3 lesson word by word “like the teacher doesn’t.” AR 46. While his older brother may have to  
4 explain an economics lesson more than once, Plaintiff is able to complete his assignment. AR  
5 46. He does not know what grade he is earning in economics because the class has just started.  
6 AR 46.

7 With specific regard to his asthma condition, Plaintiff testified that it is triggered by  
8 others smoking around him and extreme heat. He has an asthma attack about three times a year.  
9 He indicated the inhaler will “[s]ometimes” control an asthma attack. AR 47. Plaintiff is not  
10 treated by a psychiatrist or counselor for ADHD. AR 48.

11 When questioned by his attorney, Plaintiff admitted that he was no longer playing on the  
12 football team because he was “kicked off” in the seventh week of the season for cursing a  
13 teacher. Apparently his math teacher said something he did not agree with, so he “just went off  
14 on her.” AR 48. He has applied for admission to Fresno City College because he hopes to play  
15 football there. He spoke with the coach in December and was told the coach was very interested  
16 because they needed a good, short, fast running back. At the time of the hearing, Plaintiff did not  
17 yet know whether he had been accepted to junior college. AR 49-50.

18 In addition to the incident involving his math teacher, Plaintiff indicated he was involved  
19 in a fight with another student while playing basketball. The other student hit him in the head  
20 with the basketball and started laughing. Plaintiff “just got mad and hit him.” AR 49. There  
21 have been previous instances where he becomes angry with others and cannot stop himself from  
22 fighting. He explained it is as if he goes “blank” and his “frustration takes over.” AR 50. This  
23 is a problem at home as well and happens almost every day. Asked to give an example, Plaintiff  
24 indicated that in November he and his dad “got into it” and he tried to fight his dad, but his dad  
25 walked away. Plaintiff spend that night at his grandma’s house. AR 50.

26 Plaintiff’s father, Willie Wilson, testified that his son is in special education classes  
27 because he “has a learning disability because he ha[s] never gotten good grades.” AR 52. Mr.  
28 Wilson indicated that when he assigns Plaintiff chores at home he cannot follow directions, he

1 “either won’t do it or he won’t like it.” AR 52. Mr. Wilson testified that Plaintiff was different  
2 from other teenagers because he would “explode and get angry and cuss you out.” AR 52. This  
3 behavior will occur about once a month. Plaintiff will leave the house and return after cooling  
4 off for three to four hours. When he returns, it’s like nothing ever happened. There is nothing in  
5 particular that triggers the episodes. AR 53. Mr. Wilson indicated he has not taken Plaintiff for  
6 any kind of psychological or psychiatric counseling or treatment. AR 53. Neither has Plaintiff  
7 received that type of treatment through the school, nor taken medication related to that condition.  
8 AR 54.

9       According to Mr. Wilson, Plaintiff last suffered from an asthma attack the previous fall.  
10 Occasionally Plaintiff suffers from nose bleeds while he sleeps. He has suffered from nose  
11 bleeds since he “was little” rather than only during the period he has played football. AR 54-55.

12       With regard to Plaintiff’s learning disability, Mr. Wilson questioned findings that the  
13 disability only affected two subjects because Plaintiff was getting F’s in all his classes. AR 55.  
14 Asked for examples regarding Plaintiff’s learning difficulties, Mr. Wilson indicated when the  
15 family goes bowling, Plaintiff becomes frustrated because he cannot keep score. While the  
16 machines also keep score, Mr. Wilson testified a person still has to be able to keep score.  
17 Plaintiff becomes frustrated and gets mad when the other kids tease him. AR 56. Plaintiff also  
18 has difficulty accepting and following directions, and has since he was young. AR 56-57.

19       Plaintiff’s coaches have indicated that he cannot remember the plays, and that is one  
20 reason he did not play as much as he should have last year. AR 57. Mr. Wilson believes  
21 Plaintiff should receive more help than what he is getting, and that Plaintiff needs help with his  
22 “real bad anger problem.” AR 57.

23       Mr. Wilson indicated that Plaintiff does not do yard work around the house. AR 57. He  
24 takes out the trash once a week and drives down the street about once a week. AR 58. Plaintiff  
25 does not make his own bed, but he does change the sheets once a week. AR 58. He cleans the  
26 bathroom and kitchen once a week. AR 58. He washes dishes once a week. AR 60. He also  
27 babysits his niece about once a month for an hour or two. AR 58-59. While Plaintiff does play  
28 video games, he does not do so every day and Mr. Wilson estimated it was about once a month.

1 When asked about Plaintiff's completion of his homework, Mr. Wilson indicated Plaintiff does  
2 not do his homework every day. AR 59. Instead, he does it "once or twice a month." AR 60.  
3 Plaintiff can cook a simple meal like eggs when he's hungry, and Mr. Wilson indicated he will  
4 prepare simple meals just about every day. AR 60. Lastly, Mr. Wilson indicated that his son  
5 talks on the phone every day. AR 60.

