

Department of Health and Human Services

DEPARTMENTAL APPEALS BOARD

Civil Remedies Division

In the Case of:)	
Homelife Nursing, Inc.,)	DATE: March 26, 1996
Petitioner,)	
- v. -)	Docket No. C-94-382
Health Care Financing)	Decision No. CR417
Administration.)	

DECISION

Homelife Nursing, Inc. (Petitioner), a provider of home health agency services, requested a hearing to challenge the determination by the Health Care Financing Administration (HCFA) that its office located in Riverside, California (Riverside Office), be certified for Medicare purposes as a subunit of the parent office located in Lake Forest, California (Lake Forest Office), instead of as a branch of the Lake Forest Office.¹ The case was assigned to me for hearing and decision.

HCFA filed a motion to dismiss the appeal on the grounds that neither the governing statute nor its implementing regulations confer jurisdiction on an administrative law judge to hear Petitioner's appeal. The parties filed briefs on this issue, and, on February 1, 1995, I issued a ruling denying HCFA's motion to dismiss Petitioner's hearing request. I concluded that HCFA's determination to certify Petitioner's Riverside Office as a subunit of the Lake Forest Office rather than as a branch of the Lake Forest Office is a reviewable initial determination, within the meaning of 42 C.F.R. § 498.3(b)(1).²

¹ The difference between a subunit and a branch are set forth in Part IA of the Analysis.

² I incorporate the rationale of this ruling in this decision.

I held a hearing in San Francisco, California, on June 6, 1995 through June 8, 1995. Subsequent to the hearing, Petitioner offered four additional exhibits (P. Ex. 34 - 37) into evidence. HCFA offered an additional exhibit (HCFA Ex. 14) into evidence. HCFA objected to P. Ex. 36, and Petitioner withdrew this exhibit. In letters dated July 31, 1995 and August 11, 1995, I notified the parties that I admitted P. Ex. 34, P. Ex. 35, P. Ex. 37, and HCFA Ex. 14 into evidence. In addition, the parties submitted posthearing briefs, response briefs, and reply briefs.

I have considered the evidence, the applicable law, and the parties' arguments. I conclude that HCFA's determination to certify Petitioner's Riverside Office as a subunit of the Lake Forest Office, rather than a branch of the Lake Forest Office, is supported by the facts in evidence and the applicable law.

FINDINGS OF FACT AND CONCLUSIONS OF LAW (FFCL)

1. At all times relevant to this case, Petitioner was a home health agency whose parent office was located in Lake Forest, California. HCFA's Proposed Findings of Fact and Conclusions of Law at 1; Petitioner's Posthearing Response Brief at 1.
2. In October of 1991, Petitioner submitted an application packet to the San Bernardino District Office of Licensing and Certification of the California Department of Health Services (DHS). The application packet included a form in which Petitioner requested that its Riverside Office be licensed by the State of California as a branch of the Lake Forest Office. The completed application packet also included a form in which Petitioner requested that the Riverside Office be certified in the Medicare program. P. Ex. 11; Transcript [Tr.] at 394 - 395.
3. The State of California licenses facilities as either a parent or branch. The State of California does not recognize the category of subunit for home health agency licensing purposes. Tr. at 76.
4. DHS surveyed the Riverside Office and declined to license it as a branch of the Lake Forest Office. Instead, on March 24, 1992, DHS licensed the Riverside Office as a parent office. HCFA Ex. 10; P. Ex. 17; Tr. at 161.

5. In a letter to HCFA's Survey and Certification Operations Branch dated May 5, 1992, Petitioner requested that its Riverside Office be designated as a branch of the Lake Forest Office for purposes of Medicare certification. P. Ex. 17; Tr. at 649.

6. HCFA contracts with DHS to survey home health agencies and to make recommendations on Medicare certification. HCFA makes the final determination on whether a home health agency is eligible to participate in the Medicare program, including whether that facility should be certified as a subunit or branch. 42 C.F.R. §§ 488.10, 488.24, and 489.10.

7. In June of 1992, DHS, acting as an agent for HCFA, surveyed Petitioner's Riverside Office for Medicare certification purposes. Tr. at 84.

8. Based on the survey results, DHS determined that it would recommend to HCFA that it certify for Medicare purposes the Riverside Office as a subunit of the Lake Forest Office. Tr. at 100 - 103.

9. By letter dated July 30, 1992, HCFA notified the Riverside Office that, effective June 24, 1992, HCFA had accepted the agreement of the Riverside Office to participate as a home health agency in the Medicare program. HCFA Ex. 1.

10. HCFA's July 30, 1992 letter assigned the Riverside Office a provider number (55-7199). The issuance of a new provider number to the Riverside Office meant that HCFA designated the Riverside Office as a subunit rather than a branch. HCFA Ex. 1; Tr. at 655.

11. After being certified by Medicare as a subunit, Petitioner contacted HCFA by telephone to request certification as a branch rather than a subunit. Tr. at 302, 315.

12. On September 25, 1992, Petitioner requested in writing that HCFA certify its Riverside Office as a branch rather than a subunit. P. Ex. 2.

13. On November 4, 1992, HCFA denied Petitioner's request to change certification of the Riverside Office from a subunit to a branch. HCFA Ex. 3.

14. On February 12, 1993, Petitioner again asked HCFA to redesignate the Riverside Office as a branch. P. Ex. 4.

15. On May 5, 1993, HCFA again denied Petitioner's request to certify the Riverside Office as a branch instead of as a subunit. HCFA Ex. 5.
16. On January 19, 1994, Petitioner again sought to persuade HCFA to change the designation of the Riverside Office to a branch. P. Ex. 8.
17. On May 13, 1994, HCFA responded to this request by reaffirming its determination to certify the Riverside Office as a subunit rather than a branch. P. Ex. 9.
18. Regulations governing the certification of home health agencies define the distinctions between a branch and a subunit of a parent home health agency. 42 C.F.R. § 484.2.
19. A branch office means a location or site from which a home health agency provides services within a portion of the total geographic area served by the parent agency. The branch office is part of the home health agency and is located sufficiently close to share administration, supervision, and services in a manner that renders it unnecessary for the branch independently to meet the conditions of participation as a home health agency. 42 C.F.R. § 484.2.
20. A subunit means a semi-autonomous organization that -- (1) serves patients in a geographic area different from that of the parent agency; and (2) must independently meet the conditions of participation for home health agencies because it is too far from the parent agency to share administration, supervision, and services on a daily basis. 42 C.F.R. § 484.2.
21. In order for a nonparent office to qualify to be certified as a branch, the regulatory standard for the frequency of sharing of administration, supervision, and services is that the parent and nonparent office must be capable of sharing these functions on a daily basis. 42 C.F.R. § 484.2.
22. Distance in terms of both mileage and travel time are appropriate factors to be considered in determining whether to designate a nonparent office as a branch or a subunit. 42 C.F.R. § 484.2.
23. Depending on the route, the driving distance between the Lake Forest Office and the Riverside Office is between 44.3 miles and 49.6 miles. P. Ex. 37; HCFA Ex. 14.

24. Depending on traffic conditions and the time of day that the trip occurs, the driving time between the Lake Forest Office and the Riverside Office can take between 40 minutes and two and one-half hours. Tr. at 88, 153, 403, 565; P. Ex. 37; HCFA Ex. 14.

25. The geographic area of the patients served out of Petitioner's Riverside Office included the communities of Chino, Fontana, Rialto, San Bernardino, Redlands, Lake Arrowhead, and Big Bear City. Tr. at 89, 167.

26. Driving time from Lake Forest to locations in Chino can take between 51 minutes during off-peak travel hours and as long as one and one-half to two hours in heavy traffic. P. Ex. 34; Tr. at 93.

