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State Elections Enforcement Commission
Attn. Lindsey Leung
20 Trinity Street
Hartford, CT 06106

Re: Comments to SEEC Proposed Declaratory Ruling 2019-02

To the Members of the State Elections Enforcement Commission:

I write as a resident of the State of Connecticut and a concerned citizen to provide comments to the State Elections Enforcement Commission's (the "Commission") Proposed Declaratory Ruling 2019-02 (the "Proposed DR") concerning use of campaign funds to offset childcare costs.

Although somewhat unclear in the Proposed DR, what appears to be at issue is Section 9-706-2 of the Regulations of Connecticut State Agencies (the "Regulations"), which governs candidates' use of funds provided under the Citizens' Election Program ("CEP"). The Commission has authority to interpret CEP regulations, and in fact, does so regularly, as evidenced most recently in Declaratory Ruling 2017-01 ("DR 2017-01"). Here, the Commission should delay adoption of the Proposed DR and revise it to permit CEP funds to be used for necessary campaign-related childcare expenses. The Commission has both the authority and the grounds to do so.

I. The Commission Should Find That Regulation 9-706-2 Permits Use of CEP Funds for Necessary Campaign-Related Childcare Expenses

In DR 2017-01, the Commission cites *Bloomfield*[1] for the proposition that the fundamental objective in statutory interpretation is to give effect to the intent of the legislature, looking at the text of the statute. Where statutory language is ambiguous or agnostic, the interpreter is to find interpretive guidance in, *inter alia*, legislative history and the statute's "relationship to existing legislation and common law principles governing the same general subject matter . . . ."[2] Here, the text of Regulation 9-706-2 clearly refers to Conn. Gen. Stat. § 9-607(g)(4), which already has been interpreted by this Commission to include childcare expenses as permissible expenditures. Moreover, even if the Commission reinterprets its earlier Advisory Opinion to render Regulation 9-706-2 ambiguous, such ambiguity is resolved in favor of allowing CEP funds to be used for childcare expenses, as this is supported by the most closely analogous statute and is further supported by the legislative history.

[1] *Bloomfield v. United Electrical, Radio & Machine Workers of America, Connecticut Independent Police Union, Local 14*, 285 Conn. 278, 286–87 (2008).
[2] *Id.*

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A. Regulation 9-706-2 is Unambiguous in Allowing Childcare Expenses

In 1976, the Commission issued Advisory Opinion 1976-23 ("AO 1976-23"), interpreting portions of Conn. Gen. Stat. §§ 9-348 (which has since been repealed) as allowing, as a permitted campaign expenditure, childcare costs necessary to allow a candidate to participate in campaign functions. The Proposed DR concedes that AO 1976-23 is not (and presumably has not been) retracted.[3] Currently, Conn. Gen. Stat. § 9-607(g) governs permissible expenditures of political candidates, and to the extent AO 1976-23 is not retracted, it must be applied thereto.

Regulation 9-706-2(a), outlining a non-exhaustive list of permitted CEP fund campaign expenditures is silent as to childcare expenses. Regulation 9-706-2(b), including a non-exhaustive list of impermissible uses of CEP funds is similarly silent. However, it does explicitly reference Conn. Gen. Stat. § 9-607(g)(4) among the impermissible uses of CEP funds.[4] While AO 1976-23 remains instructive, and while it must apply to Conn. Gen. Stat. § 9-607(g), childcare expenses necessary to allow a candidate to attend to campaign functions *must necessarily* be excluded from the list of impermissible uses and, therefore, must be a permissible CEP expenditure.

B. Any Ambiguity Regarding Allowance of Childcare Expenses Under Regulation 9-706-2 Should Be Resolved in Favor of Allowing Such Expenses

Assuming solely for the sake of argument that the Regulation here is facially agnostic to the issue to be decided, the rule of statutory construction outlined in *Bloomfield* applies and the Commission should look to the legislative history of the CEP program and existing legislation governing the same general subject matter for guidance in interpreting the Regulation.[5] Considering both, any ambiguity should be resolved in favor of allowance of use of CEP funds for necessary campaign-related childcare expenses.

