The Protection of Vision Professionals when Employment Contracts Contain Non-Compete Agreements Within the United States and Guidance for Beyond

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Purpose

This position paper informs relevant partners about the unique roles of itinerant teachers of students with visual impairments (TSVIs) and orientation and mobility specialists (OMSs) related to the requirements and expectations of their positions and contract language regarding those services. This paper will define non-compete agreements, explain their role in teaching contracts, provide recommendations and conclude with AER's recommendations.

Background and Problem

The shortage of special education professionals particularly those specializing in vision services like Teachers of Students with Visual Impairments (TSVIs), Orientation and Mobility Specialists (OMS; Savaiano et al., 2022; Schles & Chastain, 2023), presents a significant challenge in ensuring K-12 students receive the Free Appropriate Public Education (FAPE) guaranteed under the Individuals with Disabilities Education Act (IDEA, 2004). Due to the shortages, let them be due to attrition, retirements, or lack of respect for the teaching profession (Billingsley & Bettinni, 2019; Bland, 2024), large,

often unmanageable, caseloads are the reality of most vision professionals serving K-12 populations (Ericson et al. 2024; Zebehazy et al., 2023; Wilton, 2019) as well as those serving adult populations.

Rural areas face additional significant challenges in accessing vision professionals, as fewer professionals are willing to work in these regions due to isolation, lack of resources, and lower salaries. Students in rural communities often rely on itinerant teachers, resulting in reduced face-to-face service hours, while long travel distances further complicate the delivery of timely support (Liu & Schles, 2023). In contrast, metropolitan areas benefit from greater access to specialists and more frequent service availability. Urban settings typically have larger budgets and more robust networks, which enhance districts' ability to recruit and retain qualified professionals. However, due to the prevalent global shortages in specialists, districts often contract with agencies who promise to fill their vacant specialist positions.

Due to the international shortage of vision professionals (Stern et al., 2023), which has led to an increase in services being delivered by contracted companies and agencies serving individuals with blindness and low vision, non-compete agreements (e.g., area or time limit on taking positions) imposed by these entities may cause significant costs and potential harm to highly specialized vision service providers. These costs can include being forced to switch to lower-paying occupations, relocate, leave the workforce altogether, pursue career-changing education or training, or defend against expensive litigation. Such clauses severely limit and, in many cases, eliminate the ability of these professionals to find employment within their preferred regions of residency. Furthermore, non-compete agreements can undermine the provision of Free

and Appropriate Public Education (FAPE) under the Individuals with Disabilities Education Act (IDEA) by preventing qualified providers from delivering services that would otherwise be available. These agreements also restrict the freedom to change jobs, a fundamental component of economic liberty and a thriving, competitive economy. By blocking vision service providers from seeking better wages and working conditions, non-compete agreements stifle innovation, limit economic growth, and prevent school districts and rehabilitation services from accessing a vital talent pool.

Recognizing the harmful effects of noncompete agreements , the Federal Trade Commission (FTC) introduced *“the Non-Compete Clause Rule on January 19, 2023 pursuant to sections 5 and 6(g) of the FTC Act”*. It issued a final rule to ban non-compete agreements nationwide, promoting competition, protecting workers' freedom to change jobs, and fostering innovation and new business formation (Federal Trade Commission, 2024).

> *The final rule provides that it is an unfair method of competition—and therefore a violation of section 5—for employers to, inter alia, enter into non-compete clauses with workers on or after the final rule's effective date.[2] The Commission thus adopts a comprehensive ban on new non-competes with all workers. (Federal Register, 2024)*

Although the ruling has been challenged in court, there are steps in motion to uphold the federal stance on non-compete agreements (Federal Trade Commission, 2024).

Non-compete Agreements (Star et al., 2021)
A non-compete agreement is a legal agreement or clause in a contract where an employee agrees not to compete with an employer after the employment period is over. Businesses use non-compete agreements to protect their proprietary

information, intellectual property, or to maintain their competitive advantage. Noncompete agreements are common in the media, financial services, corporate management, manufacturing, and information technology.

- Noncompete agreements may cover a variety of factors:
    - Geographical scope: The geographical area in which the vision service provider is restricted from competing with the business or school.
    - Time frame: The duration for which the restrictions apply. This could be as little as six months to as long as two years.
    - Scope: The type of work the vision service provider may perform.
    - Competitors: Might not be a list, but gives a general idea of the industry or types of businesses.
    - Damages: Lawsuits, monetary damages, and court injunctions are common.
- Legality of noncompete agreements is a matter of state jurisdiction. Courts may not uphold non-compete agreements that are deemed overly broad or unreasonable in terms of geography, time, or restrictions. Review your state's restrictions here. [State Noncompete Law Tracker]
- Examples of non-compete agreements
    - "Employee shall not, during Employee's employment with Employer and for a period of [twelve (12) months] following the termination of Employee's employment, whether such termination is voluntary or involuntary and regardless of the reason for the termination, [in any geographic region for which Employee had direct or indirect responsibility on behalf of Employer,] perform duties or services for a Direct Competitor, whether as an employee, consultant, principal, advisor, board member, or any other capacity, that are substantially similar to the duties or services Employee performed for Employer at any time during the last [twelve (12) months] of Employee's employment with Employer, or that require Employee to use, disclose, or otherwise take advantage of any Proprietary Information obtained in the course of Employee's employment with Employer. For purposes of this section, a Direct Competitor means any entity that offers or plans to offer products or services that are materially competitive with any of the products or services being manufactured, offered, marketed, or are being actively developed by Employer as of the date Employee's employment with Employer ends."
    - "The Employee specifically agrees that for a period of _____ [months/years] after the Employee is no longer employed by the Company, the Employee will not engage, directly or indirectly, either as proprietor, stockholder, partner, officer, employee or otherwise, in the

