IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF TEXAS
BEAUMONT DIVISION

CHRISTY MCCARTHY, et al.,	§	
	§	
Plaintiffs,	§	
	§	
v.	§	CIVIL ACTION NO: 1:02-CV-600
	§	
DON A. GILBERT, et al.,	§	JUDGE CLARK
	§	
Defendants.	§	

MEMORANDUM AND ORDER

Before the court are (1) "Defendants' Motion to Transfer Venue" [Doc. #13] based upon 28 U.S.C. § 1406(a), and (2) "Defendants' Supplemental Motion to Transfer Venue" [Doc. #22] based upon 28 U.S.C. § 1404(a). These motions are filed by Defendants Don Gilbert, in his official capacity as Commissioner of the Texas Health and Human Services Commission (HHSC), Karen Hale, in her official capacity as Commissioner of the Texas Department of Mental Health and Mental Retardation (TDMHMR), and James R. Hine, in his official capacity as Commissioner of the Texas Department of Human Services (TDHS). Upon review of the motions and responses on file, and for the reasons stated below, the court is of the opinion that the motions should be **GRANTED**.

I. FACTUAL AND PROCEDURAL BACKGROUND

Plaintiffs (eleven individuals and one association) filed their original complaint [Doc. #1] on September 6, 2002, in federal court in the Eastern District of Texas, Beaumont Division. Plaintiffs filed their first amended complaint adding four additional Plaintiffs on October 15, 2002. [Doc. #7]. On November 22, 2002, Defendants filed a motion to transfer venue to the Western District of Texas, Austin Division. [Doc. #13]. All Defendants reside in the Western District; the

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principal office of the Plaintiff association (ARC) and the residences of two individual Plaintiffs are located in the Western District. *See Defs.' Reply to Pls.' Mem. in Opp'n to Defs.' Mot. to Transfer Venue at 3.* [Doc. #21]. Plaintiffs filed a response to the venue transfer motion on December 9, 2002. [Doc. #19]. At the time of Plaintiffs' response, only two of the Plaintiffs resided in the Eastern District; none lived in Beaumont. *See Pls.' Mem. in Opp'n to Defs.' Mot. to Transfer Venue at 2.* [Doc #19]. On December 23, 2002, Plaintiffs filed their second amended complaint adding six more Plaintiffs for a total of twenty-one individuals and one association. [Doc. #27]. The six additional Plaintiffs reside in the Eastern District of Texas, Beaumont Division, and were added for the purpose of "avoiding" venue challenge. *See Pls.' Sur Reply to Defs.' Mot. to Transfer Venue at 3.* [Doc #26]. On March 10, 2003, the court granted the parties' motion to stay all proceedings until the motion to transfer venue was decided. *See Order Granting Joint Mot. to Stay Initial Order Governing Proceedings* [Doc. #40].

Plaintiffs claim that Defendants have failed to provide community-based living options under certain Medicaid waiver programs to persons with mental retardation and developmental disabilities within a reasonable period of time, by placing applicants on waiting lists for over a year. *Plaintiffs' Second Amended Compl. ¶¶ 1-2.* The two Medicaid waiver programs at issue are the Home and Community-based Services (HCS) administered by TDMHMR and the Community Living Assistance and Support Services (CLASS) program administered by TDHS. For those with mental retardation, the HCS program offers community-based options such as living at home, living in a small home-like setting, or living independently, and enables those individuals to avoid nursing homes and other institutional settings. *Pls.' Second Am. Compl. ¶ 1.* The CLASS program provides the same options, except that it is designed for those with developmental disabilities other than mental retardation. *Pls.' Second Am. Compl. ¶ 1.*

To apply for the HCS program, an individual submits a written request to the local mental retardation authority (MRA). The local MRA then does the following:[1]

(1) Registers the applicant on the local MRA's waiting list;
(2) Notifies the applicant of a vacancy, after TDMHMR notifies local MRA of a vacancy in the program;
(3) Informs applicant of their right to choose a waiver program (MRLA) or ICF/MR (Intermediate Care Facilities for the Mentally Retarded);
(4) Provides applicant and family an explanation of services;
(5) Documents the choice of services of the applicant;
(6) If applicant chooses the HCS program, assigns a service coordinator to develop a person-directed plan and conducts several activities associates with that;
(7) Processes the applicant's request for enrollment (including obtaining a financial eligibility determination, completing an MR/MC Assessment, administering the ICAP and recommending a Level of Need, developing the proposed IPC (Plan of Services) and informing applicant of all providers in the area;
(8) Submits enrollment information to TDMHMR for its approval or denial; and
(9) Once TDMR approves enrollment, local MRA provides the selected program provider with all relevant documentation.

