

UNITED STATES DISTRICT COURT
MIDDLE DISTRICT OF LOUISIANA

**A. A., *by and through his mother,*
P.A., ET AL.**

CIVIL ACTION

VERSUS

**STEPHEN R. RUSSO, *in his*
official capacity, as Secretary of
the Louisiana Department of
Health, ET AL.**

NO. 19-00770-BAJ-SDJ

AMENDED CLASS CERTIFICATION ORDER

The issues presently before the Court are limited to this: (1) what is meant by the terms “Intensive Care Coordination,” “Crisis Services,” and “Intensive Behavioral Services,” and (2) can those terms be defined to yield an ascertainable class consistent with the requirements of Federal Rule of Civil Procedure (“Rule”) 23. Now, after months of negotiations, briefing, argument, expert discovery, and *additional* briefing, there is no longer *any* dispute among the parties regarding the meaning of these terms. Further, upon careful review, informed by the guidance set forth by the U.S. Court of Appeals for the Fifth Circuit in its February 13, 2023 Judgment and Mandate (Doc. 149), these terms as defined herein yield an ascertainable class.

As such, the Court’s May 25, 2021 Class Certification Order (Doc. 78) will be amended to reflect the following class definition:

All Medicaid-eligible youth under the age of 21 in the State of Louisiana who have a mental health or behavioral disorder, and for whom a licensed practitioner of the healing arts recommends Intensive Care Coordination, Crisis Services, and Intensive Behavioral Services to correct or ameliorate their disorders.

Further, the May 25 Certification Order will be amended to reflect the

ascertainability analysis set forth herein. In all other respects, the Court’s May 25 Certification Order will be re-adopted and re-affirmed. In short, Plaintiffs’ request for class certification is (again) granted, and this action will (again) be referred to the Magistrate Judge for entry of a revised class action scheduling order.

I. BACKGROUND

The relevant allegations and procedural background are set forth in the Court’s May 25 Certification Order. Sections II and III of that Order are incorporated by reference here, as if fully set forth. (*See* Doc. 78 §§ II-III). To follow is additional background, as it relates to the task at hand.

Plaintiffs initiated this putative class action on November 7, 2019, alleging that the Louisiana Department of Health (LDH) is failing its statutory duty to provide medically necessary mental health interventions to Medicaid-eligible children with diagnosed mental health disorders. Plaintiffs consist of Medicaid-eligible youth under the age of 21, diagnosed with mental and behavioral health disorders, for whom intensive home- and community-based services (“IHCBS”)—*i.e.*, behavioral health interventions—have been prescribed. (Doc. 48, *hereinafter* “SAC,” at ¶¶ 14-19, 83-124). Plaintiffs allege that instead of providing these intensive interventions as required by Title XIX of the Social Security Act, 42 U.S.C.A. § 1396a (the “Medicaid Act”), LDH offers only basic mental health interventions—medication management and infrequent counseling—leaving Plaintiffs effectively untreated, at high risk of mental health crises, and frequently forced to seek emergency care or, worse, psychiatric institutionalization. (SAC at ¶¶ 14-19, 83-124). Plaintiffs propose to represent a class of similarly situated Medicaid-eligible youth spread across the

state of Louisiana. (*Id.* at ¶ 22). Similar lawsuits are being pursued against state agencies across the country, and have been certified for class treatment.¹

On May 25, 2021, this Court entered its original Class Certification Order, certifying a class consisting of:

All Medicaid-eligible youth under the age of 21 in the State of Louisiana (1) who have been diagnosed with a mental health or behavioral disorder, not attributable to an intellectual or developmental disability, and (2) for whom a licensed practitioner of the healing arts has recommended intensive home- and community- based services [IHCBS] to correct or ameliorate their disorders.

(Doc. 78 at 1). The Court’s May 25 Order defined “intensive home- and community-based services (IHCBS)” to mean “intensive care coordination, crisis services, and intensive behavioral services and supports that are necessary to correct or ameliorate Plaintiffs’ mental illnesses or conditions.” (*Id.* at 2). Critically, however, the Court rejected LDH’s demand to specifically delineate the meaning of “intensive care coordination, crisis services, and intensive behavioral services”—*i.e.*, the component parts of IHCBS—finding that LDH’s purported confusion regarding these terms was “baseless” because the evidentiary record made abundantly clear that LDH was “acutely aware of the nature and scope of interventions encompassed by Plaintiffs’ proposed class definition.” (*Id.* at 16).

