



FEDERAL ELECTION COMMISSION

Washington, DC 20463

MEMORANDUM

TO: The Commission

FROM: Office of the Commission Secretary^{VFV}

DATE: July 14, 2022

SUBJECT: AO 2022-07 (Swalwell) Drafts A and B

Attached is a comment on AOR 2022-07.

Attachment



10 G Street NE, Suite 600 | Washington, DC 20002

July 14, 2022

VIA ELECTRONIC MAIL

The Honorable Allen Dickerson
Federal Election Commission
1050 First Street NE
Washington, DC 20463

Re: Advisory Opinion 2022-07 (Swalwell) Drafts A and B

Dear Chair Dickerson:

We submit this comment on behalf of Elias Law Group LLP in response to the Federal Election Commission's (the "FEC's" or the "Commission's") Draft Advisory Opinions in AO 2022-07 (Swalwell), known as Draft A and Draft B. We urge the Commission to adopt Draft B, which accurately concludes that a candidate may use their campaign committee to pay for childcare expenses incurred in connection with campaign *or officeholder* travel. In contrast, Draft A only permits the use of campaign funds for childcare expenses incurred in connection with campaign travel, finding that the same childcare expenses would constitute "personal use" when incurred in connection with officeholder travel. Draft A not only applies an inconsistent standard to campaign and officeholder travel, but would also serve to further discourage a wide range of candidates, including candidates with young children who are not themselves independently wealthy, from running for office.

The Federal Election Campaign Act of 1971, as amended (the "Act"), contains a list of "permitted uses" of campaign funds. One acceptable use is for "ordinary and necessary expenses incurred in connection with the duties of the individual as a holder of Federal office." 52 U.S.C. § 30114(a)(2). The Commission's regulations list, as examples of "ordinary and necessary expenses," "[t]he costs of travel . . . to participate in a function directly connected to bona fide official responsibilities." 11 C.F.R. § 113.2(a)(1). In addition to the list of acceptable expenses enumerated in the Act, the Commission has stated that "campaigns have wide discretion in deciding how to spend their funds," provided they are not engaging in "personal use."¹ An officeholder or candidate converts funds to personal use when they use their campaign to pay a "commitment, obligation, or expense . . . that would exist irrespective of [their] campaign or duties as a Federal officeholder." 11 C.F.R. § 113.1(g).

The Commission has already opined that candidates may use campaign funds to pay for childcare expenses when they are at campaign events, recognizing that the only reason the candidate is away from home is because they are seeking office. *See* Advisory Op. 2019-13 (MJ for Texas); Advisory Op. 2018-06 (Liuba for Congress); Advisory Op. 1995-42 (McCrery). In those advisory opinions, the

¹ *Making Disbursements*, FEC, <https://www.fec.gov/help-candidates-and-committees/making-disbursements/> (last visited July 13, 2022); *see* Advisory Op. 2002-05 (Hutchinson) at 2.

Commission concluded that the candidates were not converting campaign funds to personal use, which is prohibited under the law, because the expenses would not have existed “irrespective of [their] election campaign.”

Like many candidates and officeholders, Representative Swalwell and his spouse work full-time and have young children. The Congressman asks the Commission whether he can use campaign funds to pay for overnight childcare if his spouse is not available, and he is traveling either in connection with his campaign or because of his official position. Both draft opinions correctly conclude that such expenditures are permissible if the travel is in connection with campaign-related activities. However, Draft A concludes that childcare expenditures in connection with officially connected travel would amount to the personal use of campaign funds, while Draft B takes the more logical position that such expenditures would be a permissible use of campaign funds.

Draft A ignores the plain language of the Act and regulations, fails to give the prior advisory opinions related to childcare expenses their proper weight, and is internally inconsistent. After concluding that childcare expenses incurred in connection with campaign-related travel may be paid for with campaign funds because they are a “direct result of Congressman Swalwell’s travel for his own campaign activities,” Draft A concludes that childcare expenses that are a direct result of an officeholder’s travel may *not* be paid for with campaign funds. The only reason given for this conclusion is that the childcare expenses “are not themselves travel costs but are, instead, merely incident to an officeholder’s travel.” But the law and regulations permit the use of campaign funds to defray “any ordinary and necessary expenses incurred in connection with the recipient’s duties as a holder of Federal office.” 11 C.F.R. § 113.2(a). Such expenses may include travel costs, but travel costs are not the *only* ordinary and necessary expenses for which campaign funds can be used.²

Draft B, on the other hand, proposes to apply the same standard to childcare expenses for candidates and officeholders, and faithfully applies the “irrespective test.” For these reasons alone, it is the superior choice. Applying the “irrespective” test, it is clear that Representative Swalwell’s proposed expenses exist only because of his position as a Member of Congress. Congressman Swalwell is traveling in his official capacity, in order to conduct the *bona fide* business of Congress. If Congressman Swalwell was not a Representative, he would not be going on overnight trips for official business and have to leave his children. In other words, Congressman Swalwell is incurring childcare costs precisely because he is a federal officeholder. His childcare expenses exist because of his official position – and he should be permitted to pay for childcare expenses with campaign funds when his spouse is otherwise unavailable. Draft B correctly applies this analysis to permit the use of campaign funds to pay for childcare expenses incurred in connection with both campaign *and* officeholder travel.

Draft B also has the added benefit of encouraging a more diverse group of people to run for federal office. When considering running for the House or Senate, potential candidates must evaluate whether they can balance their family and finances with the demands of running for and holding office. One of those demands is an unpredictable travel schedule. Spending nights away from home is a heavier

² Draft A also points out that the Commission has approved of officeholders using campaign funds to pay for their minor children to travel with them to official events simply because the children cannot be left at home alone. *See* Advisory Op. 2005-09 (Dodd); *see also* Advisory Op. 1995-20 (Roemer) (reaching the same conclusion for campaign travel). When parents travel, they have two options for childcare—bring the child along or leave the child with a babysitter. To say that one option can be paid for with campaign funds and does not raise a risk of “abuse” while the other cannot be paid for with campaign funds and does raise the risk of “abuse” is illogical. Rather than supporting the outcome in Draft A, this line of advisory opinions counsels in favor of Draft B.

financial burden for single parents and lower-income families. It also makes it difficult for women, who are often the primary caretakers for children, to run for and hold elected positions. Allowing officeholders to use campaign funds to pay for childcare expenses incurred during officially connected travel would make it easier for people with varied backgrounds to run for the Senate and Congress. Promoting and encouraging diversity among candidates and officeholders is a laudable goal, and one that can be balanced with the need to prevent fraud or misuse of campaign funds. Draft B upholds both those values. We therefore urge the Commission to reject Draft A and adopt Draft B.

Very truly yours,

A handwritten signature in blue ink, appearing to read "Kate Sawyer Keane".

Kate Sawyer Keane
Shanna M. Reulbach