6 According to Mr. Wilson, he does not understand his son when he is speaking to him  
7 because they are on "two different levels," but he did admit part of that could be that his son is a  
8 teenager. AR 61.

### 9 Educational Record

10 The entire record was revealed in this regard, however, only the most relevant reports are  
11 included in the Court's summary below.

12 A psychological and guidance report completed in 1997 by School Psychologist Michelle  
13 De La Torre included a twenty-five minute observation wherein it was witnessed Plaintiff was on  
14 task ninety-five percent of the time, attempted to solve problems using his fingers to count and  
15 did not talk or interact with other students. He was cooperative and well behaved and remained  
16 on task during testing. It was recommended he be referred for psychoeducation evaluation due to  
17 concerns about slow academic progress. His ability was in the below average range and a severe  
18 discrepancy was noted between his estimated ability and achievement in assessed areas. At the  
19 time, he did not qualify for academic special education, but due to weakness should continue in  
20 the "Reading Recovery" program. AR 292-296.

21 A Speech Language Evaluation dated May 15, 2003, revealed slightly delayed language  
22 skills, no discrepancy between expressive and receptive language skills, and normal articulation,  
23 voice and fluency skills. Gaylene Thomas, M.A., speech and language specialist, found Plaintiff  
24 did not meet the qualification guidelines for speech and language services within the Fresno  
25 Unified School District, and recommended he be dismissed from speech therapy. AR 273-274.

26 A January 5, 2006, Multidisciplinary Psychoeducational Report included the following  
27 findings. Plaintiff's reading skills were below average for comprehension. His writing skills  
28 were average overall, but slightly below average in sentence construction and expression. His

1 math skills were poor and math calculation and reasoning were borderline. His language skills  
2 were on the lower side of average and he appeared to be “decent at listening” and understanding  
3 oral presentations. AR 134. It was noted he was willing and ready to work and performed  
4 without exhibiting frustration during the testing. AR 135. His general memory skills were  
5 average, as were his verbal memory skills. His visual memory skills were below average as were  
6 the scores related to attention and concentration. AR 136. His adaptive behavior evaluation was  
7 average overall. Low average scores were recorded in the communication skills subscale and a  
8 low score on the functional academics subscale and work subscale were also recorded. AR 138.  
9 The report included an ADD evaluation scale used in the home. Willie Wilson’s report indicates  
10 that Plaintiff does not appear to display excessive symptoms of ADHD at home. AR 139.  
11 Plaintiff’s phonological awareness skills were poor, his phonological memory skills were below  
12 average and his rapid naming skills were average. A significant discrepancy was noted in the  
13 area of auditory processing compared to his intellectual ability score. AR 141. It was observed  
14 that Plaintiff demonstrated a severe discrepancy between intellectual ability and achievement in  
15 the areas of mathematics calculation and reasoning and visual processing. The recommendations  
16 included Plaintiff’s participation in an after school tutorial program to assist with homework,  
17 possible extra time afforded in order to complete math assignments or testing, and the  
18 development of goals and objectives. AR 143-144; *see also* AR 206-219.

19 In a March 20, 2006, email, one of Plaintiff’s instructors reported he was polite and able  
20 to explain how to complete a problem correctly, but was unable to perform the calculation  
21 correctly on his own. His basic algebra skills were weak. AR 118.

22 A Fresno Unified School District Individualized Education Program form of that same  
23 date reveals plaintiff’s parents received multidisciplinary and psychoeducational reports. AR  
24 120. Plaintiff had earned 85 credits and was passing English, history and his tutorial classes.  
25 However, he was failing all math classes and biology. He communicated clearly and listened to  
26 instructions and his self-help skills were appropriate. Motor skills and social/emotional skills  
27 were age appropriate, and his health was normal other than his need to wear corrective lenses. A  
28 total of forty-eight classes had been missed and thirty tardies were reported. AR 121. Short term

1 goals included improving math skills and reading comprehension. At the time of assessment,  
2 Plaintiff could perform math calculations at a sixty percent accuracy with the aid of a calculator,  
3 and could read at a fifth grade level with an eighty percent accuracy in comprehension. AR 122.  
4 Specific learning disabilities were identified in math reasoning and calculation, and visual  
5 processing. Plaintiff was permitted the use of a calculator for all math tasks, including exams,  
6 and teachers were to ensure he understood lessons and provided opportunities for visual tracking  
7 and recognition. AR 123. Plaintiff's long range goals included a career as a sports announcer  
8 and college education. AR 125.

9 A health evaluation completed for the Fresno Unified School District by Registered  
10 Nurse Kate Brown noted five suspensions for fighting and aggressive behavior, a history of  
11 asthma and the need for Plaintiff to wear glasses in the classroom to correct his vision. He was  
12 serious and cooperative, followed directions well and asked appropriate questions. His hygiene  
13 and gait were normal. AR 132.