Over Plaintiffs’ objection, the Fifth Circuit granted LDH an immediate appeal

¹ See, e.g., *N.B. v. Hamos*, 26 F. Supp. 3d 756 (N.D. Ill. 2014) (Tharp, Jr., J.) (order certifying class to pursue Medicaid-eligible children’s claims that Illinois’s failure to provide home and community-based mental health interventions violated the Medicaid Act, Title II of the Americans with Disabilities Act, and the Rehabilitation Act); *S.R., by & through Rosenbauer v. Pennsylvania Dep’t of Hum. Servs.*, 325 F.R.D. 103 (M.D. Pa. 2018) (Jones, III, J.) (same, Pennsylvania); *M. H. v. Berry*, No. 15-cv-1427, 2017 WL 2570262 (N.D. Ga. June 14, 2017) (Thrash, Jr., J.) (same, Georgia); *O.B. v. Norwood*, No. 15-cv-10463, 2016 WL 2866132 (N.D. Ill. May 17, 2016) (Kocoras, J.) (same, Illinois).

of the May 25 Certification Order. (Doc. 93). On appeal, LDH challenged every aspect of the Court’s Rule 23 analysis. *See A.A., et al., v. Phillips, et al.*, No. 21-30580, Doc. 7 (5th Cir. Nov. 30, 2021) (LDH’s opening brief on appeal). The Circuit, however, focused its review on just one element—ascertainability—and on February 13, 2023, issued its Judgment and Mandate vacating the May 25 Certification Order. (Doc. 149). In relevant part, the Circuit held:

LDH argues that the class definition is not ascertainable because it is not clear which services are included in the term “IHCBS” and which are not. We agree. The district court defined IHCBS as “intensive care coordination, crisis services, and intensive behavioral services and supports that are necessary to correct or ameliorate [class members’] mental illness or conditions.” **These three terms are not defined, nor are they specific, billable behavioral health services ordered by a doctor or licensed mental health professional.** Billable specialized behavioral health services include things like psychosocial rehabilitation or community psychiatric support and treatment. **Here, it is not clear which care coordination services and behavioral services are “intensive,” falling within the IHCBS definition, and which are not.** Knowing which services IHCBS encompasses is essential to evaluating whether an individual is a class member.

(*Id.* at 9 (emphasis added)). The Circuit remanded the case to this Court, with instructions “to clarify which services are included in the term IHCBS,” leaving for another day LDH’s remaining objections to class certification. (*Id.* at 11).

Consistent with the Circuit’s instructions on remand, on February 17, 2023 this Court ordered the parties to meet and confer to determine whether they could reach a stipulation specifying the behavioral health services included in the terms Intensive Care Coordination, Crisis Services, and Intensive Behavioral Services. (Doc. 151 at 2). Alternatively, if unable to reach agreement, the Court ordered the parties to brief their respective positions. (*Id.*).

Discussions stalled, and on March 17, 2023, Plaintiffs submitted their opening brief, asserting that Intensive Care Coordination, Crisis Services, and Intensive Behavioral Services may be defined with reference to “service definitions from the Centers for Medicare and Medicaid Services (hereinafter ‘CMS’), the federal agency that oversees Medicaid.” (Doc. 156 at 1). In support, Plaintiffs proffered multiple CMS Informational Bulletins, which, in relevant part, offer the following definitions:

Intensive Care Coordination: a service utilizing a team-based, collaborative process for developing and implementing individualized care plans for children and youth with complex needs and their families, which includes assessment and service planning, accessing and arranging for services, coordinating multiple services, including access to crisis services, assisting the child and family to meet basic needs, advocating for the child and family, and monitoring progress.

Crisis Services (a/k/a “Mobile Crises Response”): instrumental in defusing and de-escalating difficult mental health situations and preventing unnecessary out-of-home placements, particularly hospitalizations. Mobile crisis services are available 24/7 and can be provided in the home or any setting where a crisis may be occurring. In most cases, a two-person crisis team is on call and available to respond. In addition to assisting the child and family to resolve the crisis, the team works with them to identify potential triggers of future crises and learn strategies for effectively dealing with potential future crises that may arise.

