

1982-1983 REPORT OF THE ATTORNEY GENERAL

SCHOOLS. COMMERCIAL PHOTOGRAPHERS. CHARACTERIZATION OF PAYMENT BY SUPPLIER TO SCHOOL AS FUND RAISING ACTIVITY INSUFFICIENT STANDING ALONE TO CURE VIOLATION OF VIRGINIA ANTITRUST ACT.

September 15, 1982

The Honorable Kevin G. Miller
Member, House of Delegates

In your letter of August 31, 1982, you indicate that some confusion exists concerning the employment of commercial photographers by public school systems. You have requested my review of a previous Opinion on this topic rendered by the Attorney General on September 22, 1976 (1976-1977 Report of the Attorney General at 229), (hereafter referred to as "the 1976 Opinion") and my opinion on the following question:

- (1) "Whether the designation of the photographs as a fund raising project permits the school to simply award the contract to the highest bidder without any other requirements?"
- (2) "Whether the money tendered by the commercial photographer for the use of the school facilities or the assistance of school employees must bear a direct relationship to the value of those services or the reasonable value for the use of such facilities?"
- (3) "Whether a student is permitted to use his own personal photograph in the yearbook as opposed to the one supplied by the commercial photographer under contract with the particular school?"
- (4) "Whether public schools are required to advise their pupils through a written disclosure that they are not obligated to purchase photographs from the commercial photographer who has entered into a contractual relationship with the school for the sole purpose of supplying student portraits for the yearbook?"

Your inquiry focuses upon the procedure by which schools obtain photographs of students to be included in the class sections of high school yearbooks. Typically, the school will contract with a publisher for the printing of the yearbook. The school agrees to see that proper pictures of the students are submitted to the publisher for inclusion in the yearbook. Whether a student's picture is included is usually left up to the student. To facilitate the gathering of current pictures, the school will contract with a photographer to permit the photographer to take photographs of students which will be used in the printing of the yearbook. In the usual situation, the photographer will attempt to sell additional copies of the photographs to the students and their families. To obtain this opportunity, the photographer is usually willing to pay the school for the privilege of taking the student's photographs.

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In contracting with the photographer, the school, through its principal or other designated representative, is an intermediary acting on behalf of pupils and their parents. In such a situation, the school “must place the interests of those who purchase merchandise above its own interests of making money for school projects.” 1976-1977 Report of the Attorney General at 229, 231. As noted in that Opinion, any payment made to a school to influence its choice of a supplier for its pupils may violate the prohibition against commercial bribery contained in ' 59.1-9.7 (c) of the Code of Virginia.¹ Any payment to the school must be “a bona fide approximation of the cost of services rendered...” by the school. Id. Such services might include use of the school premises by the photographer or use of school employees to collect money or distribute the goods sold.

Your first question regarding designation of school photography as a “fund raising project,” assumes a situation in which the “highest bidder” receives a contract for providing photographic services. The term “highest bidder” is not defined in your question. For purposes of this Opinion, I assume that the “highest Bidder” is the photographer willing to contribute the largest sum of money to the school. This situation, in and of itself, suggests conduct potentially violative of ' 59.1-9.7(c), because such a payment might tend to induce the school to award a contract based on the size of the “contribution” by the photographer. Moreover, the schools, like all public institutions, should strive to base the award of contracts on an optimal combination of high quality and low price. See Virginia Public Procurement Act, ' 11-35, et seq. (stating the Commonwealth’s policy that public bodies should strive for high quality and reasonable cost).

The mere designation of a photography contract as a “fund raising project” is not sufficient, standing alone, to cure a situation which otherwise violates the laws against commercial bribery. As the 1976 Opinion stated, the school’s motive in selecting a particular supplier is a question of fact, and all circumstances surrounding the transaction should be considered. Designation of the contract as a mode of fund raising would be merely one factor in determining whether the payment was made to influence the choice of photographer. Accordingly, I must answer your first question in the negative.

Your second question relates to the relationship between money tendered by a photographer and the value of the services provided by the school. I reaffirm the view stated in the 1976 Opinion that payments tendered to an intermediary by a bidder must bear a reasonable relationship to the value of the services rendered by the intermediary. The value of such services will vary depending on the circumstances of the case. See Burge v. Bryant Public School District of Saline County, 1981-1982 Trade Cases (CCH) ¶ 64,276 (8th Cir. 1981).

Your third question involves a student’s use of his own personal photograph in a yearbook as opposed to one supplied by the commercial photographer under contract with the school. This question is not presented in a specific factual context, therefore, I base my response on two factual assumptions. The first assumption is that yearbook

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companies have a certain specification regarding the size and quality of photographs and a timetable which must be met if the photograph is to be reproduced properly.² The second assumption is that the yearbook company and the photographer are separate commercial entities. With those assumptions states, I conclude that any photograph meeting the yearbook company's standards tendered by or on behalf of a student should be accepted by the yearbook company regardless of its source.

Your final question concerns disclosure requirements which may be imposed upon the public schools. The first part of your question assumes that the photographer "has entered into a contractual relationship with the school for the sole purpose of supplying student portraits for the yearbook," and asks whether the public schools must make written disclosure to pupils that there is no obligation to purchase photographs from the yearbook photographer.³ Again, the nature of the relationship between the school and the student controls the outcome. The school is an intermediary, acting on behalf of the pupils and their parents in choosing a photographer. Although this relationship places a duty on the school to act in the best commercial interest of the students and parents, it does not give rise to a duty to make written disclosure in regard to what the contract does not require. The student or parent has not agreed to be bound and is not, in fact, bound by the actions of the school. I am, therefore, of the opinion that no agency or fiduciary relationship exists which requires the school to make the type of disclosure contemplated by your question.

Having concluded that there is no legal requirement to make disclosure, I shall attempt to clarify the significance of the disclosure issue. Since the Attorney General's Opinion of September 22, 1976, the school photography question has been addressed informally by several Assistant Attorneys General. Many of those discussions have resulted in constructive suggestions. At least one, however, has indicated that disclosure that the photographer was contributing money to the school, combined with disclosure of the fact that the student was not obligated to use the photographer, would avoid the prohibitions contained in ' 59.1-9.7 (c). I do not agree that public disclosure of an otherwise improper arrangement makes, in this context, that arrangement legally permissible.

¹ The 1976 Opinion also held that a payment "made for the purpose and with intent of influencing the decision of the school in choosing a supplier..." may violate ' 18.2-447.

² Conceivably, a yearbook company might utilize a process which specifies a sole source of yearbook photography. In appropriate circumstances a sole source requirement might be justified, but this Opinion is premised upon the absence of such a requirement.

³ Your question correctly assumes that it would be improper to coerce students into buying additional photographs from a yearbook photographer. Under proper circumstances, such activity might violate ' 59.1-9.5, which prohibits tying arrangements.