

**IN THE SUPREME COURT OF PENNSYLVANIA
EASTERN DISTRICT**

8 EAP 2023 & 9 EAP 2023

COMMONWEALTH OF PENNSYLVANIA,

Appellee

v.

N.E.M.,

Appellant

**Brief of *Amicus Curiae* the Allegheny County
Public Defender's Office
in Support of Appellant N.E.M.**

Appeal from the orders of the Superior Court entered on March 15,
2023, at 288 EAL 2022 & 289 EAL 2022, affirming the juvenile court's
out-of-home placement determinations

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STATEMENT OF INTEREST OF AMICUS CURIAE

The Allegheny County Public Defender's Office is the second largest public defender's office in the Commonwealth of Pennsylvania, employing approximately 90 attorneys and opening roughly 20,000 new criminal cases each year. As such, it is committed to serving the needs of defendants, to protecting their individual rights as guaranteed by the federal and state constitutions, and to ensuring that justice is achieved consistent with the rule of law.

Pursuant to Pa.R.A.P. 531(b), the Allegheny County Public Defender's Office represents that no other person or entity has paid for the preparation of, or authored, this brief in whole or in part.

STATEMENT OF THE QUESTION PRESENTED

On March 15, 2023, this Honorable Court granted allowance of appeal in *In the Interest of N.E.M.* (288 & 289 EAL 2022) to address the following question:

Did not the Superior Court err in denying the petition for specialized review under Pa.R.A.P. 1612 without issuing a memorandum opinion where petitioner had a right to review, such review falls under the abuse of discretion standard, and the juvenile court failed to make a record of its reasons or issue an opinion for the Superior Court to review?

In the Interest of N.E.M., --- A.3d ---, 2023 WL 2520913, *1 (mem.) (Pa. March 15, 2023).

STATEMENT OF THE CASE

For purposes of this *amicus* brief, the relevant facts and procedural history, as gleaned from N.E.M.'s brief to this Honorable Court, are as follows.

On June 21, 2022, 15-year-old N.E.M. was arrested and charged at two unrelated delinquency petitions. AT JV-0000789-2022, he was charged with Simple Assault (M2), 18 Pa.C.S.A. § 2701, and Criminal Mischief (M2), 18 Pa.C.S.A. § 3304.¹ At JV-0000790-2022, he was charged with Robbery (F2), 18 Pa.C.S.A. § 3701, and Theft by Unlawful Taking (F3), 18 Pa.C.S.A. § 3921.²

On July 1, 2022, N.E.M. appeared before the Honorable Jonathan Q. Irvine (“juvenile court”), at which time he tendered admissions to the above-described charges. Counsel for both parties advocated for N.E.M. to be released to his home pending disposition. However, the juvenile

¹ On May 19, 2022, N.E.M. entered the school in which he was a student by causing \$450.00 in damage to a door and door frame. Thereafter, he threatened a school staff member, smacked a cell phone out of the staffer's hand, and also threw a lit miniature cigar at him.

² On June 20, 2022, N.E.M. punched a man in the face who was getting items out of his car. N.E.M. demanded the keys and then drove away in the man's car.

court denied their request with no explanation and abruptly ended the hearing. N.E.M., therefore, remained detained.

Disposition was addressed over the course of three hearings held on July 11, July 26, and August 11, 2022. At each hearing, defense counsel urged the juvenile court to release N.E.M. to his home, emphasizing that N.E.M. had no prior criminal history and that both incidents took place in the midst of a psychiatric episode. So, too, did the Commonwealth, asking at the first hearing for N.E.M. to be released to electronic home monitoring. The juvenile court denied each and every request.

At the conclusion of the third dispositional hearing, the juvenile court ordered N.E.M. to be placed in an out-of-home facility through the Department of Public Welfare. The juvenile court offered no reasons for its determination.

On August 22, 2022, N.E.M. timely filed petitions³ for expedited review pursuant to Pa.R.A.P. 1612 (Review of Out-of-Home Placement in Juvenile Delinquency). Thereafter, he filed an application for consolidation of his petitions. In the meantime, the Commonwealth did

³ 86 EDM 2022 and 87 EDM 2022.

not file any response pursuant to Rule 1612(d). Moreover, the juvenile court did *not*, in accordance with Rule 1612(f), file an opinion in either case stating the reasons for its determination or indicating where in the record its reasons could be found.