Intensive Behavioral Services: intensive in-home therapeutic interventions delivered to children and families in their homes and other community settings to improve youth and family functioning and prevent out-of-home placement in inpatient or psychiatric residential treatment facility settings. These services include individual and family therapy, skills training and behavioral interventions, as developed by a team that can offer a combination of therapy from a licensed clinician and skills training and support from a paraprofessional.

(*See id.* at 3-5 (citing authorities)).

On March 31, 2023, LDH submitted its response. Notably, LDH conceded to Plaintiffs’ proposed definition of Crisis Services. (Doc. 159 at 7). More cryptically,

LDH indicated its satisfaction with Plaintiffs’ proposed definition of Intensive Care Coordination,” albeit by a different name (“wraparound facilitation”). (*Id.* at 5). Still, LDH objected to Plaintiffs’ proposed definition of Intensive Behavioral Services, insisting that it was “vague” and would “not assist the Court in identifying a putative class,” and, that the only way to remove the ambiguity was to define this term by reference to “specific, billable behavioral health services” already provided by LDH. (*Id.* at 2-3, 8).

On April 7, 2023, Plaintiffs submitted their reply brief, arguing that LDH’s demand for a class definition constrained by therapeutic interventions *already* provided by LDH impermissibly conflates the issues of ascertainability and liability, because the Medicaid Act expressly guarantees that Plaintiffs’ are entitled to their prescribed therapeutic interventions *regardless* of whether or not such services are currently covered under Louisiana’s Medicaid plan. Plaintiffs further argued that any class definition limited to services already provided by LDH would meaningfully impair their ability to pursue relief on behalf of Louisiana children that are *not* currently receiving the behavioral health interventions that the Medicaid Act requires. Plaintiffs’ explained:

By defining intensive care coordination, crisis services, and intensive behavioral services according to the CMS definitions, Plaintiffs have clarified what they are seeking in this action – these three services, delivered together in a highly coordinated way, to children with intensive mental and behavioral health needs – in a manner that satisfies their ascertainability burden at this stage of the litigation. ... Any attempt to define the class according to services currently provided in Louisiana would not accurately capture only those children and youth with intensive needs, and it would also leave out children and youth with intensive needs who are not currently receiving services. Moreover,

Plaintiffs maintain that the issue of whether Louisiana's existing Medicaid services constitute intensive care coordination, crisis, and intensive behavioral services is an ultimate question of liability.

(Doc. 160 at 4).

On May 18, 2023, the Court heard argument from the parties. (Doc. 172). Plaintiffs restated their position that, for purposes of ascertainability, the Court should adopt CMS's definitions of Intensive Care Coordination, Crisis Services, and Intensive Behavioral Services. As an intermediate alternative, Plaintiffs requested leave to conduct limited precertification discovery to bolster their proposed definitions with ground-level data, consisting of "expert declarations that would more fully describe the services [at issue], who they're for, what they do, how they differ [from what LDH already provides]." (Doc. 174 at 13:7-10). Plaintiffs further proposed that, upon developing this discovery, they would submit "a renewed motion for class certification that includes more of the facts that we're talking about." (Doc. 174 at 12:23-13:2).

LDH, for its part, restated its concerns regarding Plaintiffs' proposed definitions, and flatly opposed allowing Plaintiffs to conduct discovery. Still, some progress was made at the May 18 hearing. First, LDH admitted (again) that it does not dispute Plaintiffs' proposed definition of Crisis Services. (Doc. 174 at 21:18-22 ("But for the purposes of this litigation, LDH believes that the parties have had a meeting of the minds to say we're talking about mobile crisis response when we talk about crisis services.")). Second, LDH inched closer to conceding that it also does not oppose Plaintiffs' proposed definition of Intensive Care Coordination. (Doc. 174 at 30:24-31:4 ("Intensive care coordination,' we obviously call that different things, but

I think we're both getting at the same type of service”)). As such, by the end of the hearing, according to LDH’s own view, the only term still in substantial dispute was Intensive Behavioral Services. (*Id.* at 31:5-9). At the conclusion of argument, the Court ordered post-hearing briefs from the parties regarding Plaintiffs’ request for limited discovery. (*Id.* at 32:14-24).