14 A May 8, 2006, Teacher Questionnaire completed by John Nichols noted slight or  
15 obvious problems in the area of acquiring and using information (AR 165), a range of no  
16 problem to obvious problem in the area of attending and completing tasks (AR 166), no problems  
17 in the area of interacting and relating with others (AR 167) or moving about and manipulating  
18 objects (AR 168), no problem or slight problem in the area of caring for himself (AR 169), and  
19 asthma and allergies that are treated by medication, including Albuterol. AR 170.

20 A November 10, 2007, Teacher Questionnaire completed by John De La Cerda indicated  
21 a mild problem regarding the ability to finish projects, ability to listen and remain attentive, and  
22 to concentrate on schoolwork. No problems were recorded in the areas of ability to organize and  
23 to play. AR 187. A mild problem was reported regarding Plaintiff's ability to learn new skills  
24 and keep up with peers, but no problems were recorded in the areas of ability to stay seated or  
25 still, and ability to think before acting or acknowledge own mistake. Further, it was noted  
26 Plaintiff's parents were very supportive and he had no visual or hearing problems. AR 188. All  
27 areas regarding speech and hand/eye coordination were normal. AR 189. Plaintiff participated  
28 in group situations and got along with other children, was not verbally or physically aggressive

1 toward his peers, and had no difficulty expressing thoughts or feelings. He was cooperative,  
2 polite and willing to converse with adults. He attended special education classes regarding  
3 learning strategies. AR 190. He took care of his own needs, did not require special attention and  
4 played football. AR 191.

5 A grade report dated 2007 reflects an average grade point of 2.0 or less with regard to the  
6 ninth, tenth and eleventh grades with the exception of what appears to be a summer session in the  
7 eleventh grade wherein Plaintiff earned a 3.3 grade point average. AR 194.

8 An IEP form regarding accommodations and modifications dated February 1, 2007,  
9 indicates Plaintiff could use calculators and multiplication charts, was permitted more time for  
10 testing in an individual or small group setting, and that directions could be read aloud to the  
11 student and/or repeated. AR 252.

#### 12 Medical Record

##### 13 *Community Medical Center*

14 On November 6, 1999, Plaintiff was seen in the emergency room for a shortness or breath  
15 with a cough and burning sensation in the chest. The working diagnosis noted exacerbation of  
16 asthma and allergic rhinitis. Medications and treatment were administered, and he was released.  
17 AR 328-332.

18 On January 14, 2004, Plaintiff was seen in the emergency room for smoke inhalation after  
19 food was left burning on the stove. He was wheezing and reported chest pain. He was counseled  
20 and diagnosed with mild carbon monoxide poisoning and sent home. AR 203-205.

21 On March 14, 2004, Plaintiff was again seen in the emergency room for possible smoke  
22 inhalation due to burning food on the stove. He complained his chest was burning. He was not  
23 in respiratory distress, and was treated and released. AR 320-327.

24 Plaintiff was seen for an ankle injury while playing football on November 14, 2004. X-  
25 rays were negative, a sprain was diagnosed and he was provided crutches. AR 201-202, 312-318.

26 On September 29, 2006, Plaintiff was treated in the emergency room for rib pain  
27 following a tackle during a football game. Lung sounds were good and x-rays were negative but a  
28

1 clinical impression included a diagnosis of rib fracture. Pain medication was administered and  
2 he was discharged. AR 333-344.

3 *Internal Medicine Evaluation*

4 In an August 2, 2006, report, board eligible internal medicine physician Rustom F.  
5 Damania, M.D., indicated Plaintiff reported chronic low back pain since the age of thirteen. The  
6 pain is consistent and present daily, but is sometimes “on and off.” A learning disability was  
7 noted, as was his attendance in special education classes. He was accompanied by his mother  
8 who apparently reported Plaintiff was forgetful and unable to multi-task. Plaintiff reported  
9 bronchial asthma since the age of nine without hospitalization, yet with emergency room  
10 treatment on a yearly basis. He used an Albuterol and Azmacort inhaler, but did not require  
11 steroid, a nebulizer or oxygen. AR 220.

12 Plaintiff lives with his parents and does not work. He denied the use of tobacco, alcohol  
13 or illicit drugs. There was no history of any weight loss or fatigue, vision or hearing problem,  
14 nor was there a history of any problem relating to the cardiac, gastrointestinal, genitourinary,  
15 hematologic, skin, or neurological systems. AR 221.

16 Dr. Damania’s physical examination showed a well-nourished, well developed young  
17 male in no distress. Plaintiff was alert, cooperative and well-oriented. He was sixty-seven  
18 inches tall and weighed 156 pounds. Range of motion in the neck was within normal limits,  
19 head/ears/nose and throat were normal, lung sounds were symmetric and expiration was normal,  
20 heart tones were good, there was no tenderness in the chest and the abdomen was soft and non-  
21 tender. AR 222. An examination of the back revealed no tenderness to palpitation in the midline  
22 or paraspinal areas, straight leg raising was negative at ninety degrees, no muscle spasm was  
23 present and tone was equal throughout. Range of motion was within normal limits. AR 223. All  
24 upper and lower extremities showed range of motion within normal limits, hand grip was normal  
25 and finger approximation was intact, and no crepitus or patellar instability was noted in the  
26 knees. AR 223-224. Pulses were normal, motor strength was 5/5, reflexes were normal and gait  
27 was within normal limits. AR 224.

