

**IN THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT**

United States Court of Appeals
Fifth Circuit

FILED

March 29, 2011

No. 10-40384

Lyle W. Cayce
Clerk

MIGUEL HERNANDEZ, as Guardian of David P. Hernandez, an incapacitated individual; INEZ BALTAZAR HERNANDEZ, as Guardian of Armando Hernandez, Jr., an incapacitated individual; MICHELLE CRAYTON; ALICIA MATA; DEANN TORRES, as Guardian of Christopher Norris, an incapacitated individual,

Plaintiffs-Appellees

v.

ADELAIDE HORN, Commissioner of the Department of Aging and Disability Services; BARRY WALLER, Assistant Commissioner Provider Services; DENISE GEREDINE, State Schools; IVA BENSON, Superintendent of the Corpus Christi State School,

Defendants - Appellants

Appeal from the United States District Court for the
Southern District of Texas, Corpus Christi

ON PETITION FOR REHEARING

Before SMITH, WIENER, and OWEN, Circuit Judges.

PER CURIAM:

IT IS ORDERED that the appellants' Motion for Panel Rehearing regarding their contention that inadequate staffing is not actionable under *Youngberg v. Romeo*,¹ is GRANTED.

IT IS FURTHER ORDERED that panel rehearing is DENIED as to all other issues on which appellants request reconsideration because, as we held in our original panel opinion, those issues have been waived.

We have reviewed the one issue on which we grant rehearing, and now hold that it does not affect our original holding. Appellants' brief makes the narrow claim that "inadequate staffing" is an action which is properly brought against the State rather than against appellants. Even assuming this is true, it is no basis on which we should reverse the district court's denial of appellants' Motion to Dismiss/Summary Judgment. Appellees asserted, and the district court based its denial of that motion on, numerous alleged departures from professional standards, many of which do not involve staffing shortages. We do not decide how appellants may proceed on remand or whether they may make any broader "budgetary constraints" arguments than the narrow one made on appeal concerning the issue of inadequate staffing.

After reviewing the only issue on which we grant panel rehearing, we confirm our original affirmation of the district court's denial of appellants' Motion to Dismiss/Summary Judgment.

¹ 457 U.S. 307, 315-16 (1982).