LDH filed its post-hearing brief first, on May 25. This time, LDH affirmed (with absolute clarity) that Plaintiffs’ proposed definitions of Intensive Care Coordination and Crisis Services yield an “identifiable” class, and that the parties can “constructively move forward” without additional discovery aimed to flesh out the meaning of these terms. (Doc. 175 at 1-2). Still, LDH contested Plaintiffs’ proposed definition of Intensive Behavioral Services, insisting that even limited discovery to refine this term was “a waste of time” because “Plaintiffs should be capable of simply identifying the ‘intensive’ services recommended for them by their providers and do not need expert testimony to refer to their own medical records.” (*Id.* at 4).

Plaintiffs’ submitted their post-hearing brief on May 26, re-stating their position that “they are not seeking the services currently offered by LDH,” and, as such, limited expert discovery would clarify the objective criteria for class membership. (Doc. 176 at 2-3).

On June 14, 2023, the Court issued its written order granting Plaintiffs’ request for precertification discovery, allowing each side to obtain not more than two expert declarations aimed to support their respective positions as to whether Intensive Behavioral Services may be defined to yield an ascertainable class. (Doc.

177). The Court’s June 14 order limited the scope of discovery as follows:

(a) CMS’s service definition(s) of the term “intensive behavioral services”; (b) the substance of “intensive behavioral services”; c) the children for whom “intensive behavioral services” are designed and necessary; and (d) how these services differ from services designed for children with less intensive needs.

(*Id.* at 13). The Court further ordered that, upon obtaining this discovery, Plaintiffs would submit a motion to amend the Court’s May 25 Certification Order to address the Circuit’s concerns regarding the ascertainability issue, and, thereafter, LDH would be permitted to submit its response, if any. (*Id.*). Also relevant here, the Court’s June 14 order expressly overruled LDH’s objection that the term Intensive Behavioral Services must be defined according to discrete billing codes already in existence under Louisiana’s Medicaid program, explaining that such a limitation would render “meaningless” the Medicaid Act’s express guarantee that medically necessary behavioral health interventions “must be provided whether or not [they are] covered under the state plan.” (*Id.* at 10, quoting *S.D. ex rel. Dickson v. Hood*, 391 F.3d 581, 589 (5th Cir. 2004) (citing 42 U.S.C. §§ 1396d(a) & (r)(5)).

On August 31, 2023, Plaintiffs submitted the Motion To Amend the May 25 Certification Order currently under review, (Doc. 181), proposing the following amended class definition:

All Medicaid-eligible youth under the age of 21 in the State of Louisiana who have a mental health or behavioral disorder, and for whom a licensed practitioner of the healing arts recommends Intensive Care Coordination, Crisis Services, and Intensive Behavioral Services to correct or ameliorate their disorders.

(Doc. 181 at 1). To show that this definition yields an ascertainable class, Plaintiffs first note that LDH now “concede[s] that Intensive Care Coordination and Crisis

Services are ‘identifiable’ services” for purposes of class certification. (*Id.* at 2, n.2; *see also id.* at 10). Thereafter, Plaintiffs show that their expert, Dr. Richard N. Shepler—a clinical psychologist with more than 40 years of practical and supervisory experience providing and implementing statewide intensive mental health interventions to Ohio youth, (Doc. 181-1 ¶¶ 2-18, *hereinafter* “Shepler Decl.”)—has presented uncontradicted testimony defining Intensive Behavioral Services to mean “therapeutic interventions delivered to children and families in their homes and other community settings to improve youth and family functioning and prevent out-of-home placement in inpatient or psychiatric residential treatment facility settings,” specifically consisting of 10 discrete “components” (interventions):

- 1) “Medically necessary individual and family behavioral health counseling and therapy in the home;
- 2) Skill-based interventions for the remediation of behaviors or improvement of symptoms, including, but not limited to, the implementation of a care plan and/or modeling interventions for the child’s/youth’s family and/or significant others, to assist them in implementing the strategies;
- 3) Interventions that facilitate the development of adaptive skills to improve self-care, self-regulation and to ameliorate other functional impairments by intervening to decrease or replace non-functional behavior that interferes with daily living tasks or to avoid exploitation by others;
- 4) Development of skills or replacement behaviors that allow the child or youth to fully participate in the Child and Family Team (a team composed of the youth, family members, natural supports, and the behavioral health and other professionals caring for the youth) and service plans;
- 5) Improvement of self-management of symptoms;
- 6) Education of the child/youth and/or their family or caregiver(s) about, and how to manage the child’s/youth’s mental health disorder or

symptoms;