The purpose for which CEP was created, and the force driving the legislation, was to enact campaign finance reform in the wake of multiple corruption scandals in Connecticut in the mid-2000s.[6] The relevant question for the Commission to consider in light of this legislative history is whether a candidate's use of CEP funds to pay for necessary childcare to allow the candidate to participate in campaign activities would be violative of the legislative intent in creating CEP. The obvious answer after reading the relevant regulations and considering the most analogous statute is "no."

Regulation 9-706-2(b)(1) explicitly refers to Conn. Gen. Stat. § 9-607(g)(4) as listing impermissible uses of CEP funds. As indicated above, Conn. Gen. Stat. § 9-607(g)(4) makes no explicit reference to childcare. However, AO 1976-23, as indicated above, is not retracted. The Proposed DR appears to create and impose a limitation in AO 1976-23 which does not otherwise

[3] Proposed DR at p.5.
[4] Regulations of Connecticut State Agencies § 9-706-2(b)(1).
[5] This letter only considers directly relevant Connecticut legislation, although the initial Request for Declaratory Ruling and the Proposed DR make clear that other states and the federal government have addressed similar or the same issues.
[6] *Green Party of Conn. v. Garfield*, 616 F.3d 213, 218–19 (2d Cir. 2010).

exist in the actual text of the Advisory Opinion. The Proposed DR, *sua sponte*, adds the words "privately raised" to "campaign funds," thereby creating a limit to AO 1976-23's direct application to use of CEP funds, which are not privately raised.[7] To be clear, until this Proposed DR, no such limitation existed, and AO 1976-23 could be construed to apply to both privately raised and CEP funds. To the extent such a dichotomy does exist, or will be read into AO 1976-23 by the Commission, it merely means Conn. Gen. Stat. § 9-607(g)(4) is not authoritative, but is still the legislation most closely governing the same general subject matter. As such, it should be regarded as persuasive and followed for the reasons stated above.

Regulations 9-706-2(b)(2) through (17) provide further limitations on use of CEP funds, including use for a candidate's personal support or expenses, "even if such personal items . . . are used for campaign related purposes . . . ."[8] A review of examples provided in Regulation 9-706-2(b)(2) as outlined in the Proposed DR makes it clear that childcare expenses are an entirely different type of expense. The prohibited expenditure list includes:

- Day to day food items,
- Supplies,
- Merchandise,
- Mortgage, rent, and utilities, and
- Clothing or attire.

None of these are analogous to childcare costs, as all would be incurred irrespective of the candidate's political activity. Childcare costs, as incurred directly to allow the candidate to participate in campaign-related activities, are entirely dependent upon, and indeed a result of, the candidacy. But for the candidacy and need to participate in such activities, the candidate would presumably be caring for the dependent directly, incurring no costs. The Proposed DR references Opinion of Counsel 2018-05 to expand upon this list, adding the following as items for which Counsel for the Commission has advised fall outside the allowed uses of CEP funds:

- Mortgage payments for candidate's family member's house used as campaign headquarters,
- Candidate's personal cell phone bill for phone used in campaign,
- Candidate's personal clothing for use at campaign events,
- Replacement tires for vehicle used driving to campaign events, and
- Flight to Amsterdam to attend a conference as part of campaign platform.

[7] This is presumably because at the time AO 1976-23 was determined, the CEP did not exist and all campaign funds were privately raised funds. It is unclear whether this language was inserted intentionally as a *post hoc* limit AO 1976-23.

[8] Regulations of Connecticut State Agencies § 9-706-2(b)(2).

The first three of these appear to fall within the categories outlined in Regulation 9-706-2(b)(2), and are therefore explicitly barred. Similarly, replacement tires are analogous to supplies or clothing, as the vehicle would be used regardless of the political campaign, and would suffer "wear and tear" outside of campaign related activities. Finally, the absurdity of the discretionary flight to Amsterdam proves it to be an outlier, and indicating it is in any way analogous to childcare costs is a gross mischaracterization.

Childcare expenses are clearly more analogous to the permitted expenditures in Regulation 9-706-2(a), all of which are incurred solely as a result of the campaign, and some of which could conceivably be used within the bounds of the law to provide for childcare.[9] As such, they should be permitted expenses.