1 Dr. Damania's diagnostic impression included learning disability, bronchial asthma and  
2 low back pain. He found Plaintiff was capable of lifting and carrying fifty pounds occasionally  
3 and twenty-five pounds frequently. No postural, visual or manipulative limitations were  
4 identified. AR 224-225.

5 *Psychological Evaluation*

6 A September 18, 2006, report prepared by William A. Spindell, Ph.D., FACFE, FABMP,  
7 included the administration of the Bender Gestalt II, Wechsler Adult Intelligence Scale III and  
8 Vineland Adaptive Behavior Scale tests. AR 226.

9 Plaintiff was sixteen years and ten months old, and was accompanied by his mother. He  
10 was attending Sunnyside High School and was in the eleventh grade. His mother reported  
11 Plaintiff weighed six pounds, eleven ounces at birth, walked at about one year and had an  
12 otherwise typical childhood. He is the second oldest of four children. Plaintiff denied smoking  
13 or drinking. AR 226.

14 Dr. Spindell's direct examination results note a well groomed, neatly dressed individual  
15 with a well developed vocabulary. Plaintiff was fully oriented and cooperative throughout. His  
16 remote and recent memory functions were within normal limits and he did not exhibit any  
17 pressured speech, neologisms, or expressive or receptive problem that would suggest a  
18 psychiatric disorder. AR 227. The Bender Visual Motor Gestalt II results with normal with no  
19 evidence of angulation, rotation, perseveration or fragmentation. The global score was a 38 and  
20 was not associated with a neurological impaired profile. A verbal IQ of 79, performance IQ of  
21 77 and full scale IQ of 76 were recorded. The doctor's diagnostic impression was borderline  
22 intellectual functioning. AR 227. Dr. Spindell concluded plaintiff could "address the labor  
23 market at this point and from a behavioral trajectory point of view, could probably address  
24 several aspects of entry and intermediate activities." AR 227. Plaintiff got along well with  
25 others, did not need assistance with the activities of daily living, and could handle his own funds  
26 if eligible. AR 227. With regard to work capacity, the doctor indicated Plaintiff was capable of  
27 maintaining regular attendance, performing consistently without special attention or additional  
28 supervision, could complete a normal workday or workweek, accept instructions from a

1 supervisor, interact with coworkers and the public and with typical stresses. He could not  
2 perform detailed or complex tasks. AR 228. He had the ability to perform the activities of daily  
3 living, maintain social relationships, sustain concentration, persistence and pace, and function  
4 outside highly supportive arrangements, and was not limited by an episode of decompensation.  
5 AR 228; *see also* AR 229-230.

6 *Function and Disability Reports*

7 A function report prepared by Plaintiff's father on April 7, 2006, indicates Plaintiff used  
8 glasses to correct vision, and did not suffer from problems in hearing, speech, or daily activities.  
9 AR 145-147. With regard to communication, it was reported Plaintiff could answer and make  
10 telephone calls, but did not deliver phones messages; could repeat stories but not tell jokes or  
11 riddles accurately. He was able to explain why he did something, talk with family and friends  
12 and ask for what he needs. AR 148. Mr. Wilson indicated however that Plaintiff was unable to  
13 understand, carry out and remember simple instructions. AR 149. It was noted that Plaintiff did  
14 not drive a car. AR 149. While he generally got along with his parents and other adults,  
15 including teachers, and played team sports, Plaintiff did not have friends his own age or make  
16 new friends, nor did he get along with his brothers and sisters. It was noted that Plaintiff's  
17 friends are typically younger than he is, and that he gets involved in physical and verbal fights  
18 with his brother and sisters. AR 150. Regarding Plaintiff's ability care for his personal needs,  
19 Mr. Wilson indicated Plaintiff could take care of personal hygiene matters, help around the  
20 house, get to school on time, take medication and avoid accidents. However, Plaintiff could not  
21 wash and put away his clothes, cook a meal, study and do homework, use public transportation,  
22 accept criticism, keep out of trouble, obey rules or ask for help when needed. Mr. Wilson  
23 explained Plaintiff is an angry child with a bad temper. AR 151. He cannot complete homework  
24 or chores, but can pay attention and work on arts and crafts, keep busy on his own, and finish  
25 things he starts. AR 152.

