

IN THE SUPREME COURT OF PENNSYLVANIA  
EASTERN DISTRICT

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EAP 2023

NO. 8 & 9

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IN THE INTEREST OF:  
N.E.M.

APPEAL OF:  
N.E.M.  
Appellant

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BRIEF FOR APPELLANT

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Appeal From The September 28, 2022 Order Of The Superior Court Of Pennsylvania (Nos. 86 & 87 EDM 2022) Denying The Petition For Review Pursuant To Pa.R.A.P. 1612(A), Seeking Review Of The Orders Of July 1, 2022 And August 11, 2022, Ordering Out-Of-Home Placement Of N.E.M., A Juvenile, Entered By The Court Of Common Pleas Of Philadelphia County, Family Court Division, Juvenile Branch, On Petition Nos. CP-51-JV-0000789-2022 & CP-51-JV-0000790-2022.

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## STATEMENT OF JURISDICTION

This Court's jurisdiction to grant an allowance of appeal to review a final order of the Superior Court is established by 42 Pa.C.S. § 724(a).

## ORDER IN QUESTION

The order in question is the *per curiam* order of the Superior Court denying N.E.M.'s Emergency Petition For Specialized Review Of Out-Of-Home Placement In Juvenile Delinquency Matter Pursuant To Pa.R.A.P., Rule 1612, stating:

The petition for specialized review is **DENIED**.  
Superior Court Orders, attached jointly as Exhibit A.

## STATEMENT OF SCOPE AND STANDARD OF REVIEW

This appeal presents questions of statutory interpretation which is a pure question of law. Review is therefore *de novo* and plenary. *Commonwealth v. M.W.*, 39 A.3d 958, 962 (Pa. 2012) (citing *Commonwealth v. Zortman*, 23 A.3d 519, 523–24 (Pa. 2011)).



## **STATEMENT OF THE QUESTION(S) INVOLVED**

The question involved, as rephrased by this Court's order of March 15, 2023 granting an allowance of appeal, is:

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?

## STATEMENT OF THE CASE

N.E.M. entered an admission in juvenile court after entering into an agreement with the Commonwealth which included the term that he would be released to house arrest. Instead, the juvenile court immediately decided, without a hearing, that N.E.M. would be held and placed outside the home. Though the juvenile court made no record of its reasons for removing N.E.M. from his home, the Superior Court denied N.E.M.'s petition for review without consideration on the merits.

On June 21, 2022, petitioner N.E.M., a fifteen-year-old, was arrested and charged under two unrelated petitions. On July 1, 2022, delinquency petition CP-51-JV-0000790-2022 was listed for an adjudicatory hearing before the Honorable Jonathan Q. Irvine in the Philadelphia Court of Common Pleas Family Division. As part of a negotiated global agreement, delinquency petition CP-51-JV-0000789-2022 was joined for an admission in the same hearing (N.T. 7/1/22 at 5-7). At that hearing, N.E.M. and the Commonwealth presented a tender to the juvenile court, the terms of which included (1) admission on a subset of the charges in each case, (2) an agreement that he would be adjudicated delinquent on the admitted charges and (3) immediate release from detention to house

restrictions with a GPS bracelet (N.T. 7/1/22 at 5-8).

In delinquency petition CP-51-JV-0000789-2022 N.E.M. admitted to committing simple assault and criminal mischief, both misdemeanors of the second degree. 18 Pa.C.S. §§ 2701, 3304. The allegations, as stated at the adjudicatory hearing, are: On May 19, 2022 at approximately 10:30 a.m., N.E.M. attempted to enter High Road School where he is a student. He damaged the door and frame causing damage in the approximate value of \$450.00. During the incident, he threatened the complainant, a staff member, threw a lit Cigarillo at him and smacked a cell phone out of his hand (N.T. 7/1/22 at 10-11).

In delinquency petition CP-51-JV-0000790-2022 N.E.M. admitted to committing robbery graded as a felony of the second degree and theft graded as a felony of the third degree. 18 Pa.C.S. §§ 3701, 3921. The allegations, as stated at the adjudicatory hearing, are: On June 20, 2022 at approximately 11:15 p.m., N.E.M. ran towards the complaining witness, who was retrieving items from his car, and punched him in the face with a closed fist knocking him to the ground. N.E.M. then demanded his keys and drove away in his car (N.T. 7/1/22 at 8-10).

