Department of Health and Human Services

DEPARTMENTAL APPEALS BOARD

Civil Remedies Division

Wills Eye Hospital,

Petitioner,

v.

Centers for Medicare & Medicaid Services.

Docket No. C-14-846

Decision No. CR4532

Date: February 18, 2016

DECISION

The issue in this case is limited and straight-forward: in order to meet Medicare's statutory definition of "hospital," must an institution provide the bulk of its services to actual "inpatients."

Petitioner, Wills Eye Hospital, was previously enrolled in the Medicare program as an ambulatory surgical center (ASC) but wants to enroll in the program as a hospital instead. The Centers for Medicare & Medicaid Services (CMS) denied its enrollment application, finding that it did not meet the statutory definition of a hospital. Petitioner appeals, and the parties have filed cross-motions for summary judgment.

For the reasons discussed below, I find that, to enroll in the Medicare program as a hospital, an institution must *primarily* engage in providing services *to inpatients*. The undisputed evidence in this case establishes that Petitioner Wills Eye does not do so, and CMS properly denied its hospital enrollment application. I therefore grant CMS's motion and deny Petitioner's.

Background

To participate in the Medicare program as a hospital, the institution must apply, and establish that it meets the statutory definition of a hospital and complies with all regulatory requirements. Social Security Act (Act) § 1866(b)(2)(B); 42 C.F.R. §§ 482.1(a)(1), 488.3(a), 489.12(a)(4).

Here, Petitioner Wills Eye participated in the Medicare program as an ASC from about 2002 until 2013, when it relinquished its state license as an ASC, asked to terminate its Medicare participation as an ASC, and applied for Medicare enrollment as a hospital. CMS Exhibits (Exs.) 6, 7. CMS denied the application initially and following reconsideration, finding that the facility did not meet the statutory definition of a hospital because the institution "primarily engaged" in providing services to outpatients, rather than inpatients; the statute requires that hospitals provide the bulk of their services to inpatients. CMS Exs. 1, 4.

Petitioner timely requested a hearing, and the parties have filed cross-motions for summary judgment.

Issues

As a threshold matter, I consider whether summary judgment is appropriate.

On the merits, the issue is whether Petitioner Wills Eye meets the statutory definition of "hospital" and thus qualifies to participate in the Medicare program as a hospital.

Discussion

1. *CMS is entitled to summary judgment because the undisputed evidence establishes that Petitioner does not meet the statutory definition of a hospital (Act § 1861(e)), which requires that hospitals primarily engage in providing services to inpatients.*

Statutory definition. The Medicare statute defines a hospital as an institution that, among other requirements, "is *primarily* engaged in providing . . . *to inpatients*" certain diagnostic, therapeutic, or rehabilitation services. Act § 1861(e)(1); *see* Social Security Amendments of 1965, P.L. 89-97, 79 Stat. 1432 (CMS Ex. 8). To participate in the Medicare program as a hospital, an institution must meet the statutory definition and comply with regulatory requirements. Act §§ 1861(e), 1866(b)(2); 42 C.F.R. Part 482; 42 C.F.R. §§ 488.3, 489.10, 489.12; *Kearney Reg'l Med. Ctr.*, DAB No. 2639 at 12 (2015); *Ariz. Surgical Hosp., LLC*, DAB No. 1890 at 12 (2003). An "inpatient" is an individual who has been formally admitted to the institution pursuant to the order of a

physician or other qualified practitioner who is permitted by the state to admit patients to hospitals. 42 C.F.R. § 482.12(c); *see* 42 C.F.R. § 412.3(a).

An ASC is a distinct entity that operates exclusively for the purpose of providing surgical services to patients not requiring hospitalizations and in which the expected duration of services would not exceed 24 hours following an admission. 42 C.F.R. § 416.2; *see* Act § 1832(a)(2)(F).