26 Consultant Richard Betcher, M.D., prepared a Childhood Disability Evaluation Form on  
27 October 31, 2006, following a review of the records. He noted Plaintiff's impairments of asthma  
28 and learning disabilities. The doctor found the impairments were severe but did not meet or

1 equal the listings. AR 234-235. With regard to acquiring and using information, attending and  
2 completing tasks, interacting with others and caring for himself, and health and physical well  
3 being, Dr. Betcher found Plaintiff's limitations to be less than marked. He noted no limitation  
4 with regard to moving about or manipulating objects. AR 236-237. Additional consultant M. C.  
5 Vea concurred with Dr. Betcher's evaluation on November 1, 2006. AR 235.

6 A second Childhood Disability Evaluation Form was completed by L. T. Luu, M.D., on  
7 January 29, 2007. With regard to Plaintiff's impairment of borderline intellectual functioning,  
8 Dr. Luu reported the impairment to be severe but noted it did not meet or equal a listing  
9 impairment. AR 241. Less than marked limitations were noted in the areas of acquiring and  
10 using information, and attending and completing tasks. No limitations were identified in the  
11 areas of interacting and relating with others, moving about and manipulating objects, caring for  
12 self, and health and physical well being. AR 243.

13 In an undated Child Disability report, Mr. Wilson reported Plaintiff's disabilities were  
14 related to learning, and asthma. Plaintiff became disabled on October 20, 1994, but his  
15 disabilities do not cause pain. He has not been treating for emotional or mental problems. AR  
16 158. He uses an asthma inhaler for asthma related symptoms. AR 159. At the time of the  
17 report, Plaintiff was in tenth grade at Sunnyside High School and was in special education  
18 classes. AR 161.

19 An undated and unsigned Disability Report completed by Plaintiff himself references no  
20 new illnesses or injuries, continued use of Albuterol and a steroid inhaler that cause fatigue, the  
21 ability to care for his own needs with reminders, and the fact he was not employed. AR 178-186.

### 22 **SCOPE OF REVIEW**

23 Congress has provided a limited scope of judicial review of the Commissioner's decision  
24 to deny benefits under the Act. In reviewing findings of fact with respect to such determinations,  
25 the Court must determine whether the decision of the Commissioner is supported by substantial  
26 evidence. 42 U.S.C. § 405 (g). Substantial evidence means "more than a mere scintilla,"  
27 *Richardson v. Perales*, 402 U.S. 389, 402 (1971), but less than a preponderance. *Sorenson v.*  
28 *Weinberger*, 514 F.2d 1112, 1119, n. 10 (9th Cir. 1975). It is "such relevant evidence as a

1 reasonable mind might accept as adequate to support a conclusion.” *Richardson*, 402 U.S. at  
2 401. The record as a whole must be considered, weighing both the evidence that supports and  
3 the evidence that detracts from the Commissioner’s conclusion. *Jones v. Heckler*, 760 F.2d 993,  
4 995 (9th Cir. 1985). In weighing the evidence and making findings, the Commissioner must  
5 apply the proper legal standards. *E.g.*, *Burkhart v. Bowen*, 856 F.2d 1335, 1338 (9th Cir. 1988).  
6 This Court must uphold the Commissioner’s determination that the claimant is not disabled if the  
7 Secretary applied the proper legal standards, and if the Commissioner’s findings are supported by  
8 substantial evidence. *See Sanchez v. Sec’y of Health and Human Serv.*, 812 F.2d 509, 510 (9th  
9 Cir. 1987).

## 10 REVIEW

### 11 **Child Disability Standard**

12 The childhood disability standard was changed by the Personal Responsibility and Work  
13 Opportunity Act of 1996. *Pub. L. No. 104-193, § 211, 110 Stat. 2105 (1996)*, amending 42  
14 U.S.C. § 1382c(a)(3)(A). The amendment provides:

15 [A]n individual under the age of 18 shall be considered disabled . . . if that individual has  
16 a medically determinable physical or mental impairment, which results in marked or  
17 severe functional limitations, and which can be expected to result in death or which has  
lasted or can be expected to last for a continuous period of not less than 12 months.

18 42 U.S.C. § 1382c(a)(3)(C)(I).

19 To apply the new statutory standard, the Commissioner now uses a three-step sequential  
20 evaluation procedure for determining whether a child’s impairments result in marked and severe  
21 functional limitations and is therefore disabled. 20 C.F.R. § 416.924(b)-(d) (2001). The  
22 amendment eliminated the fourth step in the disability analysis: determining whether the child  
23 had an impairment or impairments of comparable severity to that which would disable an adult.  
24 This new standard applies to new claims filed on or after August 22, 1996, and to new claims not  
25 yet finally adjudicated on that date. 42 U.S.C. § 1382c. A claim is not finally adjudicated if an  
26 administrative or judicial appeal was pending on or after that date regarding a claim that has been  
27 denied in whole. *Id.*; *see Jamerson v. Chater*, 112 F.3d 1064, 1065 n.1 (9th Cir. 1997).

