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**IN THE UNITED STATES DISTRICT COURT  
FOR THE EASTERN DISTRICT OF CALIFORNIA**

CONNELL L. by and through his guardian ad litem, Janet Butler,	)	Case No. 1:09-cv-00991-JLT
	)	
Plaintiff,	)	ORDER REGARDING PLAINTIFF'S SOCIAL SECURITY COMPLAINT
vs.	)	
COMMISSIONER OF SOCIAL SECURITY	)	ORDER DIRECTING THE ENTRY OF JUDGMENT IN FAVOR OF DEFENDANT
MICHAEL J. ASTRUE, Commissioner of Social	)	MICHAEL J. ASTRUE AND AGAINST
Security,	)	PLAINTIFF CONNELL L.
	)	
Defendant.	)	
_____	)	

**BACKGROUND**

Plaintiff Connell L. ("Claimant" or "Plaintiff") is a child who is proceeding through his guardian ad litem, Janet Butler. Plaintiff seeks judicial review of an administrative decision denying his claim for supplemental security income ("SSI") benefits under Title XVI of the Social Security Act (the "Act").

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

On February 21, 2006, Plaintiff's great-aunt and guardian ad litem, Janet Butler, filed an application for SSI benefits. AR at 11. After benefits were denied by the agency, Plaintiff requested a hearing before an Administrative Law Judge ("ALJ"). *Id.* A hearing was held on November 11,

<sup>1</sup> References to the Administrative Record will be designated as "AR," followed by the appropriate page number.

1 2008. Id. at 21-55. On March 19, 2009, the ALJ issued a decision denying benefits. Id. at 8-20. On  
2 April 10, 2009, the Appeals Council affirmed this decision. Id. at 2-5.

### 3 Hearing Testimony

4 Plaintiff's great-aunt and guardian, Janet Butler, provided the bulk of the testimony in  
5 support of Plaintiff's claim. Butler testified that she picked Plaintiff up at the hospital when he was  
6 born on August 16, 2001, and he has lived with her since that time. AR at 29. She stated that  
7 Plaintiff's mother was on drugs when he was born. Id. at 42. Butler stated that she lived alone with  
8 Plaintiff, although Plaintiff had siblings who lived elsewhere. Id. at 37.

9 Butler testified that Plaintiff was in the second grade. AR at 30. She stated that he was in  
10 special education classes, but under questioning appeared to concede that, instead, he received  
11 special aid, including tutoring, in a regular classroom setting. See AR at 30. In fact, later in her  
12 testimony, Butler stated that Plaintiff attended "regular school." Id. at 36.

13 Butler testified that Plaintiff performed below normal in reading and language. AR at 44.  
14 She recounted that she helped him with his homework. Id. She stated that an occupational therapist  
15 at school helped him improve his motor skills. Id.

16 Butler testified that Plaintiff had asthma. AR at 34. She stated that he used a nebulizer for  
17 this malady, sometimes three times a day. Id. However, she stated that he used the nebulizer only  
18 twice in the week prior to the hearing. Id. She denied that he ever stayed in the hospital overnight  
19 because of breathing problems. Id.

20 Butler testified that Plaintiff had problems with his legs. AR at 42. She described him as  
21 experiencing pain "all the time," but conceded that x-rays found nothing to explain it. Id.  
22 Nevertheless, Butler estimated that Plaintiff could not walk for more than 10 minutes at a time  
23 without experiencing pain. Id. at 45. For this reason, she believed that he could not play for very  
24 long. Id.

25 Butler testified that Plaintiff suffered from atopic dermatitis. AR at 43. She stated that she  
26 treated this condition by applying cocoa butter cream to his face. Id. If his hair and scalp were  
27 seriously affected, she stated that she would apply "blue salt." Id. Because of this condition, she  
28 stated that she kept Plaintiff's hair "real short." Id.

1 Butler testified that Plaintiff was hyperactive. AR at 38. She stated that he had trouble  
2 concentrating and couldn't focus on anything for more than five minutes. Id. at 44. She reported  
3 that he had trouble finishing tasks that he started. Id. at 38. She stated that he never slowed down.  
4 Id.

5 Butler testified that Plaintiff took Adderall for his hyperactivity. AR at 39, 45. She believed  
6 that the Adderall helped him stay focused for four or five hours at a time. Id. at 45. She claimed that  
7 a doctor wanted to increase the dosage to help "slow him down." Id. at 39. Butler testified that  
8 Plaintiff took Benadryl at night to help him sleep. AR at 39. However, she believed that if he took  
9 Benadryl too frequently it was counterproductive and hindered his ability to sleep. Id. at 39. As a  
10 result, she stated that she gave him Benadryl only every other night. Id.

11 Butler testified that she couldn't leave Plaintiff home alone. AR at 40. She related that he  
12 didn't recognize dangers and sometimes hurt himself when he got angry. Id. She described him  
13 walking around without noticing where he was going. Id. at 42. Plaintiff's lack of awareness  
14 frightened her. Id.

15 In addition, Butler testified to Plaintiff's "anger" problems. Id. at 42. She recounted that a  
16 teacher told her that he didn't get along with other children and kept to himself. Id. at 38. She stated  
17 that when he visited his siblings he didn't get along with them either. Id. Butler testified that  
18 Plaintiff had few friends. AR at 31.