27. Driving time from Lake Forest to locations in Fontana, Rialto, San Bernardino, and Redlands can take between 65 and 77 minutes during off-peak travel times and as long as one and one-half to two and one-half hours in heavy traffic. P. Ex. 34; Tr. at 93 - 94.

28. Driving time from Lake Forest to locations in Lake Arrowhead can take one hour and 48 minutes during off-peak travel hours and as long as three to three and one-half hours in heavy traffic or under adverse weather conditions. P. Ex. 34; Tr. at 95 - 96.

29. Driving time from Lake Forest to locations in Big Bear City can take two hours and 20 minutes during off-peak travel hours and as long as four hours, or more, in traffic or under adverse weather conditions. P. Ex. 34; Tr. at 96 - 97.

30. Given the distance between the Lake Forest Office and the Riverside Office and the wide disbursement of home health care patients residing in the Riverside geographical service area, it is necessary to have personnel having the capability on a daily basis to be responsible for supervising the nurses, home health aides, and other staff, and overseeing their training, scheduling, performance, and other necessary functions for the provision of home health care services, to be located on-site in the Riverside Office. Such capability would be seriously eroded if the Riverside Office was designated as a branch of the Lake Forest Office. FFCL 23 - 29; Tr. at 114 - 121, 195 - 197, 207 - 208.

31. Given the distances between the Lake Forest Office and the Riverside Office and that at times home health care patients living in the remote areas of the Riverside geographical area may require supervisory, emergent, or

after hour services, designation of the Riverside Office as a branch, rather than a subunit, would result in the possible deterioration of services for such patients, adversely impacting on their health and safety. FFCL 23 - 30.

32. Petitioner's Riverside Office provided services to patients located in a geographic area different from that of the Lake Forest Office. FFCL 23 - 31.

33. The Riverside Office must meet the conditions of participation for home health agencies independently because it is too far from the parent agency to share administration, supervision, and services on a daily basis. FFCL 23 - 32.

34. The predecisional deliberations and thought processes of the State's and HCFA's decisionmakers are not relevant to my decision in this case.

35. Petitioner's Riverside Office is a subunit, within the meaning of 42 C.F.R. § 484.2.

ANALYSIS

At the time relevant to this proceeding, Petitioner was a home health agency whose parent office was located in Lake Forest, California. In October of 1991, Petitioner requested that its office in Riverside, California, be licensed by the State of California to provide home health services as a branch of the parent in Lake Forest. Petitioner requested also that its office in Riverside be certified as a Medicare provider of home health services. FFCL 1 - 2.

Surveyors from DHS surveyed Petitioner's Riverside Office to determine whether the Riverside Office met the State requirements for licensing. P. Ex. 17. The State of California licenses facilities as either a parent or branch. It does not recognize the category of subunit for home health agency licensing purposes. FFCL 3. DHS declined to license the Riverside Office as a branch of the Lake Forest Office. Instead, on March 24, 1992, DHS licensed the Riverside Office as a parent home health agency. FFCL 4.

In June of 1992, DHS, acting as an agent for HCFA, surveyed Petitioner's Riverside Office for Medicare certification purposes. FFCL 7. Based on the survey results, DHS determined that it would recommend to HCFA

to certify the Riverside Office as a subunit of the Lake Forest parent. FFCL 8.

By letter dated July 30, 1992, HCFA notified the Riverside Office that, effective June 24, 1992, it had accepted the agreement of the Riverside Office to participate as a home health agency in the Medicare program. FFCL 9. In that letter, HCFA assigned the Riverside Office a provider number different from the number already assigned to the Lake Forest Office. The issuance of a new provider number meant that HCFA designated the Riverside Office as a subunit rather than a branch. FFCL 10.

On three separate subsequent occasions, Petitioner requested in writing that HCFA reconsider its prior determination and certify its Riverside Office as a branch rather than a subunit. On all three occasions, HCFA denied Petitioner's request. FFCL 12 - 17.

Petitioner appealed HCFA's determination, and the case was assigned to me. The issue before me is whether Petitioner's Riverside Office qualifies, for Medicare purposes as a home health provider, to be certified as a branch of Petitioner's Lake Forest Office rather than as a subunit of the Lake Forest Office. In resolving this issue, the relevant time frame will be the period from the date of State licensure on March 24, 1992 through the date of notice of Medicare certification on July 30, 1992. Tr. at 52 - 60.

Petitioner contends that its Riverside Office qualified for certification as a branch of the parent in Lake Forest. I disagree.

- I. HCFA's determination that Petitioner's Riverside Office should be certified as a subunit of the Lake Forest parent, rather than a branch, is supported by the facts and the applicable law.
 - A. The implementing regulations define the terms branch and subunit.

Part A of the Medicare statute, at Title XVIII of the Social Security Act (Act), provides reimbursement for specified health care services to the elderly and disabled, including home health services. Part A services are furnished by "providers of services," and a home health agency, or other eligible entity, may participate in the Medicare program by entering into a provider agreement with the Secretary of the United

States Department of Health and Human Services (the Secretary). 42 U.S.C. §§ 1395x(u), 1395cc.

The Act defines a "home health agency" as a public agency or private organization, or a subdivision of such an agency or organization which, inter alia, "is primarily engaged in providing skilled nursing services and other therapeutic services." 42 U.S.C. § 1395x(o)(1). A home health agency must meet the conditions of participation specified in 42 U.S.C. § 1395bbb(a) and such other requirements as the Secretary may find necessary in the interest of the health and safety of individuals who are furnished services by the home health agency. See 42 U.S.C. § 1395x(o)(6).

The regulations implementing the requirements of sections 1395x(o) and 1395bbb(a) are set out at 42 C.F.R. Part 484. These implementing regulations define the distinctions between a branch and a subunit of a parent home health agency.

The regulations state that a "branch office" means:

a location or site from which a home health agency provides services within a portion of the total geographic area served by the parent agency. The branch office is part of the home health agency and is located sufficiently close to share administration, supervision, and services in a manner that renders it unnecessary for the branch independently to meet the condition of participation as a home health agency.

42 C.F.R. § 484.2. This same section states that a "subunit" means:

a semi-autonomous organization that -- (1) Serves patients in a geographic area different from that of the parent agency; and (2) Must independently meet the conditions of participation for [home health agencies] because it is too far from the parent agency to share administration, supervision, and services on a daily basis.

The resolution of the dispute over whether the Riverside Office should be designated as a branch or a subunit turns on the regulatory definition of these terms. In interpreting the regulations, it is instructive to consider the purpose for the distinction between branch and subunit.

The regulations at 42 C.F.R. Part 484 implement the requirements of the Act and "also sets forth the additional requirements considered necessary to ensure the health and safety of patients." 42 C.F.R. § 484.1. Thus, the purpose for the regulatory distinction between branch and subunit home health agencies is to ensure the health and safety of patients served by the entities.³

The regulations permit parent home health agencies to have branch offices, which are not required to separately meet the conditions of participation for home health agencies, where such branch offices are sufficiently close to the parent so that they share administration, supervision, and services with the parent. On the other hand, the regulations provide that where a home health agency is functioning as a semi-autonomous organization which (1) serves patients in a geographic area different from that of the parent agency, and (2) is too far from the parent agency to share administration, supervision, and services on a daily basis, that office must independently meet the Medicare conditions of participation for home health agencies and be certified to provide Medicare services as a subunit rather than as a branch. This requirement for independent certification is the manner in which HCFA ensures that Medicare beneficiaries will receive adequately supervised and timely services without having to rely on a distant parent which is incapable of sharing administration, supervision, and services.

The regulations contemplate that, in making the determination as to whether a nonparent office qualifies to be certified as a branch or a subunit of a parent office, the factfinder's overriding consideration is ensuring the health and safety of the patients served by the nonparent office seeking certification.