same or similar activities as were performed for the Company in any business [within a ___ mile radius of the Company] [within ___ miles of an office of the Company] [within a State where the Company has offices] [within the State of __________] which distributes or sells products or provides services similar to those distributed, sold, or provided by the Company at any time during the _____ [months/years] preceding the Employee's termination of employment."

- "Employee agrees that for _____ [months/years] after Employee is no longer employed by the Company, Employee will not directly or indirectly solicit, agree to perform or perform services of any type that the Company can render ("Services") for any person or entity who paid or engaged the Company for Services, or who received the benefit of the Company's Services, or with whom Employee had any substantial dealing while employed by the Company. However, this restriction with respect to Services applies only to those Services rendered by Employee or an office or unit of the Company in which Employee worked or over which Employee had supervisory authority. This restriction also applies to assisting any employer or other third party."

Position

The purpose of this position paper is to advocate for policies that uphold the rights of vision professionals while ensuring that students who are blind or visually impaired receive a FAPE as required under the IDEA (2004). AERBVI asserts that restrictive employment practices, such as non-compete agreements, negatively impact the availability and quality of vision services by limiting the employment mobility of specialized professionals.

Non-compete agreements often prevent TSVIs, OMS, and other vision professionals from continuing to serve students in a given geographic region after leaving a particular employer. This restriction can result in service gaps for students and create unnecessary financial and professional hardships for vision professionals. Such contractual limitations conflict with the principles of FAPE by potentially reducing the

availability of qualified personnel and limiting parental and school district choice when securing services for students with disabilities (IDEA, 2004).

Additionally, this position paper serves as a resource for Local Education Agencies (LEAs) and State Education Agencies (SEAs) when contracting with companies that provide vision services. It encourages LEAs and SEAs to ensure that contract companies do not impose non-compete agreements on their employees or those they hire under independent contracts (i.e., 1099 employees), which could otherwise restrict the supply of qualified professionals in a given region. School districts and government agencies should prioritize contracts with service providers that allow vision professionals the flexibility to continue working within their field and geographic location without legal or financial repercussions.

This position also aims to pressure vision service providers to eliminate non-compete agreements by raising awareness of their negative impact on both the workforce and student access to essential educational services. Research has shown that non-compete agreements can stifle employment opportunities, lower wages, and reduce competition in specialized fields (Starr et al., 2021). Given the increasing need for specialized vision services, eliminating these restrictive agreements could help retain and attract skilled professionals, thereby improving service delivery to students with visual impairments.

By outlining these concerns, this paper serves as both an advocacy tool and a practical guide for vision service provider companies, vision professionals, education agencies, and policymakers in making informed decisions that align with the principles

of workforce fairness, student access, and compliance with federal and state education mandates.

Furthermore, AERBVI, as a leading professional organization for vision professionals, strongly opposes and will deny support to any organization that enforces non-compete clauses in its employment practices. This includes, but is not limited to, assisting with the promotion or recruitment of vision professionals at AERBVI state or international conferences. Such policies harm professionals, weaken the field, and ultimately jeopardize the well-being of the students and clients we serve.

Recommendations

School districts and State Department of Educations should avoid entering into contracts with companies, but directly hire qualified vision professionals (i.e., TSVI, OMS). When that is not possible, the following recommendations are endorsed by AERBVI:

Recommendation for Vision Service Professionals:

- To ensure that students with visual impairments receive a FAPE, TSVIs and OMS should closely examine all contracts of employment for non-compete agreements.
- Consider advocating for a nondisclosure agreement in place of a non-compete agreement if the employer is concerned about the sharing of confidential and/or sensitive information.

Recommendations for SEAs and LEAs:

- Consider advocating for a nondisclosure agreement in place of a non-compete agreement if the company is concerned about the sharing of confidential and/or sensitive information.
- Consider entering into a cooperative agreement with neighboring districts to share the cost of hiring the qualified vision professional as a cross-district employee.

Recommendations for Companies:

- Consider a nondisclosure agreement in place of a non-compete agreement if the company is concerned about the sharing of confidential and/or sensitive information.
- Implement employee training programs to enhance their skills and knowledge, making them more valuable to the company and less likely to leave.
- Implement incentive structures that reward high performance and loyalty, encouraging employees to stay with the company.
- Consider a non-solicit agreement which prevents employees or former employees from soliciting clients, customers, or other employees of a company they once worked with for a reasonable, but specified time period after their employment or contract ends with the company.
- Consider a non-disparagement agreement which prohibits employees or former employees from making derogatory or negative statements about the company, company practices, its representatives, or other past or present employees.

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