Facts. Here, the relevant facts are not disputed. After operating for many years as a Medicare-certified ASC, Wills Eye renovated its physical plant and added four inpatient beds. It surrendered its ASC license, terminated its Medicare participation as an ASC, and applied for enrollment as a hospital. CMS Ex. 5 at 6; CMS Exs. 6 and 7. Although Petitioner is vague as to the exact proportions, it concedes that the vast majority of its services do not require inpatient hospitalization. CMS Ex. 2 at 4 ("[B]ecause of the evolution of ophthalmology itself toward treatments that allow patients to go home the same day, the number of ophthalmology inpatients at any one time is limited."); CMS Ex. 4 at 2 (estimating that Wills Eye performs 8,400 outpatient surgeries per year at this location; Petitioner has not challenged this estimate); P. Ex. 4 at 1 (showing that from July 2011 to June 2012, Petitioner performed 8,030 outpatient procedures and 370 inpatient procedures; thus, 95.6% of its procedures were outpatient). Further, CMS determined, and Petitioner does not challenge, that Petitioner's staffing levels were inconsistent with a facility that primarily provides services to inpatients. CMS Exs. 5 at 6; 10 at 2.

Summary judgment. Because this case turns on a statutory interpretation and does not present any disputes of material fact, summary judgment is appropriate. *See Ariz. Surgical Hosp.*, DAB No. 1890 at 7 ("Given Petitioner's inability to comply with the statutory definition, the [Administrative Law Judge] was not required to take additional evidence.").

According to CMS, the plain language of section 1861(e)(1) mandates that a hospital primarily engage in providing designated services to inpatients, and the undisputed evidence establishes that Petitioner Wills Eye does not meet the statutory definition. Petitioner, however, challenges CMS's reading of the statute and argues that, "given the statutory structure and syntax" of section 1861(e)(1), I should deny summary judgment in order to consider expert opinion as to the proper definition of "hospital." Petitioner's Brief in Opposition to Summary Judgment (P. Br.) at 2. Pointing to the legal analysis provided by an attorney it describes as a "legislative drafting expert," Petitioner argues that an institution is a hospital if it primarily provides the services described in section 1861(e)(1) to whatever inpatients it has, no matter how few, and without regard to where it provides the bulk of its services. Petitioner identifies a single dispute of material fact with respect to this issue, which is: "what 'primarily engaged in' modifies within

[section] 1861(e)(1), the resolution of which is properly informed by consideration of extrinsic evidence . . . ." P. Br. at 11.

Notwithstanding its "structure" or "syntax," interpreting the meaning of a statute is a legal question. I am aware of no support – and Petitioner cites none – for the proposition that a purely legal question requires the taking of evidence. In fact, the opposite is true; the federal rule governing summary judgment and the decisions deriving from that rule, including a long line of Departmental Appeals Board decisions, are explicit: if no material facts are in dispute and "the movant is entitled to judgment as a matter of law," the adjudicator "*shall grant summary judgment*." Fed. R. Civ. P. 56 (emphasis added); *Celotex Corp. v. Catrett*, 477 U.S. 317, 322-25 (1986); *Bartley Healthcare Nursing & Rehab.*, DAB No. 2539 at 3 (2013); *Ill. Knights Templar Home*, DAB No. 2274 at 3-4 (2009), and cases cited therein; *Guardian Health Care Ctr.*, DAB No. 1943 at 11 (2004) ("A dispute over the conclusion to be drawn from applying relevant legal criteria to undisputed facts does not preclude summary judgment if the record is sufficiently developed and there is only one reasonable conclusion that can be drawn from those facts."). Extrinsic evidence of the kind Petitioner urges me to consider cannot be used to create ambiguity where none exists; where a statute's meaning is plain, a court's role is to enforce it. *Exxon Mobil Corp. v. Allapattah Servs., Inc.*, 545 U.S. 546, 568 (2005) ("Extrinsic materials have a role in statutory interpretation only to the extent they shed a reliable light on the enacting Legislature's understanding of otherwise ambiguous terms.").

The significance of adverbs. Inasmuch as the agency and courts have determined its meaning (see below), I do not consider dispositive a strict grammatical analysis of the statute. Even if I did, I would reject Petitioner's analysis, which ultimately misconstrues the function of an adverb and largely ignores the critical prepositional phrase "to inpatients."