³ At the outset of the in-person hearing, Petitioner indicated that its primary reason for seeking a branch designation for the Riverside Office was financial. However, Petitioner agreed that I need not inquire into such motivation as my focus is whether such designation would impose an adverse impact on patient care and contravene the regulatory definitions for providers of home health care services. Tr. at 20 - 21.

B. The Riverside Office was too far from the Lake Forest parent to share administration, supervision, and services on a daily basis.

1. The regulations provide a standard for frequency of sharing.

Petitioner argues that there is no requirement that there be evidence of daily sharing of administration, supervision, and services with the parent office in order for an office to qualify to be designated as a branch. In support of this argument, Petitioner points out that the regulatory definition of a branch requires that the branch be "sufficiently close to share administration, supervision, and services," but that the definition does not refer to the frequency of sharing. Petitioner's Posthearing Brief at 16 - 17. HCFA disagrees, stating that it "would make no logical sense" to say that branches do not have to furnish adequate supervision and services "each and every day of their operation." HCFA's Posthearing Response Brief at 4.

It is true that the term "daily" does not specifically appear in the regulatory definition of a branch. The term "daily" does, however, appear in the regulatory definition of a subunit. Reading the regulatory definitions of branch and subunit together, I conclude that nonparent offices, whether they be branches or subunits, must provide adequate administration, supervision, and services on a daily basis. In the case of a subunit, the regulations are intended to ensure that adequate administration, supervision, and services will be provided daily independently of the parent. In the case of a branch, the regulations are intended to ensure that adequate administration, supervision, and services will be provided daily on a shared basis with the parent.

I conclude that, in order for a nonparent office to qualify to be certified as a branch, the regulatory standard for the frequency of sharing of administration, supervision, and services is that the parent and branch must be capable of sharing these functions daily so that there would not be a deterioration of the provision of such functions on a daily basis. If it is not possible for this daily sharing to occur so that such functions could not be provided on any given day by the parent office, then it is necessary that the office be certified independently as a subunit. Since the branch is not required to independently meet the conditions of participation as a home health agency, it is incumbent for the protection of the health and safety of home health care patients that the parent be capable of

sharing such services with the branch on a daily basis. If the parent office is not capable of sharing such functions on a daily basis, then HCFA would have to ensure that the nonparent office independently meets the conditions of participation. In such circumstances, the nonparent office would properly be certified as a subunit rather than a branch.

2. Mileage and time are appropriate factors to consider on a case-by-case basis.

Petitioner argues also that mileage and time are not appropriate factors to consider in determining whether a nonparent office should be designated a branch or a subunit. In support of this assertion, Petitioner cites a 1989 memorandum from the Director of the Office of Survey and Certification, at HCFA, to an Associate Regional Administrator, which states:

Because circumstances vary widely between regions and between States within regions, it is not appropriate to set a criterion such as mileage or time for purposes of determining whether or not the parent [home health agency] is operating a branch or subunit. Further, there is no authority within the statute or regulations to make aggregate determinations based on an operational standard or regional definition.

P. Ex. 29 (emphasis added).

I do not agree that the 1989 memorandum supports Petitioner's contention that mileage and time are not appropriate factors to be considered. I find that what is intended by the 1989 memorandum's prohibition against any "set criterion" such as mileage or time for purposes of determining whether an office is a branch or subunit is that it is not appropriate for HCFA to promulgate any specific mileage or time criteria to be applied in every case, either regionally or nationally. This conclusion is consistent with testimony of HCFA's witnesses. Audrey Blue, a DHS surveyor who surveyed the Riverside Office, and Captain Donna Dymon, a career commissioned officer of the United States Public Health Service who works as a nurse consultant for HCFA and who testified as HCFA's expert witness, stated that HCFA has not established specific mileage or time guidelines that apply across-the-board in determining whether a nonparent office should be designated a subunit rather than a branch. Tr. at 83, 215.

Rather than setting specific mileage and travel time requirements for determining whether an office is a subunit or a branch, the 1989 memorandum instructs that:

[t]he determination of whether [a home health agency] is operating a 'branch' or a 'subunit' must be made on an individual, case-by-case basis using the definitions contained in the Medicare [home health agency] regulations . . .

P. Ex. 29. Indeed, the regulatory definitions explicitly use the terms "sufficiently close" and "too far." They refer also to the geographic service areas of the parent and nonparent offices. This language relates to distance, and I interpret the regulations to mean that distance in terms of both mileage and time are factors to be considered in determining whether to designate a nonparent office as a branch or a subunit. While HCFA does not set specific mileage or time requirements defining what is considered "sufficiently close" and "too far" or defining the size of a geographic service area, I conclude that the regulations and the 1989 memorandum contemplate that these are appropriate factors to be considered under the circumstances of a particular case. The regulations and the 1989 memorandum provide a framework for a case-by-case determination as to whether, based on the geographic locations of the parent and nonparent office and the patients served by the two offices, administration, supervision, and services can be shared on a daily basis.

3. The Riverside Office was located at a distance too far from the Lake Forest parent to ensure that patients of the Riverside Office could be safely and timely treated from the Lake Forest parent.

HCFA proved by a preponderance of the evidence that the Riverside Office is not sufficiently close to the Lake Forest Office to ensure safe and appropriate treatment of patients served by the Riverside Office on a shared basis in such a manner that makes it unnecessary for the Riverside Office to independently meet the conditions of participation of a home health agency.

In correspondence from Petitioner to HCFA, Petitioner stated that the distance between the parent office in Lake Forest and the Riverside Office was approximately 50

miles.⁴ P. Ex. 2, P. Ex. 4. Judy Boccia, Petitioner's Vice President, submitted an affidavit stating that the distance between the two offices measured 44.3 miles on her car's odometer. P. Ex. 37. HCFA witness Audrey Blue submitted an affidavit stating that the distance between the two offices measured 49.6 miles on her car's odometer. HCFA Ex. 14. The differing distances as measured by the witnesses' odometers might be explained by the fact that Ms. Boccia and Ms. Blue took different routes. Petitioner's Posthearing Brief at 23. Based on the foregoing, I find that the evidence establishes that, depending on the route, the driving distance between the Lake Forest Office and the Riverside Office is between 44.3 miles and 49.6 miles.

Testimony at the hearing shows also that the driving time between the two offices varies, depending on traffic conditions. Traffic between the two offices is heaviest between the hours of approximately 5:00 a.m. to 9:30 a.m. and between the hours of approximately 3:00 p.m. to 7:30 p.m. Tr. at 87. In addition, the bulk of rush hour traffic flows from Riverside to Lake Forest in the morning and from Lake Forest to Riverside in the evening. Tr. at 405 - 406, 152 - 153. Accidents can cause considerable delays. In addition, roads along the route between the two offices were under construction in 1992 and continue to be now. Tr. at 569 - 570.

During the hearing, Ms. Boccia estimated that it took her an average of 40 minutes to drive from the Riverside Office to the Lake Forest Office during the morning rush hour when the bulk of traffic was flowing in the opposite direction. Tr. at 403, 565. In support of this assertion, she submitted an affidavit in which she stated that she drove from the Lake Forest Office to the Riverside Office beginning at 9:08 a.m. on August 3, 1995, and that it took her 45 minutes to drive this distance at that time of day. P. Ex. 37.