- 7) Support of the development, maintenance, and use of social networks, including the use of natural and community resources;
- 8) Support to address behaviors that interfere with a child's or youth's success in achieving educational and vocational objectives in school;
- 9) Intensive therapeutic de-escalation interventions that restore personal and situational safety; and,
- 10) Implementation of risk reduction and crisis prevention strategies.”

(Doc. 181 at 4-5 (quoting Shepler Decl. ¶ 31)). Hewing carefully to the Fifth Circuit's instructions on remand, Plaintiffs contend that the stipulated definitions of Intensive Care Coordination and Crisis Services, and Dr. Shepler's uncontroverted definition of Intensive Behavioral Services, yield an ascertainable class because membership is now set according to four “objective criteria”:

(1) eligibility for a means-tested public health insurance program in Louisiana (“Medicaid-eligible”); (2) age (“youth under the age of 21”); (3) qualifying condition (“diagnosed with a mental health or behavioral disorder”); and (4) recommendation for specific services (“recommended for Intensive Care Coordination, Crisis Services, and Intensive Behavioral Services to correct or ameliorate their disorders”).

(*Id.* at 9-10).

On September 14, 2023, LDH submitted its response. Mirroring Plaintiffs' Motion To Amend, LDH concedes that the terms Intensive Care Coordination and Crisis Services—as now defined by Plaintiffs—“permit an ascertainable class.” (Doc. 182 at 2 n.2). Still, LDH objects to a class definition that includes the term Intensive Behavioral Services, re-asserting its objection that any definition that does *not* include “an agreed-upon list of specific, billable services” falls short. (*Id.* at 7). Remarkably, LDH takes this position notwithstanding the testimony of its own

expert, Dr. Roxanne Kennedy—a clinical social worker with more than 30 years of practical, supervisory, and state-agency experience providing and implementing statewide intensive mental health interventions to New Jersey and Pennsylvania youth, *including* a 15 year stint with the New Jersey Department of Human Services “overseeing the behavioral health Medicaid program,” (Doc. 181-2 ¶¶ 2-10, *hereinafter* “Kennedy Decl.”)—who states unequivocally that she *agrees* with “the description of the substance of ‘intensive behavioral services,’” set forth by Dr. Shepler. (Kennedy Decl. ¶ 23 & n.9).

This Amended Certification Order follows.

II. LAW AND ANALYSIS

A. Ascertainability

On remand, the question is whether Plaintiffs are capable of defining a class that is “clearly ascertainable.” The Circuit’s February 13 Judgment and Mandate sets forth the standard by which ascertainability is measured:

To be ascertainable, the class must be susceptible to a precise definition to properly identify those entitled to relief, those bound by the judgment, and those entitled to notice. The district court need not know the identity of each class member before certification, but it needs to be able to identify class members at some stage of the proceeding. The order defining the class should avoid subjective standards (*e.g.*, a plaintiff’s state of mind) or terms that depend on resolution of the merits (*e.g.*, persons who were discriminated against). There can be no class action if the proposed class is amorphous’ or imprecise. The possibility that some claimants may fail to prevail on their individual claims will not defeat class membership’ on the basis of the ascertainability requirement. Ultimately, the touchstone of ascertainability is whether the class is sufficiently definite so that it is administratively feasible for the court to determine whether a particular individual is a member.

A. A. by & through P.A. v. Phillips, No. 21-30580, 2023 WL 334010, at *2 (5th Cir.

Jan. 20, 2023) (quotation marks, alterations, and citations omitted). When applying this standard anew here, the Court faithfully heeds the Circuit’s admonishment that the original class definition failed the ascertainability requirement because the terms Intensive Care Coordination, Crisis Services, and Intensive Behavioral Services were “not defined,” making it impossible to determine “whether an individual is a class member.” *Id.* at *3.