19 She stated that he could not tell time or use a newspaper to find television programs, but  
20 reported that he could turn the television on and off. Id. at 35-36. She stated that he did no house  
21 work. Id. at 38. She did not believe he could use a microwave but indicated that he could make a  
22 sandwich. Id. at 41. Butler thought that Plaintiff was incapable of cutting with a knife or using  
23 scissors. AR at 36. She stated that he could ride a bicycle and was capable of printing his name. Id.  
24 at 36. She stated that he had no hobbies. Id. at 41.

25 Plaintiff testified briefly. He stated that he had two friends. AR at 31. He stated that he  
26 played basketball, football and tetherball. Id. His aunt clarified that he did not play any organized  
27 sports and believed that he probably played these games at recess. Id. at 32. Plaintiff testified that  
28 he could dress himself and brush his teeth. AR at 32. He stated that he could bathe himself and use

1 utensils like a spoon and fork and use a cup for drinking. Id. He stated that he liked to play video  
2 games. Id. at 33. His aunt, Janet Butler, asserted that he was only permitted to play video games  
3 twice a week on the weekends, for an hour at a time. Id. at 33-34.

4 Dianne Butler, Janet Butler's sister, testified also. She stated that she saw Plaintiff about  
5 three times a week. AR at 47. She agreed that Plaintiff played video games on the weekend for  
6 about one hour at a time. Id. at 48. She agreed also that he could ride a bicycle, brush his teeth,  
7 dress himself, and shower and bathe. Id.

8 Dianne testified that she worked with disabled and handicapped children. AR at 48. She  
9 stated that some of these children had impairments similar to Plaintiff's. Id. at 49. As examples, she  
10 noted that Plaintiff was incapable of remaining still. Id. at 50. She noted that at times he screamed,  
11 banged his head, moved around and could not focus. Id. Nevertheless, she did not believe his  
12 impairments were as serious as those of children at the facility and believed that she and her sister  
13 were capable of caring for him at home. Id. at 51-52. Dianne believed that Plaintiff suffered from  
14 ADHD. AR at 53.

#### 15 Medical Record

16 Medical records from Dr. Jerry Fox diagnosed Plaintiff with asthma in 2005. AR at 152-53.  
17 He treated Plaintiff with inhalers and medication. Id. at 153.

18 Dr. Chuck-Kwan Lee, a pediatrician, examined Plaintiff on June 13, 2006. He noted a  
19 history of ADHD and behavioral troubles. AR at 181. In his physical examination, he described  
20 Plaintiff as big for his age both in height and weight. Id. He noted atopic dermatitis. Id.

21 Dr. Lee described Plaintiff's neck, chest and cardiovascular regions as normal. AR at 181.  
22 He described Plaintiff's extremities as normal also. Id. He found Plaintiff's sensory, motor  
23 functions and reflexes to be normal. Id. However, he characterized Plaintiff's demeanor as "very  
24 hyperactive." Id.

25 Aside from the dermatitis, Dr. Lee characterized his findings as "unremarkable." AR at 182.  
26 He believed Plaintiff's asthma was mild and under control. He noted that testing (the Denver  
27 Developmental Screening Test II) showed that Plaintiff performed "within the age limits for gross  
28 motor development and at 4-4 ½ years for personal/social, fine motor/adaptive and language

1 development, about six months behind.” Id. He believed that the prognosis for Plaintiff’s ADHD  
2 and behavioral problems was “guarded,” but believed that his asthma prognosis was “favorable.” Id.

3 Dr. Michael Musacco, a clinical psychologist, conducted a consultative examination of  
4 Plaintiff on June 15, 2006. Dr. Musacco noted Plaintiff’s history of ADHD and behavioral  
5 problems for which he took Adderall. Id. He noted Plaintiff’s impairments of asthma and eczema  
6 also. Id.

7 Dr. Musacco conducted a mental status examination. Plaintiff knew the month of his birth  
8 but not the year. AR at 185. Plaintiff did not know his telephone number but did know his age and  
9 could recite the alphabet with errors. Id. Dr. Musacco described Plaintiff as bright and “hyper  
10 verbal,” and found his mood and behavior to be marked by hyperactivity, noting Plaintiff’s  
11 “excessive energy and impulsivity throughout the evaluation.” Id.

12 Dr. Musacco administered the Stanford-Binet Intelligence Scale. This test revealed a verbal  
13 reasoning score of 79, an abstract/visual reasoning score of 68 and a short-term memory score of 85.  
14 AR at 185. The test found that Plaintiff had an overall composite IQ of 72, which Dr. Musacco  
15 characterized as indicative of borderline intellectual functioning. Id. However, he believed that  
16 these test results could be skewed by Plaintiff’s hyperactivity and might underestimate his  
17 intellectual functioning. See id.

18 Dr. Musacco administered the Vineland Adaptive Behavior Scales, relying on information  
19 provided by Plaintiff’s aunt. AR at 186. Based on this information, he reported scores that he  
20 believed were indicative of borderline to mild deficits in adaptive functioning. Id.