On September 28, 2022, the Superior Court entered *per curiam* orders denying N.E.M.'s petitions. The entirety of each order read:

The petition for specialized review is **DENIED**.

The application for consolidation is **DISMISSED**
as moot.

On October 28, 2022, N.E.M. timely filed petitions for allowance of appeal, which this Honorable Court granted on March 15, 2023.

SUMMARY OF THE ARGUMENT

For many years, out-of-home placement determinations that followed delinquency adjudications evaded meaningful appellate review, particularly where the juvenile's placement was shorter in time than the time period for processing an ordinary appeal. Consequently, in 2012, Pa.R.A.P. 1770 (Review of Out of Home Placement in Juvenile Delinquency Matters) was adopted as a mechanism for obtaining accelerated appellate review limited to such matters. The substance of this rule is now found at Pa.R.A.P. 1612 (Review of Out-of-Home Placement in Juvenile Delinquency).⁴

Unfortunately, despite the adoption of Rule 1612, there are no standards governing how petitions for review of out-of-home placement determinations are to be handled by the Superior Court.

Over the years, the Allegheny County Public Defender's Office has filed eight such petitions. In two cases, the Court issued published opinions explaining why the juvenile court did not commit an abuse of discretion. In the other six cases, however, the Court merely issued *per*

⁴ Despite a change in numbering, the substance of former Rule 1770 has remained the same. Accordingly, this *amicus* brief will simply refer to Rule 1612 moving forward.

curiam orders affirming the juvenile court's determination. While one such order included the smallest modicum of reasoning, the remaining orders said little more than that the order of the juvenile court for out-of-home placement was "affirmed."

The Allegheny County Public Defender's Office recognizes that, while appellate review of Rule 1612 petitions is intended to be expedited, the Superior Court's workload is not insignificant and the appellate process can be complex. Nevertheless, a juvenile's right to appeal an out-of-home placement determination cannot be an empty, illusory right. Additionally, it is crucial that similarly situated juveniles be treated similarly.

Regardless of whether the juvenile court complies with Rule 512(D) of the juvenile rules or Rule 1612(f) of the appellate rules, the Superior Court must meaningfully review the out-of-home placement determination. That is, it must thoughtfully explain why the juvenile court did, or did not, abuse its discretion. While a full-blown opinion might not always be necessary, the issuance of a *per curiam* order that merely "affirms" or "reverses" the juvenile court can never be enough.

Instantly, not only did the juvenile court fail to state reasons for why it committed N.E.M. to an out-of-home placement facility, but the Superior Court also offered no explanation for why it affirmed the juvenile court's determination. From beginning to end, this was error.

ARGUMENT

I. Regardless of whether the juvenile court states reasons for its out-of-home placement determination, the Superior Court cannot dispose of a juvenile's Rule 1612 petition without offering a meaningful explanation as to why the juvenile court did, or did not, commit an abuse of discretion.

A. Background.

For many years, out-of-home placement determinations that followed delinquency adjudications evaded meaningful appellate review, particularly where the juvenile's placement was shorter in time than the time period for processing an ordinary appeal. (Interbranch Commission on Juvenile Justice Report, May 2010, 55-56). Consequently, in 2012, Pa.R.A.P. 1770 (Review of Out of Home Placement in Juvenile Delinquency Matters) was adopted as a mechanism for obtaining accelerated appellate review limited to such matters. Pa.R.A.P. 1770, *Note*. Rule 1770 is now renumbered as Rule 1612.

Rule 1612 acknowledges that “[a] failure to seek review under this rule of the out-of-home placement shall not constitute a waiver of the juvenile's right to seek review of the placement in a notice of appeal

filed by the juvenile from a disposition after an adjudication of delinquency.” Pa.R.A.P. 1612(h). Nevertheless, in recommending implementation of this rule, the Interbranch Commission on Juvenile Justice recognized that, “[b]ecause many [out-of-home placement] dispositions are completed in 120 days or less,” there must be “an appellate process [] which assures that any appeal will be finalized, and a decision rendered by the Superior Court, in 90 days or less from the date the appeal is filed.” (Interbranch Commission on Juvenile Justice Report, May 2010, 56) (emphasis added). Just as importantly, its recommendation was based on the fact that “[t]he Pennsylvania Constitution gives juveniles the right to appeal[.]” (Interbranch Commission on Juvenile Justice Report, May 2010, 56) (emphasis added).