II. The Commission Should Consider the Doctrine of Constitutional Doubt and Interpret the Regulation Broadly to Include Necessary Campaign-Related Childcare Costs

The conclusion reached in the Proposed DR will have a disparate impact on women, raising a question as to whether the Regulation, as interpreted in the Proposed DR, runs afoul of the Equal Protection Clause of the Fourteenth Amendment to the Constitution of the United States. Because it is in question, and because there is an interpretation of the Regulation that adheres to the rules of statutory interpretation and does not potentially implicate any Constitutional issues, the doctrine of constitutional doubt suggests the former interpretation should be avoided.

In *DeBartolo*,[10] the U.S. Supreme Court addressed a rule of statutory construction, that where an otherwise acceptable construction of a statutory provision would raise serious constitutional problems, the statute should be construed to avoid such problems.[11] This is the so-called "doctrine of constitutional doubt" (or "doctrine of constitutional avoidance"). At its core, this doctrine requires courts to construe statutes and regulations to avoid questions of constitutionality, provided such avoidance is reasonable.

There is no question the Proposed DR will disparately impact women. Women have been historically underrepresented in politics.[12] This is, at least in part, because women historically bear the primary burden of childrearing in this society.[13] In refusing the allowance of CEP funds to cover costs of necessary campaign-related childcare, the Proposed DR disproportionately affects the ability of women to run for office. For some candidates, not having the ability to finance

[9] Regulation 9-706-2(a)(4), for example, allows use of CEP funds to pay campaign personnel. Nothing appears to prevent hiring a childcare professional on the campaign team and tasking the person with watching the child for the duration of the campaign *at* various campaign events.
[10] *Edward J. DeBartolo Corp. v. Fla. Gulf Coast Bldg. & Constr. Trades Council*, 485 U.S. 568 (1988).
[11] *Id.* at 575.
[12] For example, in Connecticut, 51% of the population is female, but only 32% of legislative seats are held by women.
[13] *See, e.g.*, Lawless and Fox (2008), "Why are women still not running for public office?" (finding women are 15 times more likely than men for childcare, and are generally less likely to have a political career due, *inter alia*, to family obligations); Carroll & Sanbonmatsu 2009, "Gender and the Decision to Run for State Legislature" (elected women tend to be women who wait to have children or choose not to have children).

childcare costs renders running for office functionally impossible.[14] Nor is it reasonable to suggest female candidates simply proceed to run campaigns with private donations and without CEP funding. CEP funds are a practical necessity in Connecticut political campaigns. Even the Commission, in DR 2017-01, noted that 89% of the then-sitting legislature and 100% of elected constitutional officers since 2010 used CEP funds.[15]

While this disparate impact on women is certainly not intended, and although the Proposed DR would apply to all genders, the effect will likely be fewer single parents and dual-income parents running for office, and because women are statistically more likely to handle the childcare, the majority of these will be women. Thus, Connecticut will have fewer women running for office. This disparate impact could raise constitutional questions.[16]

The Commission can easily avoid this result by permitting CEP funds to be used for necessary campaign-related childcare costs on any of the grounds indicated herein, or any other reasonable basis.

Conclusion

Far from being bound to follow the course of action set forth in the Proposed DR, the Commission is free to rule in favor of allowing use of CEP funds for necessary campaign-related childcare costs. I respectfully urge the Commission to delay adoption of the Proposed DR to allow the Commission time to amend the Proposed DR.

The Commission *can* interpret the Regulation to provide for allowance of CEP funds for necessary childcare expense. Far more importantly, the Commission *should* do so.

Respectfully submitted,

David J. Kozlowski, Esq.

cc: Caitlin Clarkson Pereira

[14] The costs of child care in Connecticut are higher on average than most states, costing on average $13,880 per year, compared to $9,652 on average in the U.S. *See*, CNBC 2018, "How much child care costs in every state."
[15] DR 2017-01 at p. 4.
[16] *See, e.g., Craig v. Boren*, 429 U.S. 190 (1976) (finding administrative sex classifications subject to intermediate scrutiny); *see generally, Personnel Administrator of Massachusetts v. Feeney*, 442 U.S. 256 (1979) (discussion of disparate impact).