Counsel for N.E.M. proffered additional information for the juvenile

court to consider in deciding whether to accept the offer, including the fact that N.E.M. had never had contact with the delinquency system and both of these incidents occurred during a psychiatric episode (N.T. 7/1/22 at 13). The child’s mother and a community umbrella agency<sup>1</sup> (“CUA”) worker were present to address the court and the court was informed that the witnesses would jointly advocate release on house arrest to his mother (N.T. 7/1/22 at 16).

Counsel for the Commonwealth also advocated for N.E.M. to be released. She indicated that she had spoken to the complainant, who agreed that allowing N.E.M. to go home on house restrictions was the most appropriate outcome (N.T. 7/1/22 at 12–13).

Judge Irvine responded only, “This is a hold. I’ll consider what probation says. This is a carjacking.” (N.T. 7/1/22 at 16). Counsel for N.E.M. moved to withdraw the admission on the grounds that the tender had been rejected (N.T. 7/1/22 at 16). The judge asserted that the admission could not be withdrawn and abruptly left the courtroom without allowing

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<sup>1</sup> A community umbrella agency is a contractor agency of the Philadelphia Department of Human Services that provides direct case management services for dependent children.

counsel to complete his arguments or consult with N.E.M.<sup>2</sup> (N.T. 7/1/22 at 16-19).

When Judge Irvine left the room, he had issued no finding of guilt on the offenses nor had he adjudicated N.E.M. delinquent. Judge Irvine had not allowed the parties to present evidence or make argument regarding N.E.M.'s need for treatment, supervision or rehabilitation. Nor did Judge Irvine take testimony from N.E.M. or his witnesses who were in the courtroom. Instead, later that day, Judge Irvine issued written orders, *in camera*, adjudicating N.E.M. delinquent. The orders included no statement of reasons or findings of fact.

A disposition hearing was scheduled for July 11, 2022, and the CUA worker and N.E.M.'s mother were both present. The court was told that the Department of Human Services (DHS) was seeking to open a petition (N.T. 7/11/22 at 5, 7-8). The Commonwealth renewed its recommendation that N.E.M. be allowed to return home with GPS and house restriction (N.T. 7/11/22 at 7). Without hearing from any witnesses, the juvenile court rejected counsel's request to permit the child to be released to his

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<sup>2</sup> N.E.M. filed a written motion to withdraw his admission on July 1, 2022 and a motion to reconsider on July 18, 2022. The motion was denied on July 26, 2022.

mother with DHS involvement, supervision, and support under a dependent petition. The juvenile court's only response was:

THE COURT: No. Listen, it's not appropriate. It's not appropriate. The recommendations are not appropriate. It's a carjacking where he punched a man in the face and took his car. It's not appropriate. PO to plan for placement.

THE COURT CLERK: 7/26.

[COUNSEL FOR N.E.M.]: Your Honor, just so I can understand the record. So, with his -- are you already ordering that he will be placed and the only question that's outstanding is where he will be placed but outside of the home?

THE COURT: Yes.

(N.T. 7/11/22 at 8).

The docket's entries for that day indicate that a behavioral health evaluation was ordered, and the matter was continued. They also state: "Honorable Jonathan Q. Irvine has ruled that the juvenile is to be placed out of the home." Juvenile Docket CP-51-JV-0000789-2022 at 23-24; Juvenile Docket CP-51-JV-0000790-2022 at 22-23.

At the next disposition hearing two weeks later, the juvenile court provided the following explanation of the order of adjudication:

All right. So just so the record is clear, I adjudicated the young man delinquent on July 1, 2022.

Reasons for the adjudication; there were two separate petitions, the second being a robbery as well as a physical attack. And the thing that he stole was a man's car. These are known as carjackings. Felonies have a presumption that the juvenile is in need of treatment, rehabilitation, and supervision. These were two separate offenses. They're not the same offense. And the second escalated to violence. I stated in this case all admissions are open in the courtroom, therefore if I don't agree with the recommendations I'll do what I think is appropriate. Based upon this young man's -- the violence committed in this case, I think he's a danger to the community.

(N.T. 7/26/22 at 3-4). The court never took the time to provide an equivalent explanation of its dispositional orders. Though N.E.M. had made admissions in these two cases with the understanding that there was an agreement that he was going home, Judge Irvine determined that he would be placed out-of-home without hearing evidence.