With the benefit of the Circuit’s guidance, Plaintiffs propose the following amended class definition:

All Medicaid-eligible youth under the age of 21 in the State of Louisiana who have a mental health or behavioral disorder, and for whom a licensed practitioner of the healing arts recommends Intensive Care Coordination, Crisis Services, and Intensive Behavioral Services to correct or ameliorate their disorders.

(Doc. 181 at 1). Significantly, LDH concedes that this definition “permit[s] an ascertainable class” *as to* Medicaid-eligible Louisiana youth recommended for Intensive Care Coordination and Crisis Services, (Doc. 182 at 2 n.2), as those terms are defined below:

Intensive Care Coordination: a service utilizing a team-based, collaborative process for developing and implementing individualized care plans for children and youth with complex needs and their families, which includes assessment and service planning, accessing and arranging for services, coordinating multiple services, including access to crisis services, assisting the child and family to meet basic needs, advocating for the child and family, and monitoring progress.

Crisis Services (a/k/a “Mobile Crises Response”): instrumental in defusing and de-escalating difficult mental health situations and preventing unnecessary out-of-home placements, particularly hospitalizations. Mobile crisis services are available 24/7 and can be provided in the home or any setting where a crisis may be occurring. In most cases, a two-person crisis team is on call and available to respond. In addition to assisting the child and family to resolve the crisis, the

team works with them to identify potential triggers of future crises and learn strategies for effectively dealing with potential future crises that may arise.

Thus, the only issue unresolved is whether the class remains ascertainable if the term Intensive Behavioral Services is added to the mix. Plainly, on the present record, the answer is “yes.”

Again, the Court’s task at present is to *define* the term Intensive Behavioral Services such that it is “feasible for the court to determine whether a particular individual is a member.” *A. A.*, 2023 WL 334010, at *2 (quotation marks omitted). Plaintiffs propose a definition drawn straight from Dr. Shepler, whose expertise in the field of intensive mental health interventions for youth is *not* challenged. Dr. Shepler explains that Intensive Behavioral Services means “therapeutic interventions delivered to children and families in their homes and other community settings to improve youth and family functioning and prevent out-of-home placement in inpatient or psychiatric residential treatment facility settings,” and specifically consists of 10 discrete “components” (interventions):

- 1) “Medically necessary individual and family behavioral health counseling and therapy in the home;
- 2) Skill-based interventions for the remediation of behaviors or improvement of symptoms, including, but not limited to, the implementation of a care plan and/or modeling interventions for the child’s/youth’s family and/or significant others, to assist them in implementing the strategies;
- 3) Interventions that facilitate the development of adaptive skills to improve self-care, self-regulation and to ameliorate other functional impairments by intervening to decrease or replace non-functional behavior that interferes with daily living tasks or to avoid exploitation by others;

- 4) Development of skills or replacement behaviors that allow the child or youth to fully participate in the Child and Family Team (a team composed of the youth, family members, natural supports, and the behavioral health and other professionals caring for the youth) and service plans;
- 5) Improvement of self-management of symptoms;
- 6) Education of the child/youth and/or their family or caregiver(s) about, and how to manage the child's/youth's mental health disorder or symptoms;
- 7) Support of the development, maintenance, and use of social networks, including the use of natural and community resources;
- 8) Support to address behaviors that interfere with a child's or youth's success in achieving educational and vocational objectives in school;
- 9) Intensive therapeutic de-escalation interventions that restore personal and situational safety; and,
- 10) Implementation of risk reduction and crisis prevention strategies.”

(Doc. 181 at 4-5 (quoting Shepler Decl. ¶ 31)). Dr. Kennedy, who was retained by LDH specifically to “identify the services that, in my professional opinion, qualify as ‘intensive behavioral services’ in the Louisiana Medicaid program” expressly *agrees* with “the description of the substance of ‘intensive behavioral services’” set forth in Dr. Shepler’s declaration. (Kennedy Decl. ¶¶ 1, 23). This is the end of the inquiry for the Court’s purposes. The actual practitioners (and experts) plainly understand what is meant by the term Intensive Behavioral Services, and by defining this term with reference to a set of 10 discrete behavioral health interventions, it is feasible for the Court to objectively sift through who is a class member and who is not.