Any individual whose request for HCS eligibility is denied or is not acted upon with reasonable promptness is entitled to a fair hearing. 25 TAC § 409.505(d). A request for fair hearing must be submitted to the TDMHMR Office of Medicaid Administration. *Id.*

The application process for the CLASS program is as follows:

(1) An individual must contact TDHS/CLASS through a toll-free line. *See Aff. of Tommy Ford at 2.*
(2) The interest list for the CLASS program is maintained at TDHS state office in Austin. *Id.*
(3) Local TDHS offices must contact the state office for information or refer inquiries related to the CLASS interest program to the state office. The CLASS program is not part of TDHS regional or local operations. *Id.*
(4) When a vacancy becomes available, TDHS in Austin contacts the applicant and asks the applicant to select a CLASS direct services agency and a CLASS case management provider agency to complete the eligibility determination process. *Id.*
(5) When applicant returns the selection of provider agencies to TDHS in Austin, TDHS notifies those agencies and instructs them to initiate contact with the applicant. *Id.*
(6) The provider agencies perform assessments related to eligibility and level-of-care, then submits those assessment to TDHS in Austin, where the final eligibility determination is made. *Id.*

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[1] *See* 25 TAC §§ 409.523, 409.525; *see also Defs.' Response to Pls.' Sur Reply to Defs.' Mot. to Transfer Venue at 4.* [Doc. #30].

Defendants seek to transfer for improper venue on the grounds that a "substantial part of the events giving rise to [Plaintiffs'] claims" did not occur in the Eastern District. 28 U.S.C. § 1391(b)(2).[2] In addition, Defendants assert that the "substantial part of the events" occurred in the Western District. *Id.* On the other hand, Plaintiffs argue that a substantial part of the events giving rise to their claims occurred in the Eastern District. *Id.*

II. DISCUSSION

A. *Is Venue Proper in the Eastern District of Texas?*

Venue is clearly proper in the Western District. Defendants reside there and the decisions to place Plaintiffs on waiting lists, which are the events Plaintiffs complain of, were made in Austin.

However, "[t]he analysis of whether or not venue is proper in a judicial district based upon the occurrence of a 'substantial part of the events or omissions' does not require the Court to decide if the [Eastern] District of Texas is the best venue for a plaintiff's lawsuit." *Bigham v. Envirocare of Utah, Inc.*, 123 F. Supp. 2d 1046, 1048 (S.D. Tex. 2000). "Often, a lawsuit may allow for proper venue in more than one judicial district." *Id.* "[A] court must ask 'whether the district the plaintiff chose had a substantial connection to the claim, whether or not other forums had greater contacts." *Id.* at 1049 (citing *Setco Enters. Corp. v. Robbins*, 19 F.3d 1278, 1281 (8th Cir. 1994)).

Once defendants raise the issue of proper venue, plaintiffs bear the burden of proof to sustain venue. *Id.* at 1047. "The court should accept uncontroverted facts contained in plaintiff's pleadings as true and resolve conflicts in the parties' affidavits in the plaintiff's favor." *Id.*

"In determining whether or not venue is proper, the Court looks to the defendant's conduct,

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[2] "A civil action wherein jurisdiction is not founded solely on diversity of citizenship may, except as otherwise provided by law, be brought only in (1) a judicial district where any defendant resides, if all defendants reside in the same State, (2) a judicial district in which a substantial part of the events or omissions giving rise to the claim occurred, or a substantial part of property that is the subject of the action is situated, or (3) a judicial district in which any defendant may be found, if there is no district in which the action may otherwise be brought." 28 U.S.C. § 1391(b).

and where that conduct took place." *Id.* (citing *Woodke v. Dahm,* 70 F.3d 983, 985-986 (8th Cir. 1995). "Actions taken by a plaintiff do not support venue." *Id.* "Moreover, the fact that a plaintiff residing in a given judicial district feels the effects of a defendant's conduct in that district does not mean that the events or omissions occurred in that district." *Id.* "Only the events that directly give rise to a claim are relevant." *Jenkins Brick Co. v. Bremer*, No. 01-16305 D.C., 2003 WL 367924, at *3 (11th Cir. Feb. 21, 2003). The only relevant events are those that have a "close nexus with the cause of action." *Id.* at *4. "And of the places where the [relevant] events have taken place, only those locations hosting a "substantial part" of the events are to be considered." *Id.* at *3.