On August 11, 2022, it became clear that, due to a shortage of placement options in Philadelphia, the only available out-of-home placement was at a residential treatment facility ("RTF") at Pennsylvania State Department of Public Welfare (N.T. 8/11/22 at 4). This placement went against the recommendations of the behavioral health evaluation, which stated: "RTF is Not recommended." Behavioral Health Evaluation, p. 29. Judge Irvine's only response to counsel's proposal for less restrictive

alternatives was to point out the seriousness of the cases and say, “So, no. My previous ruling stands.” (N.T. 8/11/22 at 8).

At the final dispositional hearing on August 11, 2022, N.E.M. was ordered placed out-of-home at a Department of Public Welfare secure facility. The juvenile court’s written orders state no findings or reason for disposition. Dispositional Orders, attached jointly as Exhibit B (“THE COURT FINDS that: [blank] // REASON FOR DISPOSITION [blank]”). The juvenile court placed neither findings of fact nor explanation of reasons that the dispositional order complied with the Juvenile Act on the record.

N.E.M. filed an emergency petition for specialized review of out-of-home placement pursuant to Pa.R.A.P. 1612 on August 22, 2022. The juvenile court failed to file a statement of reasons for its placement decision. The Commonwealth did not file a response to the petition. The Superior Court denied the petition for review without explanation on August 28, 2022.

This Court granted review. During the pendency of this appeal, as with most juvenile dispositional challenges, N.E.M. remained in out-of-home placement. N.E.M. was finally discharged from North East Secure



Treatment Unit (NESTU) to his home on May 23, 2023, after 335 days in out-of-home placement, first at the Philadelphia Juvenile Justice Services Center and then NESTU, all of which he asserts was served in error.

## SUMMARY OF ARGUMENT

In the wake of the “kids for cash” scandal, the Interbranch Commission on Juvenile Justice was formed in 2009 to analyze what went wrong and suggest reforms to restore faith in the juvenile court system and prevent such a travesty from recurring. Suggested reforms included the need for decisional transparency to ensure judges are relying on the correct factors in making placement decisions and an expedited procedure for meaningful appellate review to provide oversight and guidance.

This Court and the General Assembly took up the call and enacted 42 Pa.C.S. § 6352(c) and Pa.R.J.C.P. 512(D) which require juvenile courts to consider certain factors and state their specific reasons for placing a child out of the home, including why that placement was the least restrictive option. This Court also adopted Pa.R.A.P. 1612 (numbered 1770 at the time of enactment) to ensure speedy and meaningful appellate review of those out-of-home placement decisions. The lower court’s statement of reasons is an essential component of each of these reforms and critical to effective and meaningful appellate review under Rule 1612.

The Superior Court’s failure to require the juvenile court to provide a statement of reasons violates the rule and fundamentally undercuts its

purpose of providing children with a means to obtain meaningful appellate review. It also suggests that the Superior Court treated its review authority under Rule 1612 as discretionary, denying review without considering the merits of the petition. But Rule 1612 grants children a right to be heard, not simply a right to petition. A merits review is mandatory.

Further, appellate review under Rule 1612 must include a written analysis which can be relied upon by future courts. Though many children are committed to out-of-home placements every year, these decisions have seldom been reviewed by appellate courts. Guidance is needed to harmonize the practice among juvenile courts across the state and provide clear guidelines for the application of discretion.

## ARGUMENT

### **I. Pa.R.A.P. 1612 Mandates Meaningful Substantive Review By The Superior Court Which Requires A Statement Of Reasons From The Juvenile Court Addressing The Factors Enumerated In The Juvenile Act And Rules Of Juvenile Court Procedure.**

Rule 1612 and its predecessor, Pa.R.A.P. 1770,<sup>3</sup> were written to provide delinquent children who were removed from their homes with meaningful appellate review. The rule has failed to meet its goals. In the years since it was written, the Superior Court has treated the rule as one which provides children with a mechanism to **ask** the court to review out-of-home placement orders. Unless Rule 1612 is interpreted as a mandate to require the lower court to provide a statement of reasons for removing a delinquent child from the home in compliance with Pa.R.J.C.P. 512(D) and require the Superior Court to substantively review the lower court's exercise of discretion, it fails to provide children with meaningful appellate review.