Indeed, the only party that continues to express “confusion” at the meaning of the term Intensive Behavioral Services is LDH itself. In its original Class Certification Order, the Court dismissed LDH’s confusion as “baseless,” because it

was clearly contradicted by LDH's *own* responses to the Louisiana Legislative Auditor's official findings regarding the absence of Specialized Behavioral Health Services available to Louisiana's Medicaid recipients. (Doc. 78 at 16). That LDH persists in its feigned befuddlement is beyond frustrating, because it is now abundantly clear that LDH's confusion is *not* grounded in the evidence. How can it be? There is *no evidentiary dispute* regarding the meaning of Intensive Care Coordination, Crisis Services, *or* Intensive Behavioral Services.

Instead, LDH's "confusion" is based on a blatant misreading of the law. Specifically, LDH persists in its view—already rejected by this Court—that the only definition of Intensive Behavioral Services that yields "an objective method to identify class members" is one that is "limited to specific, billable services" already assigned "billing codes" in the Louisiana Medicaid program. (Doc. 182 at 6-8). This argument fails on two levels. First, it is not what is required by the Fifth Circuit's February 13 Judgment and Mandate, which held only that Intensive Care Coordination, Crisis Services, and Intensive Behavioral Services must be defined with reference to objective criteria. *A. A. by & through P.A.*, 2023 WL 334010, at *2-*3. Certainly, such criteria *may* include "specific, billable behavioral health services ordered by a doctor," *id.* at *3, but the Circuit in no way limited the Court's discretion to consider *other* objective criteria. Here (again), Plaintiffs propose a definition of Intensive Behavioral Health Services comprised of 10 discrete *and agreed* behavioral health interventions. In determining class membership, the Court's role will simply be to assess whether or not an otherwise eligible class member has been recommended to receive at least

one of these interventions. This is an objective test.

Second (again), limiting the term Intensive Behavioral Health to behavioral health interventions for which specific billing codes *already* exist in the Louisiana Medicaid program conflates the issues of ascertainability and liability, particularly when, as here, Plaintiffs' case is founded on the core allegation that LDH is failing its statutory duty to provide medically necessary interventions to Medicaid-eligible children. Put differently, defining the term Intensive Behavioral Services according to allegedly *inadequate* services already provided by LDH would render "meaningless" the Medicaid Act's express guarantee that medically necessary behavioral health interventions "must be provided whether or not [they are] covered under the state plan." *S.D. ex rel. Dickson v. Hood*, 391 F.3d at 589 (interpreting 42 U.S.C. §§ 1396d(a) & (r)(5)).

In sum, the Court concludes that Plaintiffs' revised class definition, and their proposed definitions of Intensive Care Coordination, Crisis Services, and Intensive Behavioral Services yield a class comprised solely of four objective criteria: (1) eligibility for a means-tested public health insurance program in Louisiana ("Medicaid-eligible"); (2) age ("youth under the age of 21"); (3) qualifying condition ("diagnosed with a mental health or behavioral disorder"); and (4) recommendation for specific services ("recommended for Intensive Care Coordination, Crisis Services, and Intensive Behavioral Services to correct or ameliorate their disorders"). These criteria may be applied mechanically, without speculation or subjectivity. As such, Plaintiffs' amended class is ascertainable.

B. Remaining Certification Factors: Rules 23(a)(1)–(4) and (b)(2)

As set forth above, the Circuit’s February 13 Judgment and Mandate stopped its analysis at the ascertainability factor, concluding that further proceedings on remand “may impact Defendants’ remaining claims that the district court abused its discretion certifying the class under Rules 23(a)(1)–(4) and (b)(2) and failed to conduct a rigorous analysis.” *A. A. by & through P.A.*, 2023 WL 334010, at *3. In light of the newly amended class definition and ascertainability analysis set forth herein, the Court has also re-visited its prior analysis of Rule 23(a)’s requirements of numerosity, commonality, typicality, and adequacy, and its prior analysis of Rule 23(b)(2)’s requirements for an injunction class. Thankfully, the Court’s prior analysis of these factors is not meaningfully impacted or undermined by today’s ruling. In other words, in this Court’s view, its prior analysis of Rules 23(a)(1)–(4) and (b)(2) is severable and salvageable—even if the original class definition *and* the original ascertainability analysis is scrapped—with the following caveat.

