A juvenile prosecutor maintains discretion to prosecute a child referred from truancy court for delinquent conduct even on a child's initial referral to juvenile court. [Tex.AG Op. KP-0064](16-2-7B)

On February 16, 2016, the Texas Attorney General opined that a court would likely conclude that a juvenile prosecutor maintains discretion under subsection 65.252(d) of the Family Code to prosecute a child for delinquent conduct as set forth in subsection 51.03(a)(2)(C) of the Family Code even on a child's initial referral from truancy court.

¶ 16-2-7B. **Tex. AG Op. KP-0064**, 2/16/16.

**Re**: Circumstances under which a truancy court may refer a child to the juvenile probation department, and circumstances under which a child may be prosecuted for delinquent conduct (RQ-0046-KP)

**Query**: Your second question concerns prosecutorial discretion under section 65.252 of the Family Code. See Request Letter at 3-4. Under section 65.252, after a child is referred to a juvenile court, "the juvenile court prosecutor shall determine" whether there is probable cause to believe the child engaged in direct contempt or failed to obey a truancy order under circumstances that would constitute contempt of court. TEX. FAM. CODE§ 65.252(a). If there is no probable cause, the juvenile court must order the child to continue his or her compliance with the truancy order and must notify the truancy court. Id. § 65.252(c). On a finding of probable cause, "the prosecutor shall determine whether to request an adjudication" from the juvenile court. Id. § 65.252(a). Subsections 65.252(a) and (b) describe this particular adjudication process, which would involve "a hearing to determine if the child engaged in conduct that constitutes contempt of the order issued by the truancy court or engaged in direct contempt of court." Id. § 65.252(a)-(b). During this hearing, if the juvenile court makes a finding of either such behavior, the court, among other things, "shall ... admonish the child ... of the consequences of subsequent referrals to the juvenile court, including ... a possible charge of delinquent conduct for contempt of the truancy court's order or direct contempt of court." Id. § 65.252(b). Subsection 65.252(d), however, expressly states that section 65 .252 "does not limit the discretion of a juvenile prosecutor or juvenile court to prosecute a child for conduct under Section 51.03." Id. § 65.252(d).

**Opinion:** House Bill 2398 amended the definition of "delinquent conduct" in subsection 51.03(a) to include "conduct that violates a lawful order of a court under circumstances that would constitute contempt of that court in ... a truancy court." Act of May 30, 2015, 84th Leg., R.S., ch. 935, § 18, Tex. Gen. Laws 3224, 3233 (codified at TEX. FAM. CODE§ 51.03(a)(2)(C)) (emphasis added). Thus, you ask "whether a prosecutor and juvenile court must comply with Section 65.252(a)-(c) of the Texas Family Code in the first instance of a child's referral ... to juvenile court, or whether a prosecutor and juvenile court maintain discretion under Section 65.252(d) to prosecute the child for delinquent conduct at any time." Request Letter at 4.

Although the mandatory admonishments to be given by the juvenile court in subsection 65 .252(b) do refer to a possible delinquent conduct charge in future terms upon "subsequent" referrals, suggesting that such a prosecution would not be the consequence of a child's initial referral to juvenile court, subsection (b) must be read in conjunction with subsection (a). Subsection 65.252(a) gives a juvenile prosecutor the discretion to "determine whether to request" the adjudication process described by subsections (a) and (b) in the first instance. TEX. FAM. CODE § 65.252(a) (emphasis added). Only if the prosecutor requests an adjudication under subsection 65.252(a) does a juvenile court proceed to "adjudicate" on the question of contempt, and only upon an affirmative finding does the juvenile court admonish the child regarding a "possible" future charge of delinquent conduct. By expressly stating that section 65.252 does not limit the prosecutor's discretion to prosecute the child on a formal delinquent conduct charge under other law, the Legislature has indicated that the adjudication process of 65.252 is at the discretion of the juvenile prosecutor. Thus, the prosecutor maintains discretion under subsection 65.252(d) to prosecute a child for delinquent conduct as set forth in subsection 5 l .03(a)(2)(C) even on a child's initial referral to juvenile court. This construction affords a juvenile prosecutor the flexibility to handle a child's defiance of a truancy order with the level of severity most appropriate for that child. See id § 65.012 (authorizing the Texas Supreme Court to promulgate "guidelines [for] the informal disposition of truancy cases"); see also id § 65.00l(c) (stating that in adjudicating a child's truant conduct, "[t]he best interest of the child is the primary consideration").

**Summary:** A court would likely conclude that a juvenile prosecutor maintains discretion under subsection 65.252(d) of the Family Code to prosecute a child for delinquent conduct as set forth in subsection 51.03(a)(2)(C) of the Family Code even on a child's initial referral to juvenile court.