21 Dr. Musacco noted that Plaintiff could articulate and tell a fairy tale with clarity. Id. He  
22 believed that Plaintiff was capable of sharing toys without being asked and had a preferred friend.  
23 Id. However, he noted that Plaintiff could not print or write his name and could not play board or  
24 card games or keep secrets. Id.

25 Dr. Musacco reviewed a teacher questionnaire which indicated that Plaintiff had a “slight  
26 problem” in his ability to acquire and use information, a “slight to obvious problem” in his ability to  
27 attain and complete tasks, and an “obvious to serious problem” in his ability to interact and relate  
28 with others. AR at 186. The teacher indicated that Plaintiff could complete most tasks but had low

1 motivation. Id.

2 Dr. Musacco confirmed a diagnosis of ADHD, as well as borderline intellectual functioning  
3 which he termed “provisional,” and asthma and eczema. AR at 186. He noted that Plaintiff was  
4 being treated for the ADHD with medication with “noted improvement in his functioning.” Id. He  
5 believed that Plaintiff’s ADHD affected his social development and rendered him vulnerable to  
6 “distractibility and impulsivity” that impacted his ability to maintain concentration and persistence.  
7 Id. at 187. However, he described Plaintiff’s communication development as intact, and found no  
8 evidence of significant deficits in his motor skills. Id.

9 Dr. V.M. Meenakshi, a non-examining agency consultant, completed a “Childhood Disability  
10 Evaluation” form in September 2006. After reviewing the record, Dr. Meenakshi noted Plaintiff’s  
11 impairments of ADHD, borderline functioning and asthma. AR at 195. However, he believed that  
12 these impairments did not meet the listings for disability. Id. Specifically, he found Plaintiff’s  
13 limitations in the domains of attending and completing tasks, interacting and relating with others,  
14 caring for himself and physical health and well-being to be “less than marked.” Id. at 197-98. He  
15 found “no limitation” in the domain of moving about and manipulating objects. Id. at 198.

16 In October 2006, Dr. Jenna Walsh, a school psychologist with the Greenfield Union School  
17 District, completed an “Initial Psychoeducational Evaluation” of Plaintiff. The stated purpose of the  
18 evaluation was to determine Plaintiff’s current academic achievement levels, estimate his cognitive  
19 ability, determine his adaptive behavior/self-help skills, his behavioral and social strengths, any  
20 health needs, and ascertain if he might need and qualify for special education services. AR at 216.  
21 Dr. Walsh based her findings on a review of the records, teacher input, a health assessment made by  
22 the school nurse, clinical testing, a parent interview, and student observations. Id.

23 Dr. Walsh noted Plaintiff’s diagnosis of ADHD from an early age. AR at 217. Teachers  
24 reported behavioral problems including difficulty staying on task, problems writing his name, and a  
25 tendency to draw and write things upside down. Id. Information provided by teachers also indicated  
26 that Plaintiff could count to 28 and could discern colors, letters and sounds. Id.

27 Dr. Walsh reported that tests administered to Plaintiff for letter-word identification, math  
28 fluency, spelling, passage comprehension (written text) and applied problems, all placed Plaintiff in

1 the “average” range. AR at 217-18. She characterized Plaintiff’s overall cognitive ability as  
2 “average” also. Id. at 218. In addition, she recorded Plaintiff as “average” for planning, processing  
3 and attention with a “demonstrated . . . ability to follow directions, determine, select, apply and  
4 evaluate solutions to problems, as well as integrate separate stimuli into a single or whole group.”  
5 Id. However, Dr. Walsh noted that Plaintiff’s aunt and teacher rated him in the “extremely low  
6 range” for adaptive skills. Id. at 219.

7 Dr. Walsh noted that Plaintiff’s aunt described him as frequently acting without thinking,  
8 acting out of control, unable to slow down, prone to tantrums and overly active. AR at 220. She  
9 believed that the conduct reported by his aunt was indicative of a clinically significant range of both  
10 aggression and depression, as well as “atypicality” and attention problems. Id. She noted that  
11 Plaintiff’s kindergarten teacher recounted similar problems. Id. at 221.

12 Based on her review, Dr. Walsh believed that Plaintiff had difficulty working independently  
13 in the classroom, and had fine and gross motor difficulties. AR at 222. Nevertheless, she noted that  
14 he was not aggressive in the classroom and could grasp concepts that were presented to him in that  
15 setting. Id. She noted that he had difficulty staying on task and believed his ADHD “may require  
16 additional support in the future [for him] to be successful in the classroom environment.” Id. She  
17 believed that Plaintiff qualified for special education services. Id.

18 In May 2007, Dr. Walsh completed a “Child Functional Assessment” form finding that  
19 Plaintiff had “marked limitations” in the ability to attend and complete tasks. AR at 260. She  
20 believed that the medications he took might adversely affect his abilities in this domain. Id. In  
21 addition, Dr. Walsh found an “extreme” limitation with respect to Plaintiff’s ability to move about  
22 and manipulate objects, and a “marked” limitation in the domain of health and physical well-being.  
23 AR at 260. In support, she cited Plaintiff’s ADHD, “marked muscle weakness,” and an inability to  
24 stand for more than 10 minutes at a time. Id.

