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June 6, 2018

ADVISORY OPINION NO. 2018-04

Dr. Jennifer Gray
P.O. Box 13862
Birmingham, AL 35202

Fair Campaign Practices Act/Use of Excess
Funds

Friends of Jennifer Gray, the requestor's principal campaign committee, may use campaign funds to pay for the childcare expenses described in the request to the extent such expenses are incurred as a direct result of campaign activity and are tied to specific campaign events. Under the facts supplied, the candidate would not have needed the childcare but for the fact that she is a candidate and without childcare she cannot participate in the described activities. Moreover, she has no reasonable option available to her but to pay for childcare. The payments must be reasonable and customary for the services rendered, and the campaign must properly document the expenditures. The conclusion reached herein applies only to these facts and may not be applied beyond these facts.

Dear Dr. Gray:

The Alabama Ethics Commission is in receipt of your request for a formal Advisory Opinion of this Commission, and this opinion is rendered pursuant to that request.

FACTS

The facts as have been presented to this Commission are as follows:

Dr. Gray is a candidate for the Alabama House of Representatives - District 45. She works from home. During the summer she cares for her child full-time in the day and works at night. She asserts that she will be unable to effectively campaign this summer without childcare, and needs additional support through the summer so that she can devote the time necessary to run a successful campaign. Under the facts supplied, she would not have needed the childcare but for the fact that she is a candidate. Specifically, she would like to use campaign funds to cover some of the cost of summer childcare for her daughter, so that she can continue to attend Chamber of Commerce meetings, meet with constituents, canvas, and phone bank. She affirms that absent childcare, she will not be able to participate in these campaign activities. As all of her nearby, living relatives work full-time, she will have to pay someone to care for her child and she has no other reasonable option available to her but to pay for childcare.

QUESTION PRESENTED

May Friends of Jennifer Gray, the requestor's principal campaign committee, use campaign funds to pay for the childcare expenses described in the request?

ANALYSIS

Yes, Friends of Jennifer Gray may use campaign funds to pay for the childcare expenses described in the request during the pendency of her campaign under the facts supplied. Campaign funds cannot be converted to personal use under the Ethics Act. See Ala. Code § 36-25-6. As the Commission has held, "Personal use is any use of funds in a campaign account to fulfill a commitment, obligation or expense of any person that exists for reasons irrespective of the person's status as a candidate or officeholder." See Advisory Opinion 2016-23. Under the Act and the Commission's Advisory Opinions, however, excess campaign funds can be used for several specific purposes, including "necessary and ordinary expenditures of the campaign." Ala. Code § 17-5-7; AO 2016-23.

In AO 2016-23, the Commission provided a non-exhaustive list of uses of campaign funds that are per se personal use. For uses of campaign funds not included on this list, the Commission determines, on a case-by-case basis, whether the use is a prohibited "personal use," i.e., whether the expense would exist irrespective of the candidate's campaign or officeholder duties. The FCPA does not expressly address childcare expenses. The Commission accordingly must determine whether the proposed use of campaign funds for certain childcare expenses would exist irrespective of this candidate's campaign for elected office.

Although the Alabama Ethics Commission has not decided the issue regarding childcare, the Federal Elections Commission (FEC) has. The FEC, which uses an “irrespective” standard with regard to determining “personal use,” unanimously concluded that it was permissible to use campaign funds to pay for the childcare expenses described in the request before them, to the extent such expenses are incurred as a direct result of campaign activity, because they would not exist irrespective of the candidate’s election campaign. See FEC AO 2018-06 (May 10, 2018).


The FEC’s analysis and conclusion largely apply here. The requestor explains that she is a full-time caregiver for her child and, because of her campaign activity, will incur expenses for part-time or full-time childcare that she would not have had otherwise. The relevant question is whether such expenses would exist irrespective of the candidate’s campaign or officeholder duties. Here, they would not. Under the facts supplied, she would not have needed to pay for childcare had she not been a candidate. Moreover, she has no reasonable option available to her but to pay for childcare. The activities described are campaign events. Therefore, the request satisfies the standard we articulated in AO 2016-23. Even though allowed under these circumstances, as we have held with other expenses the payments must be reasonable and customary for the services rendered and must be properly documented by the campaign.

CONCLUSION

Friends of Jennifer Gray, the requestor’s principal campaign committee, may use campaign funds to pay for the childcare expenses described in the request to the extent such expenses are incurred as a direct result of campaign activity and are tied to specific campaign events. Under the facts supplied, the candidate would not have needed the childcare but for the fact that she is a candidate and without childcare she cannot participate in the described activities. Moreover, she has no reasonable option available to her but to pay for childcare. The payments must be reasonable and customary for the services rendered, and the campaign must properly document the expenditures. The conclusion reached herein applies only to these facts and may not be applied beyond these facts.

AUTHORITY

By 31 vote of the Alabama Ethics Commission on June 6, 2018.


Jerry L. Fielding, Ret. Sr. Circuit Judge
Chair
Alabama Ethics Commission