Ms. Blue estimated that it could take between two and two and one-half hours to drive between the two offices in heavy traffic. At other times when traffic is not heavy,

⁴ In addition, Petitioner submitted an exhibit which indicated that the distance between Lake Forest and Riverside as measured by a map is 42.5 miles. The caption on this exhibit stated that the distance was from "Lake Forest to Riverside." The exhibit does not specify that the distance from Petitioner's office in Lake Forest to Petitioner's office in Riverside is 42.5 miles. P. Ex. 35.

she estimated that it would take approximately 50 to 55 minutes. Tr. at 88, 153. Ms. Blue submitted an affidavit in which she stated that she drove from the Riverside Office to the Lake Forest Office beginning at 9:00 a.m. on June 15, 1995 and that it took her one and one-half hours to drive that distance at that time of day. HCFA Ex. 14. The difference in the traveling times set forth in Ms. Boccia's and Ms. Blue's driving affidavits could be explained by the fact that the flow of traffic in the morning hours is heavier from Riverside to Lake Forest.

Petitioner argues that I should not adopt the time set forth in Ms. Blue's affidavit because the route taken by Ms. Blue is not the most direct route. Petitioner's Posthearing Response Brief at 20. While it appears that the route taken by Ms. Boccia is 5.3 miles shorter, Petitioner has not shown that Ms. Boccia's route is the better alternative in terms of traffic conditions.

It is noteworthy that Ms. Blue started her trip at 9:00 a.m., towards the end of the period the parties stated traffic is at its heaviest. Therefore, one hour of the one and one-half hour period that Ms. Blue drove (from 9:30 to 10:30) was not during rush hour. It is reasonable to infer that had Ms. Blue started her trip at the beginning of the morning rush hour period, it would have taken her longer than one and one-half hours to travel from the Riverside Office to the Lake Forest Office. In addition, the time would be even greater if she encountered delays caused by accidents or construction work. In view of this, I find Ms. Blue's estimate that it can take between two and two and one-half hours to travel the distance between the two offices when traffic is heavy to be credible.

I find that the driving time between the Lake Forest Office and the Riverside Office can take between 40 minutes and two and one-half hours, depending on traffic conditions.⁵

⁵ Petitioner argues that, if driving time and distance are indicators to be considered, the driving time from the parent in Lake Forest to the nonparent in Riverside is more relevant than the driving time from the Riverside Office to the Lake Forest Office since the flow of supervision, administration, and services is from the parent to the nonparent office. However, sharing of administration, supervision, and services may occur at any time of the day in which the home health agency is

(continued...)

While the mileage and travel times between the Lake Forest Office and the Riverside Office are factors to be considered in determining whether the Riverside Office qualifies to be certified as a branch, rather than a subunit, these factors alone are not determinative. In order to ascertain whether the Riverside Office is sufficiently close to the Lake Forest Office to ensure safe and timely treatment of patients on a shared basis in such a manner that makes it unnecessary to require the Riverside Office to be independently certified as a subunit, it is necessary to consider the location of the patients served by the Riverside Office.

It is undisputed that the geographic area of the patients served out of Petitioner's Riverside Office included the communities of Chino, Fontana, Rialto, San Bernardino, Redlands, Lake Arrowhead, and Big Bear City. FFCL 25.⁶ Petitioner submitted information regarding "off-peak weekday travel times" from Lake Forest to the various locations served by the Riverside Office. This information was supplied by the California Department of Transportation based on the Los Angeles Regional Transportation Study (LARTS) transportation model. P. Ex. 34. HCFA did not submit any evidence to rebut this

⁵ (...continued)

open. Thus, personnel from the Lake Forest Office might be required to travel from Lake Forest to Riverside later in the day when the traffic flow is at its heaviest. Also, it is conceivable that Petitioner would have meetings at the Lake Forest Office that involved the Riverside Office. In such circumstances, personnel from the Riverside Office would have to travel to the Lake Forest Office. In view of the fact that sharing of home health agency functions may occur at any time of the day and could flow in either direction, I do not give any significance to the direction of the flow of shared functions and services.

⁶ Petitioner points out that the number of patients in certain parts of the geographic region varied. Petitioner asserts that it had only a few patients in the farthest cities, and that home health staff was retained locally on a contract basis in these areas. Petitioner's Posthearing Response Brief at 19. However, this does not negate Petitioner's obligation to comply with regulatory requirements that adequate administration, supervision, and services be available to these patients, and any future patients, located in these distant areas.

evidence, and I rely on it to establish the driving times from Lake Forest to these locations during periods when traffic is not at its highest volume.

In addition, Ms. Blue testified concerning travel time from Lake Forest to the various locations served by the Riverside Office during periods when traffic is heavy. Ms. Blue stated that she is familiar with the driving times between Lake Forest and these locations because she has driven them under a variety of road and weather conditions over the past 13 years. HCFA witness Captain Dymon concurred with Ms. Blue's testimony regarding travel times. Tr. at 197. Petitioner did not submit evidence to rebut Ms. Blue's testimony, and I rely on it to establish the driving times from Lake Forest to these locations during periods when traffic is heavy. Tr. at 93 - 98.

I find that the evidence establishes that the driving time from Lake Forest to locations in Chino is approximately 51 minutes during off-peak travel hours and that it can take as long as one and one-half hours to two hours in heavy traffic. Driving time from Lake Forest to locations in Fontana, Rialto, San Bernardino, and Redlands takes between 65 and 77 minutes during off-peak travel hours and it can take as long as one and one-half to two and one-half hours in heavy traffic. P. Ex. 34; Tr. at 93 - 94.

Driving time from Lake Forest to locations in Lake Arrowhead is approximately one hour and 48 minutes during off-peak travel hours. Ms. Blue testified that, to get to Lake Arrowhead, it is possible to take the freeway as far as San Bernardino. The traveler must then take Highway 18, a two-lane curving road up a mountain. According to Ms. Blue, the trip is more time-consuming in the winter months when there is snow on the ground. Ms. Blue testified that the trip could take as long as three to three and one-half hours. P. Ex. 34; Tr. at 95 - 96.

With respect to the travel time from Lake Forest to locations in Big Bear City, the farthest geographical location served by the Riverside Office, it takes two hours and 20 minutes to drive this distance during off-peak travel hours and as long as four hours in traffic. Ms. Blue testified that travel to Big Bear City requires the traveler to drive on a curving, two-lane road. She stated that, under winter weather conditions, the travel time could be even longer. P. Ex. 34; Tr. at 96 - 97.

HCFA offered persuasive evidence showing that there are compelling reasons for requiring that the Riverside Office be certified as a semi-autonomous subunit, with its own responsibility for providing administration, supervision, and services on a daily basis independent of the parent in Lake Forest. I find that the evidence adduced by HCFA establishes that the Riverside Office is too far from the Lake Forest Office to ensure safe treatment of the Riverside Office's patients on a shared basis with the Lake Forest Office.

HCFA's State Operations Manual (Manual) No. 260 provides guidance with respect to the distinctions between a branch and subunit of a home health agency. With respect to administrative functions pertaining to a branch office, the Manual states that the "administration at the parent agency is aware of the staffing, patient census and any issues/matters affecting the operation of any given branch." HCFA Ex. 12 at 5. In order to accomplish the administrative functions of the branch, the administrator of the home health agency "maintains an ongoing liaison with the branch staff and the group of professional personnel." HCFA Ex. 12 at 6. The Manual states that the branch must be "located sufficiently close to the parent to share administration. The administrator is apprised of, and resolves issues affecting patients in branch(es) as well as the service area(s) covered by the parent." *Id.* The subunit, on the other hand, "maintains its own administrative staff" because it is "located at such a distance from the parent agency that it is incapable of sharing administration, supervision, and services on a daily basis." HCFA Ex. 12 at 5 - 6.

Ms. Blue testified regarding HCFA's requirements as to the appropriate designation of a home health agency as a branch or subunit. Ms. Blue stated that staff serving a home health agency includes licensed nurses, home health aides, physical therapists, occupational therapists, and social workers. With respect to administrative functions, Ms. Blue stated that both branches and subunits must have the ability to assess and evaluate the care provided to patients by the staff serving a home health agency. She explained that a subunit must have its own "staff complement administratively that would give them the ability to easily make decisions and provide guidance and supervision to the staff working out of that office." Tr. at 78 - 80.