25 Jami Grover, a school occupational therapist, completed a report in March 2007. With  
26 respect to Plaintiff’s motor skills, she noted that he could walk the school campus and carry his  
27 backpack and could hop on each foot separately. AR at 231. She wrote that he could throw a ball  
28 but had difficulty catching it in a coordinated manner. Id.

1 Grover determined that Plaintiff had difficulty with bilateral hand coordination and dexterity.  
2 AR at 232. She noted also that Plaintiff had difficulty performing tasks that required use of both  
3 hands. Id. Grover believed Plaintiff would benefit from occupational therapy, particularly therapy  
4 directed toward addressing his problems with fine motor skills and sensory processing, which she  
5 believed impacted his ability to perform in class. Id. at 234.

6 In March 2007, Dr. Paul Frye, another non-examining agency consultant, completed a  
7 “Childhood Disability Evaluation” form. After reviewing Plaintiff’s record, he noted Plaintiff’s  
8 impairments of ADHD and asthma, but characterized Plaintiff’s restrictions as less than marked in  
9 the domains of acquiring and using information, attending and completing tasks, interacting and  
10 relating with others, caring for himself and health and physical well-being. AR at 235, 237. He  
11 found no limitation in the domain of moving about and manipulating objects. Id. at 237. In an  
12 accompanying “Case Analysis,” Dr. Frye wrote that he concurred with a previous agency evaluation  
13 finding that Plaintiff’s impairments did not meet or exceed the listings for disability, noting that  
14 Plaintiff had no marked restriction in any of the domains of functioning. Id. at 241. Dr. L.T. Luu  
15 endorsed Dr. Frye’s findings. Id. at 236.

16 In February 2007, Plaintiff’s kindergarten teacher, Rachel Lantay, completed a teacher  
17 questionnaire for the agency. In regard to the first domain of acquiring and using information,  
18 Lantay wrote that Plaintiff had a hard time focusing on any instruction. AR at 224. She believed  
19 that Plaintiff performed at grade level while working and being tutored individually, but believed  
20 that he was unable to participate and performed below grade level in group settings. Id. With regard  
21 to the second domain, attending and completing tasks, Lantay reported that other students helped him  
22 because if left to his own he would sit and stare and not complete his activity. Id. at 225.  
23 Concerning the third domain, interacting and relating with others, Lantay stated that Plaintiff did a  
24 lot of “parallel play” and only engaged in activities with other students if directly asked. Id. at 226.  
25 Concerning the fourth domain, moving about and manipulating objects, Lantay noted that when  
26 singing songs, Plaintiff had difficulty incorporating singing and accompanying hand movements. Id.  
27 at 227. As to the fifth domain, caring for himself, Lantay noted that he seemed unaware of his  
28 physical self and did not attempt to clean food or dirt from his face and hands. Id. at 228.



1 Concerning the sixth domain, health and well-being, Lantay noted that Plaintiff took medication for  
2 ADHD and wondered if that medication affected his demeanor because he seemed subdued often and  
3 looked as if he was about to fall asleep. Id. at 229.

4 Individual Education Plan (“IEP”) records from the Greenfield Union School District indicate  
5 that during a meeting with Plaintiff’s guardian, Janet Butler, in October 2007, Butler stated that  
6 Plaintiff had pain in his hands and leg. AR at 258. The IEP records note that Plaintiff was taking 10  
7 milligrams of Adderall daily for his hyperactivity. Id. at 250. These records documented his trouble  
8 working independently but also described him as enjoying video games and looking at books. Id.  
9 The records described Plaintiff’s math skills as “good.” Id. In addition, the records noted that  
10 Plaintiff was “making good progress in fine motor skills” and described his coordination and hand  
11 skills for tasks such as cutting, fasteners and dexterity as “improving.” Id.

#### 12 SCOPE OF REVIEW

13 Congress has provided a limited scope of judicial review of the Commissioner’s decision to  
14 deny benefits under the Act. In reviewing findings of fact with respect to such determinations, the  
15 Court must determine whether the decision of the Commissioner is supported by substantial  
16 evidence. 42 U.S.C. 405 (g). Substantial evidence means “more than a mere scintilla,” Richardson  
17 v. Perales, 402 U.S. 389, 402 (1971), but less than a preponderance. Sorenson v. Weinberger, 514  
18 F.2d 1112, 1119, n. 10 (9th Cir. 1975). It is “such relevant evidence as a reasonable mind might  
19 accept as adequate to support a conclusion.” Richardson, 402 U.S. at 401. The record as a whole  
20 must be considered, weighing both the evidence that supports and the evidence that detracts from the  
21 Commissioner’s conclusion. Jones v. Heckler, 760 F.2d 993, 995 (9th Cir. 1985). In weighing the  
22 evidence and making findings, the Commissioner must apply the proper legal standards. E.g.,  
23 Burkhart v. Bowen, 856 F.2d 1335, 1338 (9th Cir. 1988). This Court must uphold the  
24 Commissioner’s determination that the claimant is not disabled if the Secretary applied the proper  
25 legal standards, and if the Commissioner’s findings are supported by substantial evidence. See  
26 Sanchez v. Sec’y of Health and Human Serv., 812 F.2d 509, 510 (9th Cir. 1987).