As legislation goes, I see nothing particularly unusual about the structure or syntax of section 1861(e)(1). Petitioner correctly points out that "primarily" is an adverb that modifies the verb phrase "engaged in providing."[1] But Petitioner then claims that, because the sentence includes a direct object ("services"), "primarily" applies to the types of services that must be provided. P. Br. at 9; P. Ex. 1 at 6 (Clark Decl. ¶ 14). This is not a conventional use of an adverb. Adverbs do not modify nouns, whether those nouns are

[1] For the purists: I recognize that this verb phrase is, in fact, a verb ("engaged") followed by a prepositional phrase ("in providing"), made up of a preposition ("in") followed by a gerund ("providing") as the object of the preposition. The phrase acts as an adverb that modifies the verb. John E. Warriner, *English Grammar and Composition: Complete Course* 32, 34-35, 40-41 (1963). I treat the entire phrase as a verb in an effort to simplify this discussion. Refer to the Addendum to this decision for a more technically accurate diagram of the clause.

subjects or objects; adverbs modify verbs, adjectives, or maybe other adverbs.[2] *Adjectives* modify nouns. Warriner, *supra*, at 7, 11-12, 151.[3]

Petitioner is correct that "services" is a direct object. Direct objects show the result of the action, answering the question "what?" after the action verb. *Id.* at 26. Here, it shows *what the institution engages in providing*. "To inpatients" is a prepositional phrase, used as an adverb modifying the verb, telling us to whom the action of the verb applies. *Id.* at 32, 34-35. It shows *to whom the services are provided*. If the drafters had used an indirect object instead of a prepositional phrase, as Petitioner suggests (e.g., "engaged in providing inpatients with services"), the meaning would be the same. P. Ex. 1 at 5 (Clark Decl. ¶ 12). The indirect object "inpatients" tells us to whom the institution primarily provides the listed services. Warriner, *supra*, at 27.[4]

Thus, a strict grammatical reading of the statute supports CMS's position: a hospital is an institution that primarily provides to inpatients the services listed.

Consistent interpretations of the statutory language. Petitioner cites no decision by a court or administrative tribunal to support its interpretation of section 1861(e)(1). In fact, the adjudicators who have addressed the issue have ruled that section 1861(e)(1) requires that an institution care for inpatients *as its primary activity* before Medicare will recognize and reimburse it as a hospital. *Kearney Reg'l Med. Ctr.*, DAB No. 2639 at 14.

In its seminal decision, *Arizona Surgical Hospital, LLC*, the Departmental Appeals Board characterized as "fundamental and plainly stated" the statutory requirement for inpatient services. DAB No. 1890 at 10. The Board there sustained termination of the hospital's Medicare provider agreement, finding that the hospital could not meet the statutory definition because it had voluntarily suspended inpatient admissions, had no inpatients, and was not providing inpatient hospital services. But the Board did not stop there. Considering the hospital's argument that it had suspended admissions temporarily, the Board specifically addressed the institution's earlier situation where, as here, it admitted a limited number of patients but provided a wide range of services to outpatients. The Board concluded that such an institution did not operate as a hospital but functioned "almost entirely as an outpatient surgical facility." *Id.* at 7. In short, where the institution's inpatient stays were "not [its] 'primary' service," it was not a hospital. *Id.* at 8.

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[2] CMS argues, incorrectly, that the adverb "primarily" and the verb "engaged" modify the nouns "inpatients" and "services." CMS Prehearing Exchange, Motion for Summary Judgment and Supporting Brief (CMS Br.) at 8. Again, only adjectives modify nouns.

[3] Although this standard grammar text is very old, it was current in 1965, when Congress enacted section 1861(e)(1).

[4] I include, as an addendum to this decision, a diagram of the clause.

In *Kearney Regional Medical Center.*, the Medicare applicant was a new facility with a limited history of serving inpatients. DAB No. 2639 at 10. It did not admit patients for 42 days, although it had admitted a handful of patients before deciding to suspend admissions. In a decision that leaves no doubt as to the meaning of section 1861(e)(1), the Board reaffirmed the position it laid out in *Arizona Surgical Hospital*:

- The statute and regulations "require a facility to be presently engaged in serving inpatients *as its primary activity*." *Kearney Regional Medical Ctr.,* DAB No. 2639 at 1 (emphasis added);

- "[B]eing 'primarily engaged' in treating inpatients" is the "main defining characteristic of a hospital." *Id.* at 8;

- "The Board has consistently read the statutory language requiring that a hospital be 'primarily engaged' to plainly mean that the bulk of its present activity consists of providing the required services to treat inpatients." *Id.* at 9;

- "A hospital is a facility that <u>is</u> mainly serving inpatients." (emphasis in original) *Id.* at 9; "we consider this element the core definition of hospital . . . ." *Id.* at 9 n.5.