In *Bingham,* 123 F. Supp. 2d at 1049, the district court held that venue was proper in the Southern District of Texas for Racketeer Influenced and Corrupt Organizations Act (RICO) and common law claims brought by plaintiffs, because plaintiffs were able to show that "substantial" events occurred there. Plaintiffs recited several instances where defendants personally, or through an agent, approached persons located in the Southern District, and spread misinformation about and harassed the plaintiffs and third parties. *Id.* at 1048. Even though an overwhelming majority of the alleged wrongful actions of the defendants occurred outside of the Southern District, the court found that the events noted above were substantial enough to support proper venue. *Id. at 1049.* The court rejected plaintiffs' proof of damaging effects on plaintiff and his reputation by defendants' conduct, because the "place where effects are felt is not in and of itself a proper venue." *Id.* at 1049, n.2.

In the case at bar, Plaintiffs contend that a substantial part of the events giving rise to their claims occurred here. Specifically, Plaintiffs assert that the following events occurred in the Eastern District:

(1) Plaintiffs applied at their local Texas Medicaid office for a Medicaid waiver. *Pls.' Mem. in Opp'n to Defs.' Mot. to Transfer Venue at 3.* [Doc. #19].
(2) The local Texas Medicaid official took their applications. *Id.*

(3) The local Texas Medicaid official placed them on a waiting list. *Id.*
(4) Two of the Plaintiffs, Allison Pratt and Sam Lindsay have experienced, and continue to experience, unlawful denials of medically necessary services by Defendants. *Id.* at 8.
(5) "While on these waiting lists, some for many years, Plaintiffs have been denied Medicaid services for which they are eligible and have been denied services in the most integrated setting appropriate to their needs." *Id.*
(6) Waiting years on the lists takes a "tremendous toll" and "increased the risks of regression and an institutional placement." *Aff. of Paula Pratt at ¶ 5.*
(7) Waiting lists that do not move have caused "tremendous hardships" and "devastating effects." *See Aff. of Mike Bright at ¶¶ 3, 6.*

The court finds that the above acts occurring in the Eastern District, taken alone or together, do not constitute a substantial part of the events giving rise to Plaintiffs' claim. Plaintiffs' claim is that, by placing Plaintiffs residing in the Eastern District on waiting lists for HCS and CLASS services for over a year, Defendants have failed to provide community-based living options to the applicants. *Pls.' Mem. in Opp'n to Defs.' Mot. to Transfer Venue at 2.* [Doc. #19]. As the *Bigham* court determined, the defendants' conduct and where that conduct took place are the factors to be considered. Defendants' decisions, which allegedly caused applicants to be placed on waiting lists for over a year, did not occur in the Eastern District. Plaintiffs themselves admit that those "decisions are made in Austin." *See Aff. of Mike Bright at ¶ 6.*

Plaintiffs actions, namely, applying for Medicaid waivers at their local Medicaid office, do not support venue; only the Defendants' actions do. The second and third events, the placement on the waiting lists by local Medicaid officials, do not give rise to Plaintiffs' claim because they are not themselves wrongful, and Plaintiffs do not argue that local authorities are wrongly applying the State's policies. *See Woodke v. Dahm,* 70 F.3d at 986 (noting that manufacture of semi-trailers in plaintiff's state of Iowa was insufficient to support venue in suit claiming defendant in another state was passing off trailers under an identical trademark, where manufacturing is not itself wrongful). Events four, five, six and seven all describe the *effects* of Defendants' alleged conduct of causing Plaintiffs to be placed on waiting lists for over a year.

The cases Plaintiffs cite are distinguishable on the facts. In *McNiece v. Jindal*, 1997 WL 767665 (E.D. La. 1997), a plaintiff was ejected from a nursing home in the district in which suit was filed. That was the event giving rise to the claim. In *Andrade v. Chojnacki,* 934 F. Supp. 817 (S.D. Tex. 1996), the attack on the Branch Davidian compound, the event that gave rise to the complaint, occurred in the Western District to which the suit was transferred. Any planning for the attack in Houston was not the basis for the complaint. In the present case, the only events giving rise to Plaintiffs' claim are the decisions made in Austin to place Plaintiffs on a waiting list.

