

## MEMORANDUM

TO: Chairman/Commissioner Croce

FROM: Brian M. Callahan

RE: Requirement of Written Test following Commission's Basic Correction Officer Training Program

DATE: May 7, 2002

Pursuant to Correction Law section 45(9) and Title 9 NYCRR section 7017.1, the Commission is required to establish, maintain and operate a basic correctional training program for such personnel employed in local correctional institutions as the Commission shall deem necessary. Personnel employed in a county jail must complete the training program within one year after their appointment. See 9 NYCRR 7017.1.

The Americans with Disabilities Act (ADA) of 1990 prohibits discrimination against qualified individuals with disabilities in employment and in the provision of services, programs, and activities by public entities. Title II of the ADA provides in pertinent part: "no qualified individual with a disability shall, by reason of such disability, be excluded from participation in or be denied the benefits of the services, programs, or activities of a public entity, or be subjected to discrimination by any such entity. See 42 U.S.C. section 12132. A "public entity" includes any State or local government. See 42 U.S.C. section 12131(1). A "qualified individual with a disability" means "an individual with a disability who, with or without reasonable modifications to rules, policies, or practices, the removal of architectural, communication, or transportation barriers, or the provision of auxiliary aids and services, meets the essential eligibility requirements for the receipt of services or the participation in programs or activities provided by a public entity." See 42 U.S.C. section 12131(2). It may be a defense to a charge of discrimination that tests which tend to screen out individuals with disabilities are job-related and consistent with business necessity, and performance of the job task cannot be accomplished by reasonable accommodation. See 42

U.S.C. section 12113(a).

The Department of Justice (DOJ) enforces Title II. See 42 U.S.C. section 12134. DOJ regulations describe "disability" as encompassing "[a]ny mental or psychological disorder such as ... specific learning disabilities." See 28 CFR section 35.104(1)(i)(B). Consistent with the statute, DOJ regulations require that a public entity shall not impose or apply eligibility criteria that screen out or tend to screen out an individual with a disability ... from fully and equally enjoying any service, program, or activity, *unless such criteria can be shown to be necessary for the provision of the service, program, or activity being offered.* See 28 CFR section 35.130(b)(8) (emphasis added). A public entity may not administer a licensing or certification program in a manner that subjects qualified individuals with disabilities to discrimination on the basis of disability, nor may a public entity establish requirements for the programs or activities of licensees or certified entities that subject qualified individuals with disabilities to discrimination on the basis of disability. See 28 CFR section 35.130(b)(6). A public entity must make reasonable modifications in policies, practices, or procedures when the modifications are necessary to avoid discrimination on the basis of disability, *unless the public entity can demonstrate that making the modifications would fundamentally alter the nature of the service, program, or activity.* See 28 CFR 35.130(b)(7) (emphasis added). A public entity is not required to take any action that will result in a fundamental alteration to the program, service, or activity or create undue administrative or financial burdens.

The most compelling reason for a written Basic Correction Officer Training Course examination is to ensure that all correction officers are able to read and write unaided. Literacy is essential to the proper performance of a correction officer's functions and duties. For example, a correction officer must be literate in order to comply with various Commission standard requirements. See, e.g., sections 7003.5(b) and 7003.3(i) and (j) (log entries made in the course of supervision of housing areas); section 7006.4(a) (written misbehavior reports); section 7013.7 (initial screening and risk assessment); section 7017.1(e) (policy and procedure manual); section 7063.7 (recording the use of chemical agents).

Generally, an alternative testing method need not be employed if the disability in question affects essential skills necessary for the performance of the particular job in question. See *DiPompo v. West Point Military Academy*, 708 F.Supp. 549 (S.D.N.Y. 1989) (use of written test for position of fire fighter may be used for dyslexic applicant if employer can demonstrate that persons who cannot read at minimal level cannot safely and efficiently perform essential tasks of fire fighter); compare *Stutts v. Freeman*, 694 F.2d 666 (11th Cir. 1983) (denial of dyslexic individual's application for position of heavy equipment operator based on written test unacceptable where employer does not demonstrate reading is essential skill for heavy equipment operator).

The Commission's Counsel's Office is of the opinion that a correction officer must be able to read and write unaided at a minimal level, at least sufficient to read the written examination, in order to safely and efficiently perform the essential tasks of a correction officer. Accordingly, the Commission's policy is to require all correction officers participating in the Commission's Basic Correction Officer Training Program to take a written examination, inasmuch as permitting the test to be administered orally would fundamentally alter a purpose of the test and because there are essential, legitimate, non-discriminatory reasons for requiring correction officers to be able to read and write unaided.