#### **A. Introduction.**

In the aftermath of the so called “kids for cash” tragedy uncovered

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<sup>3</sup> Rule 1770 was renumbered, and slightly edited in 2020, as discussed *infra*. References to Rule 1612 and its history should be presumed to incorporate Rule 1770 unless otherwise specified.

in Luzerne County in 2008, the Interbranch Commission on Juvenile Justice was established by the Pennsylvania General Assembly in 2009. Interbranch Commission on Juvenile Justice Report (“Commission Report”) May 2010, at 5.<sup>4</sup> It was given a mandate to uncover the failings of the juvenile system which allowed the rights of thousands of children to be violated and to make recommendations to prevent further harm by ensuring a properly functioning juvenile court system. *Id.* at 5, 19. “The commission held 11 days of public hearings ... between October 2009 and April 2010 and took testimony from more than 60 witnesses.” *Id.* at 20.

The Commission heard from young people traumatized by the experience of being removed from their homes. *Id.* at 20. It heard from the parents of the children who were sent “arbitrarily and unexpectedly into detention.” *Id.* It heard from the victims of the children’s crimes, frustrated and bitter after learning that these cases would be expunged. *Id.* All had lost faith in the juvenile court system.

These hearings uncovered a systematic practice by juvenile court judges in Luzerne County who repeatedly and unfairly removed children

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<sup>4</sup> Available at <https://www.pacourts.us/Storage/media/pdfs/20210208/161601-interbranchcommissiononjuvenilejustice.pdf>.

from their homes without providing a lawyer or any other procedural protections while also taking bribes.<sup>5</sup> *Id.* at 17-19. After investigation, approximately 4,000 cases needed to be expunged or dismissed. *Id.* at 12.

At the conclusion of these hearings, the Commission issued a report detailing its findings. It included several recommendations to guard against future harms and ensure a just and fair juvenile delinquency system. Pertinently, it made a series of recommendations regarding juvenile placement decisions and appellate review. *Id.* at 53-56. This Court and the General Assembly responded to these recommendations by amending the Rules of Juvenile Court Procedure and the Juvenile Act. *See* Pa.R.J.C.P. 512(D), 42 Pa.C.S. § 6352(c). These amendments create an interconnected system designed to ensure that juvenile courts considered

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<sup>5</sup> The indictment charged:

“The actions from which they derived improper income included, but were not limited to: entering into agreements guaranteeing placement of juvenile offenders with PA Child Care, LLC and Western PA Child Care, LLC; taking official action to remove funding from the Luzerne County Court budget for the Luzerne County juvenile detention facility, effectively closing the county-run youth detention center; facilitating the construction of juvenile detention facilities and an expansion to one of those facilities by PA Child Care and Western PA Child Care; directing that juvenile offenders be lodged at juvenile detention facilities operated by PA Child Care and Western PA Child Care...”

*Id.* at 18.

certain required factors before making the decision to remove a child from the home. They also added transparency by requiring the courts to place their reasons on the record.

These requirements were incorporated into a new Rule of Appellate Procedure, Rule 1770, now Rule 1612, which created an expedited appellate process that depends upon these layers of transparency. These new rules, taken together illuminate the ways in which the enumeration of factors is critical to both lower court decision making and appellate review, as discussed, *infra*.

This case illustrates what happens when these requirements are ignored. The juvenile court made no record of its reasons for ordering N.E.M. into an out-of-home placement. It confirmed on the record that it had made this decision without hearing from N.E.M. or his witnesses and prior to ordering a behavioral health evaluation. The scant few comments in the court record show that the decision was purely punitive. There is nothing to suggest that the court either considered the required enumerated factors or made a record for the Superior Court to review. The Superior Court, without the benefit of a complete factual record or any window into the trial court's reasoning, denied the petition *per curiam*

without conducting substantive review of N.E.M.'s claims. The Superior Court erred.

**B. The enumeration of factors upon which an out-of-home placement order is entered is critical to both lower court decision making and appellate review, and the Superior Court erred in failing to require the juvenile court's compliance with Rule 1612(f).**

Among other reforms suggested by the Commission were the need for transparency in the courts to ensure that judges rely on enumerated factors when entering a delinquency disposition and an expedited procedure for meaningful appellate review to provide oversight. Several new rules were adopted in response to these recommendations. These rules emphasize the need for the juvenile court to consider the enumerated factors by requiring them to provide a statement of reasons for dispositional orders which addresses the factors.