- "[T]he Act does require that a facility be currently caring for inpatients as its primary activity before Medicare will recognize and reimburse the facility as a hospital." *Id.* at 14.

See also Puget Sound Behavioral Health, DAB No. 1944 (2004) (defining a hospital as "a facility where injured, disabled, or sick persons receive . . . services on an inpatient basis").

In related contexts, federal courts' interpretations of section 1861(e)(1) have been consistent with the Board's.[5] For example, in deciding whether a medical institution providing emergency services was liable under the Emergency Medical Treatment and Active Labor Act (EMTALA), the First Circuit noted that EMTALA applies to Medicare-participating hospitals only. Looking to section 1861(e)(1), the court determined that the institution was not a hospital because it was "not primarily engaged in providing . . . services to *inpatients*, as required by subsection (e)(1)"; rather, it provided outpatient, ambulatory care. *Rodriguez, et al. v. Am. Int'l Ins. Co. of P.R.*, 402 F.3d 45, 48 (1st Cir. 2005) (emphasis in original); *see also P.I.A. Michigan City, Inc. v. Thompson*, 292 F. 3d 820, 821-22, 31 (D.C. Cir. 2002) (noting that the Medicare program

[5] Neither party cited any court cases involving a direct challenge to CMS's reading of section 1861(e)(1). Nor did I find any such case.

"can make direct payment to providers of inpatient hospital services" and that the institution had not been "primarily providing acute care inpatient services"); *Downing v. Dep't of Health & Human Servs.*, No. 1:12-CV-22, 2013 WL 1281795 at *6 (N.D. Ind. Mar. 6, 2013), *report and recommendation adopted*, No. 1:12-CV-22-TLS, 2013 WL 1281834 (N.D. Ind., Mar. 26, 2013) (finding that an institution that holds itself out as housing physician offices and provides services to outpatients rather than primarily inpatients "does not appear to be a hospital under the Act."); *U.S. ex rel. Thompson v. Columbia/HCA Healthcare Corp.*, 20 F. Supp. 2d 1017, 1022 (S.D. Tex. 1998) ("Medicare regulations label a provider of outpatient surgical facilities as an ambulatory surgical center. . . . In contrast, a hospital is 'an institution which is primarily engaged in providing [services] to inpatients.'").

Even if the statute were ambiguous (which it is not), I would then defer to the agency interpretation. *Chevron U.S.A. v. Natural Res. Def. Council, Inc.*, 467 U.S. 837, 842-843 (holding that an agency's interpretation of its own governing statute is entitled to deference). And, as the discussion below shows, CMS has consistently interpreted section 1861(e)(1) to require that hospitals furnish the bulk of their services to inpatients. *See, e.g.*, 70 Fed. Reg. 47,278, 47,462 (August 12, 2005) (affirming that a Medicare-participating hospital "must" primarily engage in furnishing services to inpatients); United States Department of Health and Human Services, *Final Report to the Congress and Strategic and Implementing Plan Required under Section 5006 of the Deficit Reduction Act of 2005* at 17 (2006) (CMS Ex. 9 at 19) ("Section 1861(e) of the Act provides that, in order to be a 'hospital,' an institution must be primarily engaged in providing care to inpatients."); United States Department of Health and Human Services, *Strategic Plan Regarding Physician Investment in Specialty Hospitals Section 5006 of the Deficit Reduction Act: Interim Report to Congress* at 4 (2006) (P. Ex. 6 at 6); *Physician-Owned Specialty Hospitals: Hearing Before the S. Comm. on Finance*, 109th Cong. 11 (2006) (Statement of Mark B. McClellan, Administrator, Centers for Medicare & Medicaid Servs.), 2006 WLNR 8541246 ("Under existing law, a hospital, for Medicare purposes, must be, among other requirements, primarily engaged in furnishing services to inpatients."); Survey & Cert. Memo. 08-08, at 5 (January 11, 2008) (advising that a hospital applicant specializing in emergency services must primarily engage in providing services to inpatients).

2. Petitioner is not entitled to judgment as a matter of law on its claims that CMS has unlawfully changed its standards and has certified as hospitals many institutions that primarily provide services to outpatients.