1 The relevant inquiry at step one is whether the child is engaged in substantial gainful  
2 activity. 20 C.F.R. § 416.924(b). If not, step two requires the fact finder to determine whether  
3 the child has a medically severe impairment or combination of impairments. 20 C.F.R. §  
4 416.924(c). Plaintiff bears the burden of demonstrating a severe impairment. 20 C.F.R. §  
5 416.924. If the impairment is a “slight abnormality or a combination of slight abnormalities that  
6 cause no more than a minimal functional limitation,” the Commissioner will find that the child  
7 does not have a severe impairment and therefore is not disabled. 20 C.F.R. § 416.924(c).

8 Step three requires determining whether the severe impairment meets or equals in severity  
9 any impairment that is listed in 20 C.F.R. Part 404, Subpart P, Appendix 1. 20 C.F.R. §  
10 416.924(d). If such an impairment exists, the Commissioner must find the child disabled. *Id.* If  
11 the child’s impairment does not meet or medically equal any listing, then the Commissioner must  
12 determine if the limitations caused by the impairment functionally equal a listing in the Listing of  
13 Impairments. *Id.* To do so, the Commissioner will assess all of the functional limitations caused  
14 by the child’s impairments in six domains: (1) acquiring and using information; (2) attending and  
15 completing tasks; (3) interacting and relating with others; (4) moving about and manipulating  
16 objects; (5) caring for self; and (6) health and physical well being. *See* 20 C.F.R. § 416.926a(a)-  
17 (b). To functionally equal a listing, the impairments must result in marked limitations in two  
18 domains of functioning or an “extreme” limitation in one domain. 20 C.F.R. § 416.926a(a).

19 Where the final decision of the Commissioner was proper under the old standard, it must  
20 be upheld under the new standard, as the new standard is more stringent. *Jamerson v. Chater*,  
21 112 F.3d at 1068.

### 22 **Adult Disability Standard**

23 In order to qualify for benefits, a claimant must establish that he is unable to engage in  
24 substantial gainful activity due to a medically determinable physical or mental impairment which  
25 has lasted or can be expected to last for a continuous period of not less than twelve months. 42  
26 U.S.C. § 1382c (a)(3)(A). A claimant must show that he has a physical or mental impairment of  
27 such severity that he is not only unable to do her previous work, but cannot, considering his age,  
28 education, and work experience, engage in any other kind of substantial gainful work which

1 exists in the national economy. *Quang Van Han v. Bowen*, 882 F.2d 1453, 1456 (9th Cir. 1989).  
2 The burden is on the claimant to establish disability. *Terry v. Sullivan*, 903 F.2d 1273, 1275 (9th  
3 Cir. 1990).

4 In an effort to achieve uniformity of decisions, the Commissioner has promulgated  
5 regulations which contain, inter alia, a five-step sequential disability evaluation process. 20  
6 C.F.R. §§ 404.1520 (a)-(f), 416.920 (a)-(f) (1994).

7 In this case, the ALJ found Plaintiff (1) was a minor at the time of application and  
8 attained majority on October 20, 2007; (2) has never engaged in substantial gainful activity; (3)  
9 has the severe impairments of borderline intellectual functioning, a history of ADHD and a  
10 history of a learning disorder; but (4) the impairments do not meet or medically equal any of the  
11 listed impairments. Thus, the ALJ found Plaintiff was not under a disability as defined in the  
12 Social Security Act. Further, the ALJ determined that despite having no past relevant work, as  
13 an adult, Plaintiff has the residual functional capacity (“RFC”) to perform simple repetitive tasks  
14 without exertional limitation. AR 10-21.

15 Plaintiff contends the ALJ committed reversible error at step three of the child’s  
16 sequential disability analysis, and thus, this Court should reverse and remand for the payment of  
17 benefits. (Doc. 13 at 3.)

## 18 DISCUSSION

### 19 **A. *Step Three of the Child Disability Analysis***

20 Plaintiff asserts the ALJ did not properly conduct the required analysis for child  
21 disability. He argues in order to functionally equal a listed impairment, his severe impairments  
22 must result in marked limitations in two domains of functioning or an extreme limitation in one  
23 domain. Further, Plaintiff asserts that because his performance on the Wechsler intelligence test  
24 found an extreme limitation in the domain of acquiring and using information, he is entitled to  
25 benefits. Further, he argues the ALJ never mentioned the Wechsler test scores and thus did not  
26 sufficiently explain why he chose not to rely upon the scores, resulting in legal error. (Doc. 13 at  
27 7-11.) The Commissioner replies that the ALJ considered all medical evidence and correctly  
28 determined his finding of less than marked limitations in acquiring and using information,

1 attending and completing tasks, and interacting and relating to others. More specifically, the  
2 Commissioner asserts the ALJ's finding of less than marked limitation, notwithstanding the  
3 Wechsler scores, is proper because the ALJ relied upon the substantial evidence provided by Drs.  
4 Betcher, Vea and Luu. (Doc. 17 at 7-10.)