#### 27 REVIEW

28 In determining eligibility for SSI benefits for children based upon disability, the agency will

1 consider whether the child is performing substantial gainful activity. If the child is not, the agency  
2 will consider whether the child suffers from an impairment or combination of impairments that is  
3 severe. If the child’s impairment is severe, the agency will determine whether the impairments meet,  
4 medically equal, or functionally equal the listings and whether the impairment has lasted, or is  
5 expected to last, for twelve continuous months. 20 C.F.R. §§ 416.923, 416.924(a). If the child’s  
6 impairment meets or functionally equals an impairment in the listings and meets the durational  
7 requirement, then the child is conclusively presumed to be disabled and the child is entitled to an  
8 award of benefits. 20 C.F.R. § 416.924(d). If the impairment does not meet or functionally equal a  
9 listed impairment or meet the durational requirement, then the child is not disabled. 20 C.F.R. §  
10 416.924(d)(2).

11 To determine whether an impairment or combination of impairments functionally equals any  
12 listing, the ALJ is required to evaluate the child’s abilities in six domains of functioning. These  
13 domains measure the child’s limitations with respect to: (1) acquiring and using information; (2)  
14 attending and completing tasks; (3) interacting and relating with others; (4) moving about and  
15 manipulating objects; (5) caring for himself; and (6) health and well-being. 20 C.F.R. §  
16 416.926a(b)(1)(i) - (vi). The child must have marked<sup>2</sup> limitations in two of these domains of  
17 functioning or an extreme limitation in one domain to qualify as disabled under agency rules. Id.

#### 18 ALJ Findings

19 The ALJ evaluated Plaintiff pursuant to the three-step sequential evaluation for eligibility for  
20 child benefits. First, he determined that Plaintiff had not engaged in substantial gainful activity at  
21 any time relevant to the decision. AR at 14. Second, he determined that Plaintiff had the following  
22 severe impairments: attention deficit hyperactivity disorder (“ADHD”), borderline intellectual  
23 functioning, and asthma. Id. However, at step three he found that Plaintiff’s impairment or  
24 combination of impairments did not meet or functionally equal the agency listings. Id.

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25  
26 <sup>2</sup> A “marked” limitation is one that “interferes seriously with [the child’s] ability to independently initiate,  
27 sustain, or complete activities.” 20 C.F.R. section 416.926a(e)(2). It means “‘more than moderate’ but ‘less than  
28 extreme.’” Id. On the other hand, an “extreme” limitation “interferes very seriously with [the child’s] ability to  
independently initiate, sustain, or complete activities.” 20 C.F.R. section 416.926a(e)(3). It is the rating given to the  
“worst limitations.” Id.

1 In reaching this conclusion, the ALJ addressed Plaintiff's impairments under the six domains  
2 of functioning previously noted. With respect to the second domain of functioning, attending and  
3 completing tasks, the ALJ determined that Plaintiff had a "marked limitation." AR at 18. However,  
4 with respect to each of the other five domains, the ALJ determined Plaintiff's had either no  
5 limitation or a "less than marked" limitation. Id. at 18-19. As a result, he determined that Plaintiff  
6 was not disabled under the Act. Id. at 19.

7 Plaintiff challenges the ALJ's decision at step three. In particular, he asserts that the ALJ  
8 improperly discounted the opinion of a school psychologist and contends that if that opinion is  
9 credited, he is entitled to a finding of disabled and an award of benefits. (Doc. 18 at 6-9).

### 10 DISCUSSION

#### 11 The ALJ properly discounted the opinion of the school psychologist

12 As recounted above, Dr. Walsh, filed an "Initial Psychoeducational Evaluation" report in  
13 October 2006. The stated purpose of her evaluation was to establish Plaintiff's academic  
14 achievement level, his estimated cognitive ability, his adaptive behavior/self-help skills, his  
15 behavioral and social strengths and any health needs to improve his school performance and  
16 determine if he needed and qualified for special education services. See AR at 216. Her report was  
17 based on a review of the records, teacher interviews and input, student observations, a health  
18 assessment by the school nurse, clinical testing and a parent interview. Id.

19 Dr. Walsh determined that Plaintiff's cognitive ability fell in the average range. AR at 218.  
20 However, she identified problems with his "fine and gross" motor skills. Id. at 222. Dr. Walsh  
21 recommended that Plaintiff's parent take him to the doctor frequently to monitor the effects of his  
22 medication.<sup>3</sup> AR at 222. She recommended also that Plaintiff be evaluated by an occupational  
23 therapist regarding his gross and fine motor skills, and be evaluated by a speech pathologist due to  
24 his low communication skills. Id. Finally, she recommended that Plaintiff be included in "recourse  
25 specialist programs" to focus on staying on task regarding writing and penmanship. Id.

26 In May 2007, Dr. Walsh completed a "Child Functional Assessment" form. In that document

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27 <sup>3</sup> This recommendation appears to be based upon teacher input indicating that Plaintiff had less difficulty  
28 following directions, staying on task and showing emotion when he hadn't been given his medication. See AR at 220.

1 she concluded that Plaintiff had a “marked limitation” in the domains of attending and completing  
2 tasks, and health and physical well-being, and an “extreme limitation” in the domain for moving  
3 about and manipulating objects. AR at 260.