B. Rule 1612 petitions filed by the Allegheny County Public Defender’s Office perfectly illustrate that there are no standards governing how such petitions are to be reviewed by the Superior Court.

While there exists a mechanism for seeking accelerated appellate review of out-of-home placement determinations, there are, unfortunately, no standards governing how Rule 1612 petitions are to

be handled by the Superior Court. The eight petitions filed by the Allegheny County Public Defender's Office over the years perfectly underscore this point.

The first petition filed by this office was *Commonwealth v. K.M-F.*, 117 A.3d 346 (Pa.Super. 2015) (*per curiam*). It also happened to be the first case in which the Superior Court dealt with the “relatively new rule” governing out-of-home placement petitions. *Id.* at 347. Accordingly, the Court issued a published opinion to explain that “such petitions are [] reviewed by the court’s Central Legal Staff and submitted to the motions panel for decision.” *Id.* at 349. Although the standards for governing such decisions were not discussed, the Court nevertheless spent the balance of its opinion thoughtfully explaining its conclusion that the juvenile court’s out-of-home placement determination was not unreasonable or an abuse of discretion. *Id.* at 350-352. *See* Appendix A.

In *In the Interest of L.S.-J.H.*, --- A.3d ---, 11 WDA 2018 (Pa.Super. March 26, 2018) (*per curiam*), the Court denied the juvenile’s petition in an order that simply read:

The petition for review is hereby **GRANTED** and the decision of the juvenile court for out-of-home placement be **AFFIRMED**.

See Appendix B (capitalization and emphasis in original).

In *Commonwealth v. A.S.*, --- A.3d ---, 55 WDM 2018 (Pa.Super. July 11, 2018) (*per curiam*), the Court denied the juvenile's petition in an order that merely provided:

Upon review of the petitioner-jvenile's petition for expedited judicial review of an out-of-home placement in a juvenile delinquency, filed May 31, 2018, the petition for review is **GRANTED**. The Order of the juvenile court for out-of-home placement is **AFFIRMED**.

See Appendix C (capitalization and emphasis in original).

In *In the Interest of A.B.*, --- A.3d ---, 116 WDA 2018 (Pa.Super. January 22, 2019) (*per curiam*),⁵ the Court denied the juvenile's petition in an order that simply read:

The Court hereby **GRANTS** the petition for review and the decision of the juvenile court for out-of-home placement is hereby **AFFIRMED**.

See Appendix D (capitalization and emphasis in original).

⁵ The case was docketed using the juvenile's full name. To avoid problems under the public access policy, this *amicus* brief will use the juvenile's initials.

In *In the Interest of M.W.*, --- A.3d ---, 35 WDM 2019 (Pa.Super. April 11, 2019) (*per curiam*),⁶ the Court denied the juvenile's petition in an order that merely provided:

Upon review of the petitioner-jvenile's petition for expedited judicial review of an out-of-home placement in a juvenile delinquency, filed March 15, 2019, the petition for review is **GRANTED**. The Order of the juvenile court for out-of-home placement is **AFFIRMED**.

See Appendix E (capitalization and emphasis in original).

In *In the Interest of T.R.*, --- A.3d ---, 68 WDM 2019 (Pa.Super. July 22, 2019) (*per curiam*), the Court denied the juvenile's petition in an order that stated:

AND NOW, this 22nd day of July, 2019, upon review of Appellant's "Petition for Expedited Judicial Review of Out-of-Home Placement in a Juvenile Delinquency Matter ("Petition")," filed pursuant to Pa.R.A.P. 1770, and the July 8, 2019 Juvenile Court's Findings of Fact and Conclusions of Law issued in response to our Order of June 28, 2019, it is hereby **ORDERED**:

1. The relief requested in the petition is **DENIED**;
2. Appellant's July 9, 2019, application for post-submission communication pursuant to

⁶ See footnote 5.

Pa.R.A.P. 2501(a) is hereby **GRANTED**;
and

3. The May 14, 2019 dispositional order directing out-of-home placement for Appellant, as further directed under the dispositional order dated June 4, 2019 ordering that Appellant be placed in a residential facility at Outside In as of May 24, 2019, is **AFFIRMED**. It is the Court's conclusion that the juvenile court's July 8, 2019 opinion containing findings of fact and conclusions of law sufficiently addresses the necessary criteria for out-of-home placement under Section 6352 of the Juvenile Act and Rule of Juvenile Court Procedure 512(D), such that we find no abuse of discretion in the out-of-home placement ordered. We hereby incorporate the July 8, 2019 opinion and direct that it be included with this Order if [it] is submitted in any further proceedings in connection with this matter.