5 Step three of the sequential analysis requires determining whether the severe impairment  
6 meets or equals in severity any impairment that is listed in 20 C.F.R. Part 404, Subpart P,  
7 Appendix 1. 20 C.F.R. § 416.924(d). If such an impairment exists, the Commissioner must find  
8 the child disabled. *Id.* If the disease or impairments does not meet or medically equal any  
9 listing, the Commissioner must decide whether it functionally equals a listing. 20 C.F.R. §  
10 416.926a(a). Functional equivalence to a listing is established where plaintiff has an "extreme"  
11 limitation in one domain of functioning, or "marked" limitations in two or more of the domains  
12 of functioning. 20 C.F.R. § 416.926a(a). The domains used are: acquiring and using  
13 information; attending and completing tasks; interacting and relating with others; moving about  
14 and manipulating objects; caring for one's self; and health and physical well being. 20 C.F.R. §  
15 416.926a(b). A "marked" limitation is one that interferes seriously with the ability to  
16 independently initiate, sustain, or complete activities. 20 C.F.R. § 416.926a(e). "Marked"  
17 limitation also means a limitation that is "more than moderate" but "less than extreme." *Id.*

18 ALJ Haubner found, in pertinent part:

19 After considering the evidence of record, I find that the claimant's  
20 medically determinable impairments could reasonably be expected to produce  
21 only some of the alleged symptoms, and that the statements concerning the  
22 intensity, persistence and limiting effects of the claimant's symptoms are not  
23 entirely credible . . .

24 On two occasions, the State agency medical consultants concluded that in  
25 the six domains discussed below, the claimant has less than marked limitation in  
26 the first and second domains, no limitations in the fourth, and none-to-less than  
27 marked limitation in the third, fifth and sixth domains. I agree with these  
28 assessments.

29 Consultative psychologist Dr. Spindell, who examined the claimant when  
30 he was 16 years, 10 months old, noted that the claimant intended to attend college.  
31 Obtained IQ scores were Verbal 79, Performance 77 and Full Scale 76, which  
32 produced a diagnosis of borderline intellectual functions. Dr. Spindell noted that  
33 the claimant was articulate, motivated and apparently doing reasonably well in his  
34 Special Education classes and concluded that the claimant could "address the  
35 labor market at this point and from a behavior trajectory point of view, could  
36 probably address several aspects of entry and intermediate activities." The  
37 claimant was independent with his activities of daily living, got along with his

1 family, and could hand[le] money. The only limitation Dr. Spindell noted was  
2 that the claimant would not be able to perform detailed and complex tasks.

3 In terms of the six domains of function, I find the following regarding  
4 limitations caused by the claimant's impairments:

5 **a. Acquiring and Using Information**

6 This domain considers how well a child is able to acquire or learn  
7 information, and how well a child uses the information he has learned.

8 The regulations provide that an adolescent . . . without an impairment should  
9 continue to demonstrate in middle and high school what he has learned in academic  
10 assignments . . . . The child should also be able to use what he has learned in daily living  
11 situations without assistance (e.g., going to the store, using the library, and using public  
12 transportation). The child should be able to comprehend and express both simple and  
13 complex ideas, using increasingly complex language (vocabulary and grammar) in  
14 learning and daily living situations (e.g., to obtain and convey information and ideas).  
15 The child should also learn to apply these skills in practical ways that will help him enter  
16 the workplace after finishing school (e.g., carrying out instructions, preparing a job  
17 application, or being interviewed by a potential employer).

18 Social Security regulation 20 CFR 416.926a(g)(3) sets forth some  
19 examples of limited functioning in this domain that children of different ages  
20 might have. The examples do not apply to a child of a particular age; rather, they  
21 cover a range of ages and developmental periods. In addition, the examples do  
22 not necessarily describe "marked" or "extreme" limitation in the domain. Some  
23 examples of difficulty children could have in acquiring and using information  
24 area: (i) does not understand words about space, size, or time . . . (ii) cannot  
25 rhyme words or the sounds in words; (iii) has difficulty recalling important things  
26 learned in school yesterday; (iv) has difficulty solving mathematics questions or  
27 computing arithmetic answers; or (v) talks only in short, simple sentences, and has  
28 difficulty explaining what he means.

The claimant has less than marked limitation in acquiring and using information.  
A few "obvious" problems were noted in the first Teacher Questionnaire, and the  
claimant qualified for and was in special education, but the more recent Teacher  
Questionnaire listed generally good comments which were supported by the State agency  
evaluation discussed above. The claimant testified that he has never had to repeat an  
entire year of school, and his father stated that his son is only in 2 special education  
classes.

AR 15-16, emphasis in original & internal citations omitted.