4 As an initial matter, Plaintiff asserts that Dr. Walsh should be accorded the status of a treating  
5 source. In addition, he argues that “[b]ecause Dr. Walsh’s opinions fit with the four corners of the  
6 eligibility established by 20 C.F.R. § 416.926a, the Court should order a payment of benefits.” (Doc.  
7 18 at 8).

8 20 C.F.R. § 404.902 defines a treating source as,

9 *Treating source means your own physician, psychologist, or other acceptable*  
10 *medical source who provides you, or has provided you, with medical treatment or*  
11 *evaluation and who has, or has had, an ongoing treatment relationship with you.*  
12 *Generally, we will consider that you have an ongoing treatment relationship with an*  
13 *acceptable medical source when the medical evidence establishes that you see, or*  
14 *have seen, the source with a frequency consistent with accepted medical practice for*  
15 *the type of treatment and/or evaluation required for you medical condition(s). We*  
16 *may consider an acceptable medical source who has treated or evaluated you only a*  
17 *few times or only after long intervals (e.g., twice a year) to be your treating source if*  
18 *the nature and frequency of the treatment or evaluation is typical for your*  
19 *condition(s). We will not consider an acceptable medical source to be your treating*  
20 *source if your relationship with the source is not based on your medical need for*  
21 *treatment or evaluation, but solely your need to obtain a report in support of your*  
22 *claim for disability. In such a case, we will consider the acceptable medical source to*  
23 *be a non-treating source. (Emphasis added).*

24 Plaintiff does not allege an ongoing relationship with Dr. Walsh nor does the record indicate  
25 that Dr. Walsh saw Plaintiff frequently or consistently. Rather, the record indicates that Dr. Walsh,  
26 who was a school psychologist, performed a one-time evaluation of Plaintiff to determine the best  
27 course of action for dealing with his behavioral and cognitive problems at school. Her report does  
28 not indicate that she actually examined or interviewed Plaintiff. Rather, her report indicates that her  
opinions were based on a review of the records, clinical testing (it is not clear if these tests were  
administered by her or by other sources), teacher interviews and input, a parent interview, and  
student observations. See AR at 216.

Plaintiff cites Murray v. Heckler, 722 F.2d 499 (9<sup>th</sup> Cir. 1983), for the general proposition  
that a treating source is superior to other sources and is entitled to deference. (See Doc. 18 at 8).  
While this is true, Heckler does not support his assertion that Dr. Walsh qualifies as a treating  
source. Plaintiff states that Dr. Walsh had contact with him “more than once.” (Id.) While Dr.

1 Walsh followed up her October 2006 report by completing a May 2007 “Child Functional  
2 Assessment,” the record does not indicate that this assessment was based on additional contact with  
3 Plaintiff. In fact, it appears that this document may have been prepared to provide additional  
4 evidence in support of Plaintiff’s application for social security benefits, in that it speaks exclusively  
5 to Plaintiff’s limitations with respect to the six domains necessary for determining child disability  
6 under the agency regulations.<sup>4</sup> See AR at 259-60; see also Johnson v. Astrue, 2008 WL 4553141 at  
7 \*3 (C.D. Cal., Oct. 9, 2008) (rejecting the contention that a school psychologist who participated in  
8 preparation of an IEP report for the child claimant should be considered a treating source under  
9 Social Security regulations).

10 For these reasons, the Court concludes that the evidence does not establish that Dr. Walsh  
11 qualifies as a treating source as defined by 20 C.F.R. § 416.902, with the attendant deference that  
12 accompanies that designation. At best, Dr. Walsh may be considered an examining source.  
13 Nevertheless, even if contradicted by the opinions of other doctors, the ALJ may only discount Dr.  
14 Walsh’s opinion by providing specific and legitimate reasons that are supported by substantial  
15 evidence. Bayliss v Barnhart, 427 F.3d 1211, 1216 (9<sup>th</sup> Cir. 2005); Lester v. Chater, 81 F.3d 821,  
16 830-31 (9<sup>th</sup> Cir. 1995).

17 Plaintiff asserts that the ALJ failed to provide specific reasons for rejecting Dr. Walsh’s  
18 opinions. The Court disagrees. In fact, the ALJ did agree with Dr. Walsh that Plaintiff’s ADHD  
19 created marked limitations in the domain of attending and completing tasks.<sup>5</sup> AR at 16. However,  
20 as noted, he rejected Dr. Walsh’s findings of marked and extreme limitations regarding the domains  
21 of health and well-being and the ability to move about and manipulate objects, respectively. Id. It is  
22 his rejection of this aspect of Dr. Walsh’s opinion that prompts Plaintiff’s appeal.

23 Upon review, the Court concludes that the ALJ provided specific and legitimate reasons

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24  
25 <sup>4</sup> This assessment form is in check-box format and does not explain its findings accept in the briefest manner.  
26 See AR at 260. However, the court presumes that her findings are based on the evidence she reviewed and the  
conclusions that she made in her October 2006 report.

27 <sup>5</sup> Plaintiff suggests erroneously that the ALJ failed to find a marked limitation in the domain of attending and  
28 completing tasks. (Doc. 18 at 7). Review of the ALJ’s opinion refutes this contention. The ALJ found expressly that  
Plaintiff had “marked, but not extreme, limitations in attending and completing tasks.” AR at 18.