In 1965, when the Medicare statute was drafted, virtually all of the types of services described in section 1861(e)(1) would have been provided in hospitals. Since then, an increasing number of those services are provided to outpatients, and, in 1982, Medicare began to cover outpatient surgical services provided in ASCs, albeit at rates of reimbursement that were generally lower than those paid to hospitals. *See* Omnibus

Reconciliation Act of 1980, P.L. 96-499, 94 Stat. 2599; Act § 1832(a)(2)(F); 42 C.F.R. § 416.2.[6]

Distinguishing between a hospital and an ASC is not always easy. CMS has declined to set strict numerical standards for determining exactly when an institution establishes that its inpatient services constitute its primary business. Rather, it assesses, case-by-case, whether the statutory definition is met. *Kearney Reg'l Med. Ctr.*, DAB No. 2639 at 14; CMS Ex. 9 at 21.[7] Where, as here, an institution provides the vast majority of its services to outpatients, it unquestionably does not meet the statutory definition, and I need not consider the methods CMS uses to decide closer cases.

Petitioner, nevertheless, argues that CMS violated section 1871(a)(2) of the Act (as well as the Administrative Procedures Act and the Constitution) because it purportedly changed the standards for hospital certification without promulgating regulations, in violation of section 1871. P. Br. at 12. Section 1871(a)(2) precludes any "rule, requirement, or other statement of policy" that "*establishes* or *changes* a substantive legal standard governing" an entity's eligibility to furnish services under Medicare, unless the new standard is promulgated by regulation. Act §§ 1871(a) and (b) (emphasis added). Petitioner's argument fails because CMS neither "established" nor "changed" the requirement for inpatient services. That definition is set forth in the statute and has remained unchanged for 50 years. Petitioner points to no regulation, policy issuance, or other reliable evidence suggesting that the agency has deviated from this position.

Petitioner also asserts that CMS has certified as hospitals institutions whose inpatient services represent an even smaller share of their overall services than Petitioner Wills Eye's and that CMS's treatment of Petitioner has been arbitrary and capricious.

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[6] Medical practices may have outpaced the statute. Petitioner and others note that surgical centers provide to outpatients increasingly sophisticated services, services that, in the past, required hospitalization. Yet the centers are reimbursed at significantly lower rates because they cannot be certified as hospitals. A legislative or policy change could provide Petitioner and others the relief they seek but this is not the appropriate forum for effecting such changes.

[7] CMS considers whether to approve a new hospital that has a significant non-inpatient mission based on "a detailed analysis of the facts of the applicant's operations . . . ." In the absence of "other clearly persuasive data," CMS bases its determination on the proportion of inpatient beds to all other beds. To meet the statutory requirement the provider generally must devote 51% or more of its beds to inpatient care. Interpreting "primarily engaged" to mean that an institution engages in that activity more than other activities seems eminently reasonable. However, at the request of the applicant, CMS may consider other factors and the "51% test" may not be dispositive in all cases. Survey & Cert. Memo. 08-08, at 5 (January 11, 2008).

According to Petitioner, CMS has certified "hundreds of hospitals with small complements of inpatient beds and exponentially greater volumes of outpatient than inpatient services, including specialized hospitals." P. Br. at 17. For purposes of summary judgment, I accept that some institutions participating in the Medicare program as hospitals may not qualify. In some cases, a hospital's services may have changed over time but CMS is not yet aware of that fact; in other cases, CMS personnel may have erred when they certified the institution in the first place. But this does not change the statutory definition, and I may not compound CMS's purported errors by compelling CMS to allow yet another unqualified institution to be certified. *See Beverly Health & Rehab.-- Springhill*, DAB No. 1696 (1999) (holding that selective enforcement does not bar future enforcement actions), *aff'd, Beverly Health & Rehab Servs. v. Thompson*, 223 F. Supp. 2d 73 (D.D.C. 2002). The remedy for these purported errors is set forth in the statute and regulations: CMS may refuse to renew or may terminate the noncompliant institution's provider agreement. Act § 1866(b)(2)(B); 42 C.F.R. § 489.53(a)(1).[8]

I am bound by the terms of the statute and cannot ignore the fact that Petitioner does not meet the definition of a hospital, without regard to whether CMS has previously admitted other hospitals that also do not meet the definition. *Ariz. Surgical Hosp.*, DAB No. 1890 at 10 ("CMS's actions or lack thereof regarding other facilities would provide no basis for the ALJ to ignore or decline to enforce the statute's clear requirements."); *see also Pepper Hill Nursing & Rehab. Ctr., LLC*, DAB No. 2395 at 10-11 (2011) (stating that an ALJ and the Departmental Appeals Board are bound by the applicable statute and regulations). Moreover, "CMS's treatment of other facilities cannot undercut [Petitioner's] responsibility to show that it was in compliance with the applicable legal requirements or remove CMS's authority to take actions which it is authorized by statute . . . to take." *Jewish Home of Eastern Pa.*, DAB No. 2254 at 15 (2009), *aff'd*, *Jewish Home of Eastern Pa. v. Centers for Medicare & Medicaid Servs.*, 693 F.3d 359 (2012).