Ms. Blue opined that, in this case, because of the far distances of the Riverside Office's patients from the parent office at Lake Forest, it was not possible for the Riverside Office to share administrative functions with the Lake Forest Office. Instead, Ms. Blue expressed the view that it was imperative that the administrative functions be available on-site in the Riverside Office in order to "ensure that patient-related goals and objectives were met." Tr. at 114 - 115. Based on this, Ms. Blue opined that the Riverside Office should be certified as a subunit rather than a branch.

Captain Dymon agreed with Ms. Blue's testimony. She elaborated on the type of activities included in the term "administration." According to Captain Dymon, administrative functions include not only the responsibility for the daily patient census, but "assuring that the beneficiaries have their care needs met by the various professional entities that are serving in the home." The home health agency's administrative staff must ensure that services and staff are available as needed. Tr. at 195 - 196. Captain Dymon opined that, in view of the distances and travel times involved in this case, it was necessary that the Riverside Office have administrative staff on-site to ensure that these administrative functions are performed adequately. Tr. at 197.

With respect to supervision, Ms. Blue testified that many supervisory functions go "hand-in-hand" with administrative functions. Tr. at 146. According to Ms. Blue, responsibilities of supervisory personnel include: evaluating the work performance of non-supervisory personnel; scheduling the nurses, home health aides, and staff under contract with the home health agency, including locating replacements when regularly scheduled personnel are unavailable; training; and participating in routine case conferences with staff to ensure beneficiaries are receiving appropriate care. Tr. at 80, 117 - 121.

Captain Dymon testified that supervision is necessary to establish "consistency in care and to assure that the care for the beneficiary is being dedicated in a professional manner." Tr. at 196. Supervisory responsibilities identified by Captain Dymon include reviewing personnel policies; making sure the non-supervisory personnel are complying with the policies; managing leave taken by staff; oversight and monitoring of home health aides; monitoring the clinical record; monitoring therapy services; making sure that supervisory visits are conducted according to regulations; and

assuring that durable medical equipment is provided and in working order. Tr. at 207 - 208.

HCFA's Manual provides that, in the case of a subunit, supervisory personnel (a supervisory physician or registered nurse) must be available on the premises during operating hours. HCFA Ex. 12 at 6. In the case of a branch office, on the other hand, its location must be such that supervision can be accomplished easily from the parent office, since HCFA does not require branch offices to have supervisory personnel on the premises. HCFA Ex. 12 at 6; Tr. at 117, 338. Thus, where the patients served by a nonparent office are located at a geographic distance from the parent such that supervision will be, or is likely to be, interrupted if it is performed by the parent, then the nonparent office must be certified as a subunit with its own supervisory personnel available on site on a daily basis.

Petitioner repeatedly points out in its posthearing submissions that California licensure law requires all home health agency offices, including branches, to have an on-site nursing supervisor. Petitioner contends that the fact that federal requirements do not require nursing supervisors in branch offices is irrelevant because California law requires all home health agency offices to have a clinical supervisor. According to Petitioner, the Riverside Office's patients will be adequately supervised even if HCFA designates it as a branch because of the State law requirement to have a supervisor on site. Petitioner's Posthearing Response Brief at 16 - 17.

Petitioner's argument that California law requires the presence of a supervisor on-site is not persuasive. It is incumbent that HCFA certify home health agency providers according to federal regulatory requirements. HCFA cannot certify as a branch a home health agency office which it otherwise was required to certify as a subunit simply because the office would satisfy some of the subunit requirements under State law. HCFA has the responsibility to ensure that entities are operating at the level which they have been found qualified, regardless of any changes in State requirements which might occur. Under Petitioner's scenario, the Riverside Office could be certified as a branch based on State law requirements, and then remove its on-site supervisor in the event that State law requirements change. If that were the case, the Riverside Office would still be

certified as a branch even though it lacked the necessary supervision.⁷

Petitioner contends that "[i]n contrast to institutional providers, patient care personnel in a home health agency must be able to operate without a great deal of supervision when furnishing hands-on patient care in the home." Petitioner's Posthearing Brief at 15. Petitioner asserts that this is recognized by the definition of "supervision" under the conditions of participation for home health agencies. Citing 42 C.F.R. § 484.2, Petitioner states that the regulations do not require supervision of direct patient care at the patient's home where the individuals furnishing that care meet the qualifications specified in 42 C.F.R. § 484.4. According to Petitioner, "the vast majority of home health personnel" meet those qualifications. *Id.*⁸ Petitioner contends that most supervision in the home health setting "is actually conducted by telephone, in writing, through review of patient charts, or in the office when team meetings are conducted." *Id.* From this, it appears that Petitioner is arguing that, since supervision occurs in a location other than the patient's home, then it does not matter how far patients are from where a supervisor is physically located. Petitioner's Posthearing Brief at 15, 40 - 41.

⁷ Although HCFA establishes its regulatory standards on the basis of nationwide application, it is obviously cognizant of the various State requirements for licensing of home health agencies. Here, the Riverside Office under California licensing procedures was either to be classified as a parent or branch. Using criteria similar to the HCFA definitional standards, DHS licensed the Riverside Office as a parent rather than a branch. Petitioner's compliance with this designation does not automatically mean that its Riverside Office could not be a branch under federal law. Irrespective of the placement of supervisory personnel in Riverside, the controlling factor is the Lake Forest Office's ability to share functions with the Riverside Office on a daily basis to ensure the health and safety of home health patients being served from the Riverside Office.

⁸ Ms. Boccia testified that there are separate supervision requirements for home health aides which require that supervisory visits be made to patients' homes. However, she testified also that these supervisory visits are made by a staff nurse assigned to the patient, and are not performed by supervisors. Tr. at 481.

This argument is not supported by the testimony of HCFA's witnesses. Ms. Blue testified that the nature of supervisory responsibilities contemplate that supervisory staff be available to go into patients' homes. In order to evaluate the services provided by staff and contract personnel, supervisors must be able to see for themselves the interaction between the workers and the patient. Ms. Blue stated that, in the event that a patient is not progressing as anticipated, a supervisor should be able to go to the site where services are being provided to be able to assess the situation for themselves. Tr. at 80, 104, 108.⁹

In addition, Ms. Blue testified that not only do supervisors evaluate the actions of home health care workers, but they provide guidance and general expertise to staff. Tr. at 104. If warranted, supervisors should "be ready to lend whatever assistance they may need to the individual in the field," including actually providing health care to patients where necessary. Tr. at 105 - 106.

Moreover, Captain Dymon testified that, with respect to at least one of the services furnished by staff out of the Riverside Office, that of nutritional guidance, HCFA's regulations require the presence of a supervisor on the premises to supervise the individual furnishing that service. Captain Dymon explained that 42 C.F.R. § 484.4 does not specify any qualifications for the category of personnel responsible for performing nutritional guidance, and therefore the home health agency is required to furnish direct supervision on the

⁹ The conditions of participation for a home health agency providing care through the use of home health aides specifically mandates that such aides be "closely supervised to ensure their competence in providing care." 42 C.F.R. § 484.36. Moreover, such conditions require that the home health aides receive supervisory visits, at least once every 60 days, from a registered nurse in the home of their patient when the aide is furnishing care to such patient. *Id.* at § 436.(d)(1). When other types of care are furnished to a patient by someone other than a registered nurse, such as skilled nursing or physical, speech or occupational therapy, more frequent supervisory visits (at least every two weeks), are required by a registered nurse or skilled therapist. *Id.* at § 436.(d)(2). A home health agency must provide a supervisory structure which ensures that its personnel will receive this level of supervision.

premises for those individuals providing nutritional guidance. Tr. at 198 - 200.¹⁰

Captain Dymon stated that nutritional guidance can be provided by various categories of personnel, including a professional nurse, a dietitian, or a nutritionist. Tr. at 202. Captain Dymon explained that nutritional guidance involves "designing a diet that may be a therapeutic diet used in conjunction with a particular diagnosis, in order to treat the person from a nutritional standpoint." Tr. at 200. As an example, Captain Dymon stated that an end-stage renal disease diet would have certain restrictions, and that this service would be needed to provide guidance on food preparation, to monitor consumption, and to monitor the patient's response to the diet. Tr. at 201. According to Captain Dymon, supervision of nutritional guidance entails assessing the patient's needs and assessing who best on the staff can serve those needs. Also required is the supervisory capacity to assess whether the nutritional interventions are actually meeting the needs of the patients. If the interventions are not effective, the supervisor must be available to communicate the findings to the patient's physician and possibly request an alteration of the patient's plan of care. Tr. at 203 - 204.