Agreeing with the *Bigham* court's interpretation of 28 U.S.C. 1391(b)(2), this court finds that the fact that Plaintiffs are experiencing alleged adverse effects in the Eastern District from Defendants' conduct does not mean that the events or omissions occurred here. Those events, which describe the effects of Plaintiffs not receiving specific services, do not directly give rise to the cause of action. Plaintiffs themselves assert that "[t]his case is not about whether any specific individual can obtain a specific service, but about whether the mandates of federal law are met." *Aff. of Mike Bright at ¶ 5.*

For their part, Defendants assert facts showing that the decisions about how the mandates of federal law are met, with regard to the HCS and CLASS waiver programs, are made in the Western District of Texas, specifically in Austin. As noted above, Plaintiffs agree with this proposition. In short, it is undisputed that the events giving rise to Plaintiffs claims (the decisions to place Plaintiffs on waiting lists) occurred in Austin, in the Western District of Texas.

Accordingly, the court finds that venue is not proper in the Eastern District under 28 U.S.C. § 1391, and is proper in the Western District. In the interest of justice, the case should be transferred to the Western District pursuant to 28 U.S.C. § 1406(a).

B. *Convenience Factors*

Assuming, *arguendo*, that venue is proper in the Eastern District, which it is not, the court

finds that transfer to the Western District would be warranted under 28 U.S.C. § 1404(a). That Section provides that "[f]or the convenience of parties and witnesses, in the interest of justice, a district court may transfer any civil action to any other district or division where it might have been brought." Under this statute, the party seeking the transfer of venue bears the burden of demonstrating that the Court should, in its sound discretion, transfer the action. *Bingham,* 123 F. Supp. 2d at 1049 (citing *Time, Inc. v. Manning,* 366 F.2d 690, 698 (5th Cir. 1966)). The factors a court may consider for a Section 1404(a) transfer include: (1) plaintiff's choice of forum; (2) the convenience of parties and witnesses; (3) the place of the alleged wrong; (4) the location of counsel; and (5) the cost of obtaining the attendance of witnesses. *See* 17 JAMES WM. MOORE ET AL., MOORE'S FEDERAL PRACTICE §§ 111.13, *et seq.* (3d ed. 1997); *see also Robertson v. Kiamichi R.R. Co.,* 42 F. Supp. 2d 651, 655 (E.D. Tex. 1999).

1. *Plaintiff's Choice of Forum*

Ordinarily, Plaintiffs' choice of forum in the Eastern District of Texas' Beaumont Division would be given significant weight. *Robertson,* 42 F. Supp. 2d at 655. However, where other factors weigh substantially in favor of transfer, the Plaintiffs' choice of forum may be of minimal consequence. *Id.* at 656. On one hand, Plaintiffs claim that because many of the named Plaintiffs reside in the Eastern District, this venue is more convenient. On the other hand, Plaintiffs claim that they seek to represent a class whose members are spread throughout the state of Texas. (Austin is more centrally located for a statewide class, for whom travel to Beaumont would not be convenient). *See Pls.' Mem. in Opp'n to Defs.' Mot. to Transfer Venue at 8.* This duplicitous argument significantly reduces the weight given to Plaintiffs' forum choice.

2. *Convenience of Parties and Witnesses*

As to the convenience of parties and witnesses, the court looks to the locations of the parties. *Robertson,* 42 F. Supp. 2d at 657 (finding that "the logical starting point for analyzing convenience

is to consider the parties' residences). It is undisputed that the Western District is where all Defendants, the principal office of Plaintiff association, ARC (which has over 3700 member families), and two individual Plaintiffs reside. *Id.* at 2. Plaintiffs claim – without stating any supporting facts – that a "majority of the named plaintiffs reside in this district." *Pls.' Sur Reply to Defs.' Mot. to Transfer Venue at 3.* After review of the pleadings, the court finds to the contrary. Of the named Plaintiffs, eight reside in the Eastern District, seven reside in the Southern District, three, including ARC, reside in the Western District, and one resides in the Northern District. *See Pls.' Second Am. Compl. ¶ 17.* For three of the named Plaintiffs, no addresses are given. *Id. at ¶¶ 17(l) - (n).* Under the circumstances of the case at bar, even if a majority of the named plaintiffs resided in this district, the court would find the Western District's Austin Division to be more convenient for the parties, because Austin is more centrally located than Beaumont, and the class which Plaintiffs seek to represent can be found all over Texas. *See Mohamed v. Mazda Motor Corp.*, 90 F. Supp. 2d 757, 775 (E.D. Tex. 2000)(citing 15 CHARLES ALAN WRIGHT & ARTHUR R. MILLER, FEDERAL PRACTICE AND PROCEDURE § 3851, at 424-425 (2d ed. 1986)("noting that courts have uniformly 'refused to let applications for transfer become a 'battle of numbers.'")).