The Commission explained the dire need for judges to place their reasoning on the record in its section titled "Recommendations Regarding Stating Dispositional Reasoning on the Record." Commission Report, at 53. Transparency was recommended in part to restore the faith of all parties in the juvenile court system. *Id.* Families appeared in court in Luzerne County expecting fair treatment, but



[i]nstead, many were subjected to disproportionately harsh dispositions for minor offenses with no justification. A requirement that juvenile court judges state the reasons for dispositional orders on the record would add a layer of transparency to juvenile court proceedings that would help children and families understand the purpose of juvenile court dispositions.

*Id.* Furthermore, the Commission posited that requiring judges to balance all of the enumerated factors on the record “would help to ensure that the principles which should guide every juvenile court disposition would be followed.” *Id.* The additional emphasis on these requirements for out-of-home placements ensured that these decisions were not taken lightly. *Id.* Furthermore, the Commission noted that this record is vital to meaningful appellate review:

In cases where a dispositional order was challenged, appellate courts would have a clear record to review.

*Id.* The Commission recommended changes to the Rules of Juvenile Court Procedure and the Juvenile Act to meet these goals.

In response to these recommendations, in 2011, this Court adopted amendments to the Rules of Juvenile Court Procedure 512 and 515 in an effort to provide transparency and “require[ ] the judge to consider the least restrictive out-of-home placement of a juvenile consistent with the

protection of the public and the best interests of the juvenile.” Final Report on Implementation on Recommendations of the Interbranch Commission on Juvenile Justice (“Final Report”), April 8, 2013, at 2.<sup>6</sup> An entirely new subsection was added to Rule 512, which dictates the rules governing dispositional hearings. It states, in part:

D. Court’s findings. The court shall enter its findings and conclusions of law into the record and enter an order pursuant to Rule 515. On the record in open court, the court shall state:

- (1) its disposition;
- (2) the reasons for its disposition;
- (3) the terms, conditions, and limitations of the disposition; and
- (4) if the juvenile is removed from the home:

...

(b) its findings and conclusions of law that formed the basis of its decision consistent with 42 Pa.C.S. §§ 6301 and 6352, including why the court found that the out-of-home placement ordered is the least restrictive type of placement that is consistent with the protection of the public and best suited to the juvenile’s treatment, supervision, rehabilitation, and welfare; ...

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<sup>6</sup> Available at <https://www.pacourts.us/Storage/media/pdfs/20210208/161633-finalreportonimplementationonrecommendationsoftheinterbranchcommissiononjuvenilejustice.pdf>.

Pa.R.J.C.P. 512(D). Several comments were added to the rule at the same time which emphasize the point, including:

Pursuant to paragraph (D), when the court has determined the juvenile is in need of treatment, supervision, and rehabilitation, the court is to place its findings and conclusions of law on the record by announcing them orally in the courtroom, followed by written order. The court is to consider the following factors: a) the protection of the community; b) the treatment needs of the juvenile; c) the supervision needs of the juvenile; d) the development of competencies to enable the juvenile to become a responsible and productive member of the community; e) accountability for the offense(s) committed; and f) any other factors that the court deems appropriate.

...

Pursuant to paragraph (D)(4), when out-of-home placement is necessary, the court is to explain why the placement is the least restrictive type of placement that is consistent with the protection of the public and the rehabilitation needs of the child. *See* 42 Pa.C.S. § 6352.

Pa.R.J.C.P. 512, cmt.

Shortly thereafter, an amendment to the Juvenile Act was passed unanimously in both houses of the General Assembly. PA House Journal, 2012 Reg. Sess. No. 14; PA Bill History, 2012 Reg. Sess., S.B. 818. On April 3, 2012, the following subsection was added to Section 6352 of the

Juvenile Act, “Disposition of delinquent child”:

(c) **Required statement of reasons.**--Prior to entering an order of disposition under subsection (a), the court shall state its disposition and the reasons for its disposition on the record in open court, together with the goals, terms and conditions of that disposition. If the child is to be committed to out-of-home placement, the court shall also state ... its findings and conclusions of law that formed the basis of its decision consistent with subsection (a) and section 6301, including the reasons why commitment to that facility or type of facility was determined to be the least restrictive placement that is consistent with the protection of the public and best suited to the child’s treatment, supervision, rehabilitation and welfare.