[8] In fact, the *Kearney Regional Medical Center* decision alludes to CMS's taking such actions. Referring to an article published by the American Bar Association, Petitioner Kearney complained about its own termination and speculated that CMS was widely enforcing the "primarily engaged" definition because hospitals with low inpatient volume, which should be considered ASCs, had managed to enroll as inpatient hospitals "in order to obtain greater reimbursement under the hospital outpatient prospective payment system." *Kearney Reg'l Med. Ctr.*, DAB No. 2639 at 15 (citing Mark Faccenda, *CMS Enforcement against Hospitals for Failure to be Primarily Engaged in Inpatient Care*, ABA Health eSource, Vol. 10 No.8 (April 2014)); *see Freedom Pain Hosp.*, DAB CR4530 (2016).

3. CMS is not bound by recommendations from the state agencies.

The Pennsylvania state agency surveyed Petitioner Wills Eye, concluded that it satisfied the Medicare Conditions of Participation for hospitals, and recommended that it be certified. Petitioner complains that CMS should have deferred to the state's recommendation.

Petitioner misconstrues the relationship between the state agency and CMS. Section 1864(a) says that CMS contracts with state agencies to determine the institutions' compliance with regulatory requirements (referred to as conditions of participation). CMS may accept the state agency's certification "to the extent that [it] finds it appropriate. Act § 1864(a). Moreover, section 1866(b)(2) of the Act gives CMS the ultimate authority to determine whether an institution meets the provisions of section 1861. *See also* 42 C.F.R. § 488.12 (providing that the state agency *recommends* but CMS *determines* whether a provider is eligible to participate in the Medicare program.); *Big Bend Hosp. Corp.*, DAB No. 1814 at 6 (2002), *aff'd*, *Big Bend Hosp. Corp. v. Thompson*, 88 F. App'x 4 (5th Cir. 2003) (holding that section 1864(a) authorizes CMS "to proceed as it deems appropriate to make a determination about how to treat a certification").[9]

4. Petitioner has not satisfied the requirements for issuance of subpoenas.

Finally, Petitioner asked me to subpoena unspecified agency records that, it claims, are calculated to lead to admissible evidence through which it can demonstrate that CMS discriminated in denying it hospital status. It also asked that I compel the testimony of two CMS officials, Dale Van Wieren and Timothy J. Hock, and one state official, Charles Schlegel. The regulations governing these proceedings do not allow such broad requests for discovery or for the issuance of subpoenas that are not necessary to allow Petitioner to present its case.

- First, the *requesting party* must *identify the documents* to be produced and describe their locations *with sufficient particularity* to permit them to be found. 42 C.F.R. § 498.58(c)(1)-(2). Here, Petitioner identifies broad categories of records and asks that *CMS* be compelled to identify and locate particular documents that fit within those categories.

- Second, the regulation requires that the requesting party "*specify* the pertinent facts the party expects to establish by the . . . witnesses or documents, and indicate why those facts could not be established without use of a subpoena." 42 C.F.R.

[9] For this reason, the opinions of a state agency employee, whom Petitioner asks me to subpoena, are irrelevant. *See* 42 C.F.R. § 498.58(a) and (c) and discussion below.

§ 498.58(c)(3). But no material facts are in dispute, so additional documents would not be relevant.

- Finally, the requesting party must establish that the documents or witnesses' testimony sought are "reasonably necessary for the full presentation of a case." 42 C.F.R. § 498.58(a). This case turns on a purely legal issue: whether, under the statute, hospitals must provide services primarily to inpatients. I find that hospitals must do so and that, without regard to the standard CMS applies, Petitioner Wills Eye does not meet the statutory definition. Even if I were to grant Petitioner the subpoenas it seeks, the principal purposes of which are to establish that it has been treated disparately (P. Br. at 18), I cannot ignore the plain meaning of the statute. The documents sought are therefore not necessary for a full presentation of Petitioner's case.