Captain Dymon testified also that inadequate supervision of nutritional guidance could have a detrimental effect on the health and safety of patients. As an example, Captain Dymon stated that a renal dialysis patient could

¹⁰ Petitioner does not dispute that personnel responsible for providing nutritional guidance do not meet the qualifications specified in 42 C.F.R. § 484.4. However, Petitioner contends that "dietary/nutritional guidance visits are not separately billable to Medicare as are the visits by each category of personnel listed in § 484.4." Petitioner's Posthearing Brief at 15. Dietary and nutritional services are billable as administrative costs by a home health agency where dieticians or nutritionists are used to provide overall training or consultative advice to the staff of the home health agency and incidentally provide dietetic or nutritional services to beneficiaries in their homes. 42 C.F.R. § 409.46(d). However, visits by such personnel to a home health agency patient's home are not separately billable under Medicare. *Id.* It is conceivable that a home health care agency could provide nutritional or dietetic advice as part of another covered service.

have excessive fluids in the body if the diet is not correct. Tr. at 204.

In addition, Ms. Blue and Captain Dymon testified that there may at times be a need for supervisory personnel to go to a patient's home in order to respond to an emergency when other staff are unavailable. Ms. Blue and Captain Dymon distinguished between emergencies which require hospital emergency treatment and emergencies arising in connection with the provision of a home health service which requires immediate in-home treatment by a home health agency staff member. Ms. Blue and Captain Dymon explained that, with respect to home health patients, there may be situations which require the immediate intervention of a skilled caregiver in the home. In these instances, it would not be appropriate or cost effective to make a patient go to a hospital emergency room for a service which is supposed to be provided in the home. An example of this type of immediate need requiring in-home treatment is where a catheter may have become dislodged in a patient with a stage 4 decubitus ulcer. In this instance, the patient would need to have the catheter replaced quickly in order to prevent further progression of the decubitus ulcer. Tr. at 81, 106, 116, 197 - 198, 237, 243 - 244.

Robert Gleason, Petitioner's President, testified that one of the services furnished to patients out of the Riverside Office involved the use of "high tech" infusion therapy. According to Mr. Gleason, this therapy involves the infusion of a solution, such as intravenous food, intravenous antibiotics, or intravenous pain medication, into a patient's veins. He stated that these are considered high tech procedures because they are infused intravenously. In addition, he stated that these procedures require careful monitoring and that they require somebody to be on call in the Riverside Office on a 24-hour basis, with the ability to get staff to a patient within an hour or two in the event that a problem develops.¹¹ Tr. at 697, 700 - 701.

¹¹ Petitioner contends that the home health agency conditions of participation do not require a home health agency to cover its telephone during nonbusiness hours or to furnish services during nonbusiness hours to meet unexpected patient needs. Petitioner stated that, at its own initiative, it has established a 24-hour on-call service, but that this service is provided above and beyond any regulatory requirement. I agree that the conditions of participation do not specify the hours of

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Mr. Gleason gave several examples of problems with this type of therapy which might require immediate attention. A nurse would need to restart the therapy in the event that the intravenous line which delivers the infusion becomes clogged or the needle which delivers the infusion becomes dislodged. In addition, a nurse would need to go to the patient's home to fix a broken intravenous pump. A nurse would also be sent to a patient's home if a patient reported any signs of infection. Tr. at 698 - 700.

In the event of a sudden need requiring a prompt, unscheduled visit, it would be necessary for supervisory personnel to delegate staff to attend to the patient's need. It could also become necessary for the supervisor to personally step in and respond with a visit to the patient's home if other staff are not available at the time the need arose. Tr. at 81, 244.

Moreover, even if a home health agency supervisor never needed to actually go to the homes of patients, it still must be practical for non-supervisory personnel to travel to the office where the supervisor is located for training, routine case conferences, and evaluations. Mr. Gleason testified that the supervisor and home health care personnel regularly meet to discuss patients' care. These conferences occur either weekly or every two weeks. Tr. at 691. Thus, the location of supervision is important in order to accomplish these supervisory activities. If such supervision was to be offered in the Lake Forest Office rather than the Riverside Office, then the travelling time and distance would significantly

¹¹ (...continued)

operation for a home health agency. However, it is evident from the array of medical services provided in a patient's home that some of these services would be provided outside the normal office hours of the agency. In fact, it is conceivable that some seriously ill patients might require 24-hour skilled nursing or home health aide services. In such instances, supervisory personnel might need to respond to problems occurring after business hours. Consequently, Petitioner should have the capacity to respond to unexpected patient needs both during and after business hours. Moreover, even if I found that Petitioner was not required to respond to unexpected patient needs during nonbusiness hours, Petitioner would still be required to have the capacity to meet unexpected needs at least during business hours.

impact on the availability and timeliness of the supervision provided.

Ms. Blue and Captain Dymon both expressed the view that, given the distances and travel times in this case, the Lake Forest Office was not able to adequately share supervision with the Riverside Office. Both Ms. Blue and Captain Dymon opined that the certification of the Riverside Office as a subunit was necessary to protect the health and safety of Riverside's patients. Tr. at 116, 208.

Petitioner contends that HCFA's emphasis on supervision for unexpected patient needs is misplaced because it always had on-call staff working near its patients. Ms. Boccia testified that it was not necessary for the Lake Forest Office to respond to direct patient care needs or emergencies of Riverside patients because from "the time we saw patients in that area, we always had on-call staff that lived in that area." Tr. at 517.

Petitioner's argument is unavailing because even local, on-call staff need to be supervised. They need to be scheduled, trained, and supervised by supervisory staff. In addition, in the event that the on-call staff is unavailable, it still would be necessary for supervisory staff to be available to meet the unanticipated need. Tr. at 467 - 468.

Moreover, Ms. Boccia's testimony that she hired staff locally to be available to meet patient needs supports HCFA's position that the Lake Forest Office and the Riverside Office cannot share services on a daily basis. Ms. Boccia testified that she hired separate on-call nurses for the Lake Forest Office and for the Riverside Office. She identified specific geographic territories in which the on-call nurses had to live in order to be able to provide timely services to patients living in those territories.¹² Tr. at 586 - 589.

¹² Ms. Boccia testified that she hired on-call nurses in Big Bear City and Lake Arrowhead which were separate from the on-call nurses hired to serve the vicinity closer to the Riverside Office. Petitioner points out that "HCFA does not object to the Riverside office serving Big Bear, even though Big Bear is farther from Riverside than Riverside is from Lake Forest." Petitioner's Reply Brief at 4. While it is true that patients in Big Bear City and Lake Arrowhead are geographically distant from the Riverside Office, this

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In view of the foregoing, I find that based on the distances between the Riverside Office and its patients from the parent in Lake Forest, the high tech types of services being provided to patients by Petitioner, as well as the need to promptly respond to unexpected needs of home health patients, the weight of the evidence establishes that the Lake Forest Office was not able to share administration, supervision, and services with the Riverside Office on a daily basis, within the meaning of 42 C.F.R. § 484.2.