1 supported by substantial evidence in the record for discounting Dr. Walsh’s conclusion that Plaintiff  
2 had extreme and marked limitations in these domains. With respect to the domain of moving about  
3 and manipulating objects, the ALJ found Dr. Walsh’s opinion inconsistent with the schools IEP,  
4 which only mandated a limited amount of extra help in the general classroom setting. AR at 16. He  
5 noted that the plan called for occupational therapy twice a month and in-class tutoring all within the  
6 context of the general education classroom. Id. This conclusion is supported by the record. See id.  
7 at 249-56. Regarding his motor skills in particular, the IEP evaluation form states that Plaintiff was  
8 making “good progress in fine motor skills” and notes that his “[c]oordination and hand skills [are]  
9 improving for tasks such as cutting, fasteners and dexterity.” Id. at 250.

10 The ALJ cited Plaintiff’s testimony concerning his daily activities to contradict Dr. Walsh’s  
11 findings also. He noted Plaintiff’s testimony that he had two friends and played basketball, football  
12 and tetherball at school, albeit not in organized competitions. Id. He noted that Plaintiff stated that  
13 he could dress and bathe himself, brush his teeth and feed himself. Id. at 16-17. Plaintiff testified  
14 also that he played video games, rode a bicycle, printed his name and used the microwave. Id. at 17.

15 The ALJ recounted that both of Plaintiff’s aunts corroborated most of these activities. They  
16 acknowledged that he was able to dress himself, play video games and ride a bicycle, although his  
17 aunt Janet Butler (and guardian) denied he knew how to use the microwave. AR at 17. He noted  
18 that Janet Butler testified that Plaintiff attended regular classes and had not been held back for  
19 academic reasons or suspended for behavioral problems. Id. He noted that Dianne Butler stated that  
20 she worked with handicapped and mentally disabled children and believed Plaintiff was not as  
21 severely impaired as they were and could be taken care of by his family. Id.

22 In addition, the ALJ referenced the contradictory findings of Dr. Musacco and Dr. Lee. He  
23 recounted that Dr. Musacco, an examining psychologist, determined that Plaintiff had no defects in  
24 regard to his motor skills, had normal communication skills for a five-year old and only mild  
25 problems in other adaptive skills. AR at 15.

26 The ALJ recounted that Dr. Lee, a pediatrician, believed that Plaintiff’s motor functions were  
27 normal as well. AR at 181. In particular, Dr. Lee identified testing (the Denver Development  
28 Screening Test II) that indicated that Plaintiff “is performing within age limits for gross motor

1 development.” Id. at 182. While noting Plaintiff’s “very hyperactive demeanor,” Dr. Lee described  
2 Plaintiff’s asthma as mild and under control. Id. In fact, other than noting Plaintiff had dermatitis,  
3 he characterized his examination of Plaintiff as “unremarkable.” Id. The ALJ believed that the  
4 testimony of Plaintiff and his aunts, together with the findings of Drs. Lee and Musacco, suggested  
5 that any difficulties concerning a lack of coordination or muscle weakness “were transient rather than  
6 signs of permanent impairment, and that he does not have ongoing limitations in this domain.” Id. at  
7 19. Moreover, he believed that the activities Plaintiff and his aunts testified to, such as playing  
8 sports, throwing a ball, riding a bicycle, turning on the television and playing video games, and  
9 printing his name, evidenced an ability to move about and manipulate objects that was less than  
10 marked or extreme. See id.

11       Regarding the domain of health and well-being, the ALJ cited Dr. Lee’s findings and the  
12 testimony from Plaintiff and his aunts to support his conclusion of less than marked limitations. AR  
13 at 19.

14       Upon review, the Court concludes that the ALJ’s interpretation of this evidence is reasonable  
15 and finds that he has cited substantial evidence in the record to support his conclusion that Plaintiff is  
16 not disabled. Plaintiff acknowledges that Dr. Walsh’s opinions directly conflict with those of the  
17 other examining consultants as well as the non-examining consultants. (See Doc. 18 at 6, 7). In  
18 fact, the ALJ appreciated this and noted “a substantial conflict in the evidence concerning the  
19 claimant’s functioning in [the domain of moving about and manipulating objects].” AR at 18.  
20 Under these circumstances, it was the ALJ’s duty to resolve any differences and reach a conclusion.  
21 Thomas v. Barnhart, 278 F.3d 947, 956-57 (9<sup>th</sup> Cir. 2002) (“When there is conflicting medical  
22 evidence, the Secretary must determine credibility and resolve the conflict.”)

23       Plaintiff contends that in relying on the “stale” findings of the consulting examiners, the ALJ  
24 ignored the “new” evidence from Dr. Walsh and the occupational therapist, Jami Grover, who filed a  
25 report in March 2007. (Doc. 20 at 4, 5). The Court disagrees. The Court notes that Dr. Lee and Dr.  
26 Musacco examined Plaintiff just four months before Dr. Walsh issued her report and less than nine  
27 months before the occupational therapist issued her report. Plaintiff’s suggestion that the reports of  
28 Drs. Lee and Musacco are stale is not convincing.