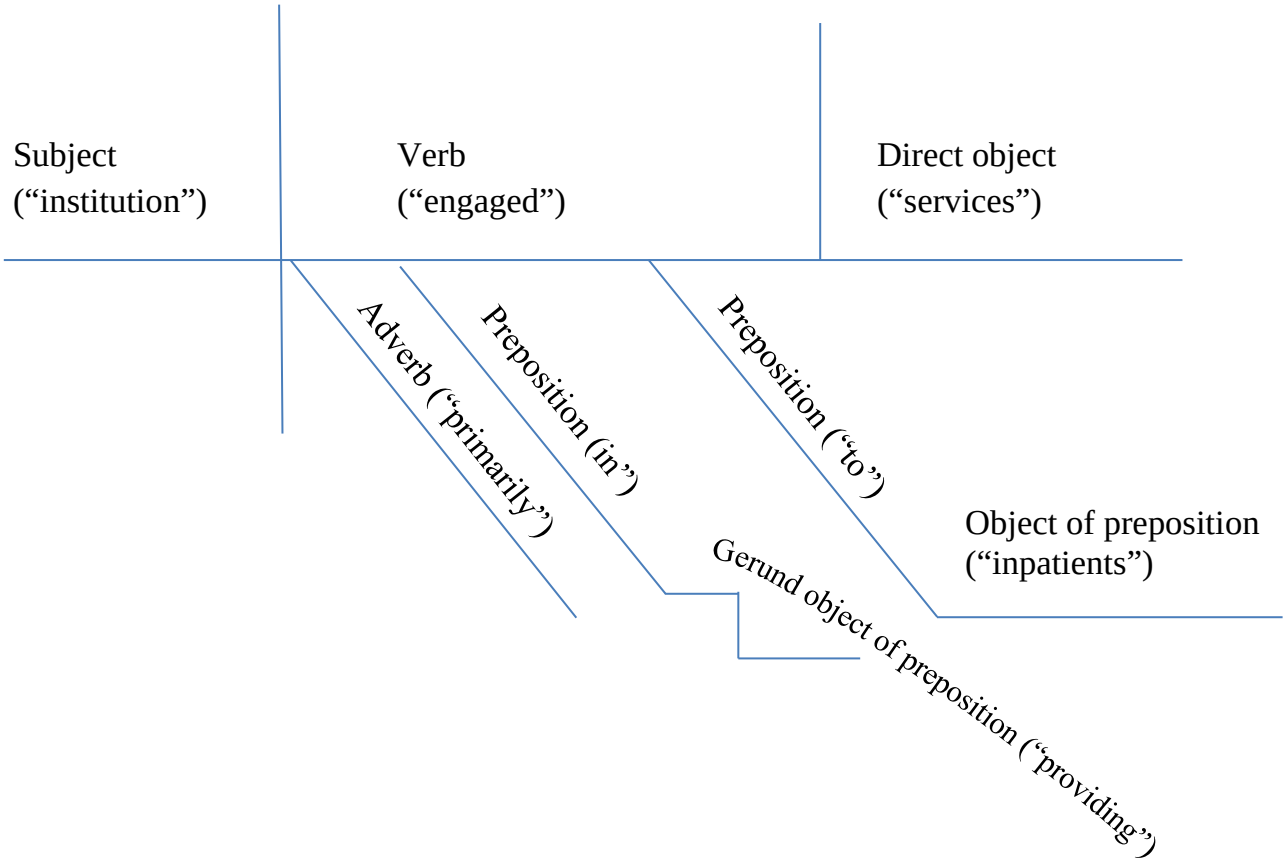
Thus, Petitioner's request does not satisfy the requirements of section 498.58, and Petitioner is not entitled to a subpoena for the documents it seeks or any of the three officials whose testimony it seeks to compel.

Conclusion

The *sine qua non* of a hospital is that it provides the bulk of its services to inpatients. Here, the undisputed evidence establishes that Petitioner Wills Eye does not primarily provide services to inpatients; rather its inpatient services make up a very small proportion of the services it provides. CMS properly denied its Medicare hospital enrollment application. I therefore grant CMS's motion for summary judgment and deny Petitioner's.

/s/
Carolyn Cozad Hughes
Administrative Law Judge

ADDENDUM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