Petitioner argues that the Lake Forest Office was the centralized focus of Petitioner's operation. According to Petitioner, many functions originated out of the parent office and were shared with the Riverside Office. Petitioner contends that even though the Riverside Office independently met the conditions of participation for a home health agency, this is not prohibitive of branch status.

Petitioner gave examples of shared activities between the two offices, including policy-setting, billing, payroll, accounting, support for recruiting and hiring, and upper management leadership in terms of decision-making. Petitioner asserts that shared activity between the two offices was facilitated by the multiple visits to the Riverside Office by high level staff from Lake Forest. Petitioner's Posthearing Brief at 27 - 35. Mr. Gleason testified that it was always Petitioner's intent for the parent in Lake Forest "to maintain central corporate administrative and clinical policy control" over the operations in the Riverside Office. Tr. at 725 - 726.

In reaching my decision in this case, I recognize that there are some shared activities between the parent at Lake Forest and the Riverside Office. The regulations do not define a subunit as an office which is completely autonomous from the parent. On the contrary, it describes a subunit as being semi-autonomous. I read this to mean that the regulations envision that the parent will retain some responsibilities to set overall company management policies and procedures and to enforce quality of care controls in its nonparent offices. Tr.

¹² (...continued)

does not provide justification for certifying the Riverside Office as a branch rather than a subunit. On the contrary, the distances between the Riverside Office and these outlying northern areas supports HCFA's position that services to these areas cannot be shared with the parent in Lake Forest.

at 191. Thus, the fact that the Lake Forest Office may have had overall responsibility for setting policy and may have shared some activities does not prevent me from reaching the conclusion that the Riverside Office should be certified as a subunit rather than a branch. Moreover, the mere fact that high level officials in Lake Forest traveled to the Riverside Office during the period the office was being set up for purposes such as obtaining space, marketing, and recruiting staff does not establish that the requisite administration, supervision, and services can be shared on a daily basis after the Riverside Office became fully operational. Tr. at 423.

C. The Riverside Office served patients in a geographic area different from that of the Lake Forest Office.

HCFA asserts that the Riverside Office should be certified as a subunit because it served patients "in a geographic area different from that of the parent agency," in accordance with the definition of a subunit set forth at 42 C.F.R. § 484.2. Petitioner argues that the Riverside Office should be certified as a branch because it is a "location or site from which a home health agency provides services within a portion of the total geographic area served by the parent" in accordance with the definition of a branch set forth at 42 C.F.R. § 484.2.

During the hearing, Ms. Boccia referred to the geographic area served by the Riverside Office and stated that before the Riverside Office was licensed by the State of California, Petitioner provided services to the patients who resided in this geographic area out of its Lake Forest Office. She noted specifically that the Lake Forest Office served patients as far away as Big Bear City at that time. Ms. Boccia stated that once the Riverside Office was licensed, these patients were admitted to the Riverside Office. Tr. at 422, 501 - 502. Based on this, Petitioner argues that the Riverside Office met the regulatory criteria for a branch because it "served patients who were within the geographic area also served by Lake Forest." Petitioner's Posthearing Brief at 21.

Petitioner attempts to establish that the geographic area of its Lake Forest Office extended as far away as Big Bear City by relying on Ms. Boccia's testimony that this area was served by the Lake Forest Office prior to the licensure of the Riverside Office. I do not agree that Petitioner's actions prior to undergoing the scrutiny of the State licensing process establishes that Lake

Forest's geographic service area extended as far as Big Bear City.

Although the Lake Forest Office may have been providing services to the entire geographic area now covered by the Riverside Office, Petitioner has not adduced any evidence to show that the Lake Forest Office did so with the approval of the appropriate State licensing authority. Indeed, once the State agency in San Bernardino surveyed the Riverside Office, it refused to license the Riverside Office as a branch of the parent in Lake Forest. Instead, the State licensed the Riverside Office as a parent home health agency. In addition, the State recommended HCFA to certify the Riverside Office as a Medicare provider as a subunit, rather than as a branch, of the Lake Forest Office, and HCFA adopted this recommendation. This shows that, once the Riverside Office submitted to the survey process, both the State and HCFA concluded that the Riverside Office had to meet Medicare certification requirements independently of the Lake Forest Office in order to be certified to provide services to patients located in the geographic area served by the Riverside Office. I infer from this that the State and HCFA concluded that the Lake Forest Office could not be relied on to adequately provide services to this geographic area.

In the absence of persuasive evidence documenting that the Lake Forest Office had the ability to administer, supervise, and serve patients residing in the geographic area covered by the Riverside Office, Ms. Boccia's testimony that the Lake Forest Office once served patients in this geographic area is not sufficient for me to conclude that the Lake Forest Office's geographic service area encompasses the geographic area served by the Riverside Office. Accordingly, Ms. Boccia's testimony does not establish that the Riverside Office provides services within a part of the total geographic area served by the Lake Forest Office.

Petitioner argues that an understanding of the operation of home health services and supervision supports the conclusion that the distances from the Lake Forest Office to the locations of the Riverside Office's patients' homes has little relevance in this case. Petitioner states that, since home health agencies furnish services in patients' homes, patient care personnel operate with a great deal less supervision than personnel in an institutional setting. Petitioner asserts that the nature of home health services is to provide supervision "from office to office," thereby implying that the distance between the Lake Forest Office and the Riverside

Office is more relevant than the distance between the Lake Forest Office and locations of patients in determining whether the Riverside Office should be designated as a branch or a subunit. Petitioner's Posthearing Brief at 15, 26 - 27.

Petitioner asserts also that a showing that the Riverside Office serves patients which are not in the geographic area served by the Lake Forest Office does not disqualify the Riverside Office from being designated a branch. Petitioner argues that the reason to open a branch office is to have increased efficiency and to provide the opportunity to expand the geographical range of services. Petitioner reasons that if the Riverside Office was serving the same patient population as the Lake Forest Office, there would be no reason to open a branch office. Petitioner argues that the regulation requires only that a branch provide services within a "portion" of the total geographic area served by the parent. Petitioner takes the position that, as long as the service areas of the Riverside Office and Lake Forest Office "overlap," then they are not different and they would meet the requirement that a branch provide services within a portion of the total geographic area served by the parent. Petitioner's Posthearing Response Brief at 19; Tr. at 19 - 20.

Petitioner asserts that, in this case, the record shows that the Lake Forest Office and the Riverside Office are in the same geographical area. Petitioner's Proposed Findings of Fact and Conclusions of Law at 4. Petitioner cites Mr. Gleason's testimony that the Riverside area and the Lake Forest area are "immediately adjacent and kind of all the same area" and that "the towns just go through Orange County and continue on when you cross the Riverside County border." Tr. at 663. Petitioner also points out that Ms. Boccia testified that there are employees of Petitioner who furnish services to patients of both the Riverside Office and the Lake Forest Office. Tr. at 406. Based on this, Petitioner contends that the service area of the Riverside Office overlaps with the service area of the Lake Forest Office, and therefore the Riverside Office provides services within a portion of the total geographic area served by the Lake Forest Office.

I do not agree with Petitioner's interpretation of the regulations. Petitioner appears to be arguing that there are no limits to how far a branch office may expand its service area as long as the branch has some service area in common with the parent. Under Petitioner's reading of the regulations, a branch could be permitted to serve

patients all over the State of California as long as some of its patients were drawn from the same geographic area served by the parent. Moreover, the operative phrase in the definition of branch is that it is a site from which a home health agency provides services "within a portion of the total geographic area served by the parent agency." 42 C.F.R. § 484.2. If, as here, the nonparent office is located arguably within the geographical area of the parent but provides services to patients outside that geographical area, then the nonparent cannot be a branch and must be classified as a subunit. This is consistent with the subunit definition that applies to nonparent offices that service patients in a geographic area different from the parent.