1 Second, Plaintiff contends that no “qualified” pediatrician or psychologist reviewed Dr.  
2 Walsh’s opinion. Records indicate that Dr. Lee is a board-certified pediatrician and Dr. Musacco is a  
3 clinical and forensic psychologist. AR at 181, 184. While it is true that they examined Plaintiff prior  
4 to Dr. Walsh’s report, his suggestion that this diminished the value of their findings is not supported  
5 by case law or citation to rules or regulations.<sup>6</sup> As noted, their examinations were essentially  
6 contemporaneous to Dr. Walsh’s report. In addition, a non-examining agency consultant, Dr. Frye,  
7 completed a “Childhood Disability Evaluation” form in March 2007 and noted Dr. Walsh’s earlier  
8 findings and opinions. AR at 240-41. Nevertheless, Dr. Frye agreed with Drs. Lee and Musacco that  
9 Plaintiff did not have marked limitations in the domains of moving about and manipulating objects  
10 or in health and well-being. *Id.* at 237, 241; *see Salee v. Chater*, 94 F.3d 520, 522 (9<sup>th</sup> Cir. 1996)  
11 (“We have held that the findings of a nontreating, nonexamining physician can amount to substantial  
12 evidence, so long as other evidence in the record supports those findings.”) Although no expert  
13 reviewed Dr Walsh’s May 2007 “Child Functional Assessment,” there is no authority presented that  
14 this report, which appears to have relied upon Dr. Walsh’s October 2006 evaluation of the child,  
15 impacted the case evaluation because it added only categorical conclusions, rather than any  
16 substantial analysis of the child’s condition.

17 Finally, the ALJ acknowledged the occupational therapist’s March 2007 report. In particular,  
18 he noted her conclusion that Plaintiff had problems with motor skills, including a “weak grip and

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19  
20 <sup>6</sup> Though not explained Plaintiff cites Acquiescence Ruling 04-1(9) to support this contention. However,  
21 nothing in the quoted language of that ruling supports his suggestion that Dr. Lee’s or Dr. Musacco’s opinions should be  
22 accorded less weight because they failed to discuss Dr. Walsh’s findings. In fact, that ruling states that the agency may  
23 rely upon a “case evaluation made by a State agency medical or psychological consultant that is already in the record.”  
(*See* Doc. 18 at 7). Plaintiff cites also *Howard on behalf of Wolff v. Barnhart*, 341 F.3d 1006 (9<sup>th</sup> Cir. 2003), to support  
24 his assertion that a medical expert should have been called by the ALJ to review the “new” evidence from Dr. Walsh and  
25 the occupational therapist. *Wolff* fails to support his position.

26 In *Wolff*, the ALJ failed to obtain a “case evaluation” that considered the totality of the child’s circumstances  
27 and, instead, “construct[ed] his own case evaluation from the evidence in the record.” *Wolff*, at 1014. Contrary to this  
28 situation, here the ALJ received reports from a board-certified pediatrician and a clinical and forensic psychologist who  
performed consultative examinations of Plaintiff to discern his overall condition. *See* AR at 181-83; 184-88. In addition,  
a non-examining agency consultant filed an assessment of Plaintiff’s condition that cited and outlined this “new”  
evidence. *See* AR at 240-41. This comports with 42 USC 1382c(I) which provides, “In making any determination under  
this title [42 USCS §§ 1381 et seq.] with respect to the disability of an individual who has not attained the age of 18 years  
and to whom section 221(h) [42 USCS § 421(h)] does not apply, the Commissioner of Social Security shall make  
reasonable efforts to ensure that a qualified pediatrician or other individual who specializes in a field of medicine  
appropriate to the disability of the individual (as determined by the Commissioner of Social Security) evaluates the case  
of such individual.”



1 weak muscles.” See AR at 232, 233. However, as noted, the ALJ cited Plaintiff’s testimony  
2 concerning his daily activities which were corroborated by the testimony of his aunts. AR at 19.  
3 The ALJ believed that these activities supported a conclusion that Plaintiff’s limitations in the  
4 domain of moving about and manipulating objects were less than marked. Dr. Frye’s March 2007  
5 assessment addressed and acknowledged the occupational therapist’s findings also. Id. at 241.  
6 Nevertheless, he concluded that Plaintiff had no limitation with respect to this domain. See id. at  
7 237, 241.

8 **CONCLUSION**

9 In sum, the Court concludes that the ALJ provided specific and legitimate reasons for  
10 discounting Dr. Walsh’s findings that Plaintiff had a marked limitation in the domain of health and  
11 well-being and an extreme limitation in the domain of moving about and manipulating objects.  
12 Moreover, substantial evidence in the record supported the ALJ’s conclusion that Plaintiff’s  
13 impairments did not satisfy the requirements for a finding of disability and, as a result, the Court  
14 must defer to that determination.

15 Accordingly, the Court DENIES Plaintiff’s appeal from the administrative decision of the  
16 Commissioner of Social Security. The Clerk of Court IS DIRECTED to enter judgment in favor of  
17 Defendant Michael J. Astrue, Commissioner of Social Security and against Plaintiff Connell L.

18  
19  
20 IT IS SO ORDERED.

21 Dated: August 11, 2010

/s/ Jennifer L. Thurston  
UNITED STATES MAGISTRATE JUDGE