3. *Place of the Alleged Wrong*

As the court has determined, *supra,* the place of the alleged wrong is in the Western District's Austin Division. The alleged wrong asserted by Plaintiffs is that Defendants' policies and programs have caused Plaintiffs to remain on waiting lists for over a year. The decisions regarding Plaintiffs' eligibility for the programs at issue, as well as the waiting lists, are made in Austin. *Defs.' Reply to Pls.' Mem. in Opp'n to Defs.' Mot. to Transfer Venue at 3.* The policies and programs for HHSC, TDMHMR, and TDHS, of which Plaintiffs complain, are developed by staff located at agency headquarters and administrative offices in Austin. *Defs.' Mot. to Transfer Venue at 2.* Thus, the

place of the alleged wrong supports transfer to the Western District's Austin Division.

4. *Location of Counsel*

"The location of counsel, while a factor in deciding whether to transfer, is given little weight as compared to other convenience factors." *Robertson,* 42 F. Supp. 2d. at 658. "Nevertheless, this Court may consider the location of counsel in deciding whether to transfer a case for convenience and justice under Section 1404(a)." *Mohamed,* 90 F. Supp. 2d at 777. The Plaintiffs list Geoffrey N. Courtney of Austin, Texas as Attorney-In-Charge and Garth A. Corbett of Advocacy, Inc. in Austin, Texas as co-counsel. Defendants list Nancy K. Juren, Assistant Attorney General of the Attorney General's Office in Austin, Texas, as their attorney. The fact that all attorneys for all parties are located in Austin is a point in favor of transfer to the Western Districts' Austin Division.

5. *The Cost of Obtaining the Attendance of Witnesses*

The Supreme Court has recognized that the purpose of Section 1404(a) is to "prevent the waste 'of time, energy and money' and to 'protect litigants, witnesses and the public against unnecessary inconvenience and expense.'" *Van Dusen v. Barrack,* 376 U.S. 612, 616 (1964). Congress has emphasized the importance of administering the federal court in an efficient manner, so as to avoid undue delay and expense. 28 U.S.C. §§ 471, *et seq.*; *see also* Judicial Improvements Act of 1990, Pub. L. 101-650, § 102, 104 Stat. 5089 (1990)(Congressional Statement of Findings). The very first rule of procedure requires that the rules be construed "to secure the just, speedy and inexpensive determination of every action." FED. R. CIV. P. 1.

As Defendants have pointed out, cost is a concern not only for the parties and their witnesses, but for the Texas state taxpayers, as well. *See Defs.' Mot. to Transfer Venue at 3.* The policies and programs for HHSC, TDMHMR, and TDHS, of which Plaintiffs complain, are developed by staff located at agency headquarters and administrative offices in Austin. *Defs.' Mot. to Transfer Venue*

at 2. The underlying records are at those Austin offices. Maintaining the instant case in the Eastern Districts' Beaumont Division would require a five hour drive from Austin for witnesses, records, and attorneys on both sides for every hearing. What might amount to a total of one hour's time for witnesses and attorneys to attend a hearing in federal court in Austin, would be at least a ten hour ordeal if venue were in Beaumont. In addition, the only requested relief for monetary damages is Plaintiffs' attorneys' fees; every trip to Beaumont by Plaintiffs' attorneys would only serve to add a minimum of ten hours to those fees – not to relief for Plaintiffs. Thus, this factor favors transfer to the Western District's Austin Division.

III. CONCLUSION

The court finds that venue is not proper in the Eastern District under 28 U.S.C. § 1391, and is proper in the Western District. In the interest of justice, the case should be transferred to the Western District pursuant to 28 U.S.C. § 1406(a).

Alternatively, the court finds that transfer to the Western District would also be warranted under 28 U.S.C. § 1404(a).

It is therefore **ORDERED** that (1) Defendants' Motion to Transfer Venue [Doc. #13], and (2) Defendants' Supplemental Motion to Transfer Venue [Doc. #22] are **GRANTED** and that this case, *McCarthy, et al. v. Gilbert, et al.*, Cause No. 1:02-CV-600, is hereby transferred to the United States District Court for the Western District of Texas, Austin Division.

SIGNED March 17, 2003.

Ron Clark
United States District Court Judge