I find that Petitioner's interpretation is contrary to the intent of the regulations. The issue before me is not whether the Lake Forest Office and the Riverside Office have some service area in common, but rather whether the geographic service area of the Riverside Office is contained within the total geographic service area of the Lake Forest Office. This is consistent with the testimony of HCFA's witnesses. Captain Dymon testified that a branch is "an extension of the parent serving the identical services as the parent area within the geographic description of the parent." Tr. at 193. On the other hand, a subunit serves patients in a geographic area different from that of the parent. Ms. Blue testified that "different from the parent" would be the areas that would be further beyond the area of what might be a branch; an area that might cause a problem for a patient to readily access the system or for the agency staff to reach the patient in a timely fashion to provide care. Further, Ms. Blue stated, "[h]owever, if, indeed, patients reside outside of the general area that the parent serves, it's geographically different. Then, indeed, that office would need to be a subunit." Tr. at 82 - 83.

In this case, even if I were to accept that the distances and travel time between the Riverside Office and the Lake Forest Office put the two offices in the same geographic area and that some of the patients of the Riverside Office were drawn from the same geographic area as some of the patients of the Lake Forest Office, I would still find that the Riverside Office served other patients who were located outside of the total geographic area served by the Lake Forest Office. I find that the evidence establishes that the Lake Forest Office cannot be relied on to provide safe and timely administration, supervision, and services to patients located as far away as Big Bear City and Lake Arrowhead. Based on this, I

find that the Riverside Office served patients in a geographic area different from that of Lake Forest, within the meaning of the regulatory definition of a subunit.

II. Petitioner's arguments attacking the decisionmaking process are unavailing.

Petitioner argues also that HCFA's determination to designate the Riverside Office as a subunit should not stand because the underlying decisionmaking process was defective. According to Petitioner, HCFA never engaged in openminded factfinding related to the issue of whether the Riverside Office should be certified as a subunit or a branch.

Petitioner asserts that, at all times, it wanted the Riverside Office to be a branch of the parent at Lake Forest and that it consistently communicated this desire to HCFA. Petitioner's Posthearing Response Brief at 6 - 7. Petitioner points out that it indicated on the State licensure application that it wanted its Riverside Office to be a branch of the parent in Lake Forest. In addition, Petitioner points out that it expressed its desire to have its Riverside Office designated as a branch for purposes of Medicare certification in a letter written to HCFA before the Medicare survey.

Ms. Blue testified that, when she visited the Riverside Office for the Medicare survey in June of 1992, she was informed by Petitioner's staff that they considered the Riverside Office to be a subunit, and she entered that information on HCFA Form 1572, Home Health Agency Survey and Deficiencies Report. Tr. at 99 - 100; HCFA Ex. 8. On the other hand, Ms. Boccia speculated that the reason the question, "Is this home health agency a subunit?" was answered "yes" on HCFA Form 1572 was that State licensing officials had refused to license the Riverside Office as a branch. Ms. Boccia suggested that the response to this question was not intended to convey that Petitioner viewed the Riverside Office to be a subunit, but instead was intended to convey that Petitioner recognized that, for State licensure purposes, the Riverside Office was characterized as a subunit. Tr. at 398, 513.¹³ Ms.

¹³ This testimony is somewhat confusing since the California DHS does not certify home health agencies as subunits, only parents and branches. However, Ms. Boccia clarified her testimony by stating that, at the time of

(continued...)

Boccia further testified that she told Ms. Blue during the survey that the Riverside Office would like to be given the same provider number as the Lake Forest Office. Tr. at 400.

Petitioner takes the position that, notwithstanding the fact that it repeatedly expressed its desire for the Riverside Office to be certified as a branch, HCFA did not give adequate consideration to this request. Petitioner contends that HCFA relied on the State licensure determination to refuse to license the Riverside Office as a branch, and, as a result, HCFA did not conduct an adequate survey addressing this issue. Petitioner argues that there never would have been a Medicare survey of the Riverside Office unless it had been predetermined that the office should be certified as a subunit for Medicare purposes.

According to Petitioner, the decisionmaking process was deficient because no part of the Medicare survey which was conducted related to reaching findings on the issue of branch status. Petitioner states that, contrary to HCFA's own policy as set forth in its Manual, HCFA never visited the parent to pursue the question of Lake Forest's capability of sharing administration, supervision, and services with the Riverside Office. Petitioner argues that, in the absence of a factfinding survey to determine the facts relating to the regulatory criteria, the correspondence between the parties on this issue amounts to nothing more than post hoc rationalization of HCFA's prior decision. Petitioner's Posthearing Brief at 8 - 14; Petitioner's Posthearing Reply Brief at 25 - 26.

Petitioner's arguments attacking the underlying decisionmaking process are without merit. As I stated in my June 2, 1995 ruling, this hearing is, by law, de novo. Act, section 205(b). Accordingly, in evaluating whether the Riverside Office should be certified as a branch, I must make an independent assessment of the regulatory factors which define branches and subunits and apply them to the facts of this case.

The underlying decisionmaking process is not at issue before me. The predecisional deliberations and thought processes of the State's and HCFA's decisionmakers are

¹³ (...continued)

the Medicare certification survey, Petitioner believed that the Riverside Office was operating as a subunit. Tr. at 511 - 513.

not relevant to my decision in this case because it has nothing to do with the issue of whether the Riverside Office meets the regulatory definition of a branch. I must decide this case on its merits, not in terms of whether HCFA properly followed its own internal procedures in making its determination to certify the Riverside Office as a subunit. In accordance with my June 2, 1995 ruling, Petitioner's criticisms of procedures followed by the State and HCFA relating to the survey process are not relevant to the issue at hand.

Moreover, even if Petitioner's arguments were relevant, there is nothing in HCFA's regulations or Manual which prohibits HCFA from conducting a direct survey of a nonparent office for the purpose of determining whether the nonparent office qualifies to be certified as a branch or a subunit.¹⁴ However, assuming arguendo that HCFA disregarded its own guidelines by failing to make adequate findings with respect to the issue of whether the Riverside Office qualified to be designated as a branch, this deficiency in the survey process is cured by this hearing. Petitioner has had ample opportunity in this forum to come forward with factual information to support its contention that the Riverside Office met the

¹⁴ The guidelines in the Manual cited by Petitioner state:

when conducting a survey of a [home health agency] with branch offices, ascertain from [home health agency] records whether the branch offices are provided adequate supervision by the parent agency and whether they are, in fact, sufficiently close to the parent agency to be considered branch offices rather than subunits. If this judgment cannot be made without direct observation, visit the branch office to make this determination. When reviewing records and conducting visits to patients' homes, select some records and schedule some home visits to patients who are served by a branch office. You may also conduct a standard survey of the [home health agency] at a branch office.

P. Ex. 15 at 4. I do not read these guidelines to mean that HCFA is required to survey the parent to determine branch or subunit status. Instead, the guidelines endorse conducting a standard survey of the nonparent office. While the guidelines suggest that visiting the nonparent office might not be necessary if sufficient information can be obtained from the parent, they do not require that in all cases parents must be surveyed first.

regulatory definition of a branch. I find that the preponderance of the evidence adduced by the parties at this hearing supports HCFA's determination to certify the Riverside Office as a subunit rather than as a branch.

CONCLUSION

I conclude that HCFA's determination to certify Petitioner's Riverside Office as a subunit of the parent in Lake Forest was in accordance with the applicable law at 42 C.F.R. § 484.2. Therefore, I sustain HCFA's determination.

/s/

Edward D. Steinman
Administrative Law Judge