See Appendix F (capitalization and emphasis in original).

In *In the Interest of D.W.*, 220 A.3d 573 (Pa.Super. 2019), the Court issued a published opinion affirming the juvenile court's out-of-home placement determination. 220 A.3d at 581. Notably, the Court pointed out that "the juvenile court did not state the reasons for placement on the record at the time of disposition pursuant to Rule 512(D)" of the Rules of Juvenile Court Procedure, and that the juvenile

court also failed to “file of record a brief statement of the reasons for the determination or where in the record such reasons may be found, within five days of service of the petition for review.’ Pa.R.A.P. 1770(f).” *Id.* at 578. It also noted that the juvenile court belatedly filed its findings of fact and conclusions of law 13 days after the Court ordered the juvenile court to enter its rationale for placing the juvenile in an out-of-home facility. *Id.* at 578 n. 6. See Appendix G.

Finally, in *In the Interest of R.C.*, --- A.3d ---, 97 WDM 2020 (Pa.Super. November 10, 2020) (*per curiam*), the Court denied the juvenile’s petition in an order that simply said:

Upon review of the petitioner-juvenile’s petition for expedited judicial review of an out-of-home placement in a juvenile delinquency, filed October 22, 2020, the petition for review is **GRANTED**. The Order of the juvenile court for out-of-home placement is **AFFIRMED**.

See Appendix H (capitalization and emphasis in original).

As the above readily demonstrates, the Superior Court’s handling of Rule 1612 petitions has been anything but consistent. In two cases, the Court issued published opinions thoughtfully explaining why the juvenile court did not commit an abuse of discretion. In the other six cases, however, the Court merely issued *per curiam* orders affirming the

juvenile court's determination. And, five of those six orders said little more than that the order of the juvenile court for out-of-home placement was "affirmed."

C. The issuance of a *per curiam* order that merely "affirms" or "reverses" the lower court is not enough to constitute meaningful appellate review, particularly where, as here, the issue is so important that it is appealable as of right.

The Allegheny County Public Defender's Office recognizes that, while appellate review of Rule 1612 petitions is intended to be expedited, the Superior Court's workload is not insignificant and the appellate process can be complex. Nevertheless, a juvenile has a right to appeal an out-of-home placement determination, and this Honorable Court has made clear that "a defendant's right to appeal will not be an empty, illusory right[.]" *Commonwealth v. Shields*, 383 A.2d 844, 846 (Pa. 1978). It is also crucial that similarly situated juveniles be treated similarly.

Regardless of whether the juvenile court complies with Rule 512(D) of the juvenile rules or Rule 1612(f) of the appellate rules, the Superior Court must meaningfully review the out-of-home placement determination. That is, it must explain why the juvenile court did, or

did not, abuse its discretion. Indeed, “arbitrary and unsupported use of” discretionary power is “clearly inappropriate[,]” and that mere “conclusion[s] in the absence of amplification could well serve as a cloak or shield for abused [] discretion.” *Commonwealth v. Powell*, 590 A.2d 1240, 1243 (Pa. 1991) (citations omitted).

Simply put, while a full-blown opinion might not always be necessary (but it very well could be required), the issuance of a *per curiam* order that merely “affirms” or “reverses” the juvenile court can never be enough. Instantly, not only did the juvenile court fail to state reasons for why it committed N.E.M. to an out-of-home placement facility, but the Superior Court also offered no explanation for why it affirmed the juvenile court’s determination. Consequently, from beginning to end, this was error.

CONCLUSION

For the foregoing reasons, the Superior Court's order affirming the juvenile court's order placing N.E.M. in an out-of-home facility should be reversed.

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**CERTIFICATE OF COMPLIANCE PURSUANT TO Pa.R.A.P.
531(b)(3)**

I, Brandon P. Ging, Esquire, hereby certify that this *amicus* brief complies with the word count requirement pursuant to Pa.R.A.P. 531(b)(3), as it does not exceed 7,000 words.

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CERTIFICATE OF COMPLIANCE PURSUANT TO Pa.R.A.P. 127

I certify that this filing complies with the provisions of the *Public Access Policy of the Unified Judicial System of Pennsylvania: Case Records of the Appellate and Trial Courts* that require filing confidential information and documents differently than non-confidential information and documents.

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