As determined by the Circuit, the original class definition failed to yield an ascertainable class because it employed the term “intensive home-and community-based services/IHCBS” without adequately defining its component parts—*i.e.*, Intensive Care Coordination, Crisis Services, and Intensive Behavioral Services. *A. A. by & through P.A.*, 2023 WL 334010, at *3. The Court has now corrected that error. But the term/acronym “IHCBS” appears throughout the Court’s May 25 Certification Order, and not just in the class definition and ascertainability inquiry. Thus, consistent with the analysis herein, and to iron out any discrepancies, the term “intensive home-and community-based services/IHCBS” as it appears in the Court’s

May 25 Certification Order should *now* be understood to mean Intensive Care Coordination, Crisis Services, and Intensive Behavioral Services, as those terms are defined herein. In all other respects, the Court’s prior analysis of Rules 23(a)(1)–(4) and (b)(2)—set forth at Section IV(B)(ii)-(iv) of the Court’s May 25 Certification Order—is re-adopted, re-affirmed, and incorporated by reference here. (*See* Doc. 78 §§ IV(B)(ii)-(iv)).

C. Rule 23(f)

On a final note, LDH insists that “even if the Court resolves the ascertainability issue,” it nonetheless remains “opposed to class certification for several reasons,” which must also be resolved by the Circuit before this case may proceed. (Doc. 182 at 12). Perhaps, but not necessarily so. The Circuit’s February 13 Judgment and Mandate vacated the May 25 Certification Order and remanded this case for “further proceedings.” (Doc. 149 at 3). The Circuit did not, however, demand that this action be automatically returned pending this Court’s review of Plaintiff’s amended class definition and the ascertainability factor. (*Id.*). As such, for the reasons set forth herein, this case will once again proceed as a class action, and this matter will be referred to the Magistrate Judge for entry of a new scheduling order. (*See* Docs. 128, 150). Should LDH desire further review of this Court’s Amended Certification Order, it must seek appropriate relief under Rule 23(f).

III. CONCLUSION

Accordingly,

IT IS ORDERED that Plaintiffs’ **Motion To Amend Class Definition (Doc. 181)** be and is hereby **GRANTED**.

IT IS FURTHER ORDERED that the Court's May 25, 2021 Class Certification Order (Doc. 78) be and is hereby **AMENDED** to reflect the new class definition and ascertainability analysis set forth herein.

IT IS FURTHER ORDERED that in all other respects, and specifically as to the Court's analysis of Rule 23(a)'s requirements of numerosity, commonality, typicality, and adequacy, and Rule 23(b)(2)'s requirements for an injunction class, the Court's May 25, 2021 Class Certification Order (Doc. 78) be and is hereby **RE-ADOPTED AND RE-AFFIRMED**, as set forth herein.

IT IS FURTHER ORDERED that, for the reasons set forth in the May 25, 2021 Class Certification Order (Doc. 78), as supplemented herein, Plaintiffs' Renewed Motion For Class Certification (Doc. 51) is (again) **GRANTED**.

a. The class is hereby defined as follows:

All Medicaid-eligible youth under the age of 21 in the State of Louisiana who have a mental health or behavioral disorder, and for whom a licensed practitioner of the healing arts recommends Intensive Care Coordination, Crisis Services, and Intensive Behavioral Services to correct or ameliorate their disorders.


b. Named Plaintiffs, by and through their legal representatives, are hereby designated as the class representatives.

c. Plaintiffs' counsel are hereby designated as class counsel.

IT IS FURTHER ORDERED that, pursuant to Rule 23(c)(2)(A), within 30 days of the date of this Order Plaintiffs shall file a motion for approval of their proposed form of class notice and their notice program ("Notice Motion"). If the Notice Motion is opposed by any party, that party shall file a brief in opposition to the Notice Motion not later than 14 days after the filing of the Notice Motion.

IT IS FURTHER ORDERED that this matter be and is hereby **REFERRED** to the Magistrate Judge for entry of a new Scheduling Order.

Baton Rouge, Louisiana, this 30th day of November, 2023



JUDGE BRIAN A. JACKSON
UNITED STATES DISTRICT COURT
MIDDLE DISTRICT OF LOUISIANA