While the ALJ's findings do not specifically reference the Wechsler test scores, his  
findings do expressly reference exhibit "2F, p. 10" - or page 215 of the administrative record -  
which includes the recommendations of School Psychologist James Russo and School  
Psychology Intern Karin Kawagoe following testing of Plaintiff, including the Wechsler  
Individual Achievement Test administered by Frank Capalare "RSP" on November 21, 2005.  
The ALJ explained that he opted to rely on "the more recent Teacher Questionnaire" and  
disability evaluation. Teacher John De La Cerda indicated in November 2007 that Plaintiff had  
no problem or mild problems in the following areas: completing tasks; listening and remaining  
attentive; organization; concentration on schoolwork; playing; staying seated and still; thinking

1 before acting; ability to learn new skills and keep up with peers; and ability to acknowledge  
2 mistakes. It was noted Plaintiff did not have any difficulty expressing his thoughts or feelings,  
3 and that he was cooperative and polite, could take care of his own needs and did not require  
4 special supervision in the classroom. AR 187-193. Dr. Luu completed a childhood disability  
5 evaluation form on January 29, 2007, and found less than marked limitations in the four of the  
6 six domains, and no limitation with regard the remaining four domains. In the domain of  
7 acquiring and using information, Dr. Luu noted “Per TQ 4/10 obvious problems, 6/10 sligh[t]  
8 problems” and in the attending and completing tasks domain, Dr. Luu noted “Per TQ. 4/13  
9 obvious problems, 5/13 slight problems, 3/13 no problem.” AR 243.

10 In sum, the ALJ provided an explanation for his findings; he elected to credit the more  
11 recent questionnaire and evaluation, coupled with the fact Plaintiff was receiving special  
12 education instruction in just two classes rather than all classes, and had not had to repeat a year in  
13 school.

#### 14 ***Examining Opinion of Dr. Damania***

15 Plaintiff contends the ALJ’s RFC assessment is contrary to and ignores the medical  
16 opinion contained in Dr. Damania’s report. He reasons the ALJ failed to properly consider the  
17 functional limitations assessed and the ALJ did not offer a legitimate reason for discounting it.  
18 More particularly, Dr. Damania limited Plaintiff to lifting and carrying fifty pounds occasionally  
19 and twenty-five pounds frequently, yet the ALJ’s finding involves no exertional limitation. (Doc.  
20 13 at 11-13.) The Commissioner replies that any error was harmless because Dr. Damania’s  
21 opinion regarding Plaintiff’s functional limitations concerning lifting and carrying would result  
22 in a finding that Plaintiff could perform the full range of medium unskilled work. Due to  
23 Plaintiff’s young age and level of education, a medium unskilled RFC would result in a finding  
24 of not disabled. Moreover, application of the Grids would result in the same findings even were  
25 Dr. Damania’s opinion fully credited. (Doc. 17 at 10-11.)

26 An ALJ must provide “clear and convincing” reasons for rejecting the uncontroverted  
27 opinion of an examining physician. *Lester v. Chater*, 81 F.3d 821, 830-831 (9th Cir. 1995)  
28 (citations omitted). The opinion of an examining doctor, even if contradicted by another doctor,

1 can only be rejected for specific and legitimate reasons that are supported by substantial evidence  
2 in the record. *Id.* (citing *Andrews v. Shalala*, 53 F.3d 1035, 1043 (9th Cir.1995)).

3 The ALJ's RFC found no restriction in the area of daily living, mild difficulty in  
4 maintaining social functioning and maintaining concentration, persistence and pace, progressing  
5 to moderate difficulties with detailed or complex tasks.

6 Here however, ALJ Haubner's findings do not "simply ignore" Dr. Damania's opinion as  
7 Plaintiff suggests. The ALJ referenced Dr. Damania's opinion when he addressed Plaintiff's  
8 severe impairments at pages 13 and 14 of the administrative record: "Exhibit 3F." Further, the  
9 ALJ expressly stated "I do not find the consultative examiner's opinion that claimant is limited to  
10 medium exertion consistent with the evidence discussed above, *including the examiner's own*  
11 *completely normal physical examination*. That medium limitation is therefore given little  
12 weight." AR 13, n. 1, emphasis added. A lack of supporting clinical findings is a valid reason  
13 for rejecting a treating physician's opinion. *Magallenes v. Bowen*, 881 F.2d 747, 751 (9th Cir.  
14 1989). Thus, ALJ Haubner provided a specific and legitimate reason for discounting Dr.  
15 Damania's opinion regarding Plaintiff's exertional limitations.

16 **CONCLUSION**

17 Based on the foregoing, the Court finds that the ALJ's decision is supported by  
18 substantial evidence in the record as a whole and is based on proper legal standards.  
19 Accordingly, this Court DENIES Plaintiff's appeal from the administrative decision of the  
20 Commissioner of Social Security. The Clerk of this Court is DIRECTED to enter judgment in  
21 favor of Defendant Michael J. Astrue, Commissioner of Social Security and against Plaintiff,  
22 Jacobbi J. Wilson.

23  
24 IT IS SO ORDERED.

25 Dated: February 16, 2010

26 /s/ Gary S. Austin  
27 UNITED STATES MAGISTRATE JUDGE  
28