42 Pa.C.S. § 6352.

Taken together, the amendments to these rules inform and cabin the juvenile court’s exercise of discretion in issuing dispositional orders. In determining the disposition of a delinquent child, a juvenile court must make a record of its consideration of certain enumerated factors: (1) what is best suited to the child’s treatment, supervision, rehabilitation and welfare; (2) what is consistent with the public interest; (3) the protection of the community; (4) the development of competencies; (5) accountability for the offense committed; and (6) any other factors that the court deems appropriate. 42 Pa.C.S. § 6352(a), (c); Pa.R.J.C.P. 512(D), and cmt. *See*

*also*, 42 Pa.C.S. § 6301. Out-of-home placement must be the “least restrictive type of placement that is consistent with the protection of the public and best suited to the juvenile’s treatment, supervision, rehabilitation, and welfare.” Pa.R.J.C.P. 512(D)(4)(b). *See also*, 42 Pa.C.S. § 6352(c), 42 Pa.C.S. § 6301(b)(3) (A stated purpose of the Juvenile Act is to “separate[e] the child from parents only when necessary for his welfare, safety or health or in the interests of public safety ... by using the least restrictive intervention”).

The Commission further recommended the creation of a meaningful appellate process, because:

Appellate review by the Superior Court of Pennsylvania is essential to the proper functioning of the juvenile justice system because it provides an aggrieved party an opportunity to seek review of the juvenile court judge’s decision, and provides a mechanism to correct legal and procedural errors that may have been made by the judge.

Commission Report, at 54-55. In response to the Commission’s recommendations, this Court adopted Rule 1770 for the stated purpose of providing an expedited procedure for appeals so that children would have access to meaningful appellate review. Final Report, *supra*, at 2.

The new procedure incorporates the requirement for transparency:

if the judge “did not state the reasons for such placement on the record at the time of disposition pursuant to Pa.R.J.C.P. 512(D), the judge **shall** file of record a brief statement of the reasons for the determination.” Pa.R.A.P. 1612(f) (emphasis added) (language identical to the former Rule 1770(f)). There is no ambiguity in this directive or the context in which it is made: the word “shall” is mandatory. *See, e.g., Chanceford Aviation Properties, L.L.P. v. Chanceford Twp. Bd. of Supervisors*, 923 A.2d 1099, 1104 (Pa. 2007), *Oberneder v. Link Computer Corp.*, 696 A.2d 148, 150 (Pa. 1997). It is clear that the statute requires the juvenile court’s compliance, the word “shall” leaves no room for doubt that the juvenile court was required to supply a statement of reasons.

Rule 1612 creates its own procedure for filing of a petition for review which delineates the responsibilities of all parties in the lower court. Subsection (b) very specifically describes the content of the petition for review. Subsection (c) limits the scope of review to the single issue: the reviewing court “may consider only a challenge to the fact that the placement is out-of-home.” Rule 1612(c)(1). This limitation obviates the need for a statement of errors like the kind required by Pa.R.A.P. 1925(b): the rule itself denotes the error to be addressed.

However, Rule 1612 does not dispense with the need for an explanation from the trial court: subsection (f) requires it. While this procedure is designed to be expedited, where the juvenile court has failed to follow the Juvenile Act and the juvenile rules, Rule 1612 fills the gap and directs the lower court to provide a statement of reasons to show that it complied with the requirements of Pa.R.J.C.P. 512(D). This requirement ensures that the Superior Court has the ability to review the actions taken by the court below, a parallel to the Pa.R.A.P. 1925(a) opinion in a direct appeal, which this Court has said is crucial to the appeals process. *See, e.g., Commonwealth v. Lord*, 719 A.2d 306, 308 (Pa. 1998) (“The absence of a trial court opinion poses a substantial impediment to meaningful and effective appellate review.”).

Because dispositional orders are reviewed under the abuse of discretion standard, Subsection (f) guarantees that a record of reasons is created to further meaningful appellate review. *See In re A.D.*, 771 A.2d 45 (Pa. Super. 2001) (*en banc*), *Commonwealth v. K.M.-F.*, 117 A.3d 346, 349 (Pa. Super. 2015). Substantive review under this standard requires the Superior court to “accept the findings of fact and credibility determinations of the trial court if they are supported by the record” and “review

to determine if the trial court made an error of law or abused its discretion.” *In re Adoption of S.P.*, 47 A.3d 817, 826 (Pa. 2012). The Superior Court is not permitted to simply review the factual record for itself to determine whether a child should have been removed from his home. *Id.* Without some record of the juvenile court’s reasons, appellate review of its exercise of discretion is impossible.

For this reason, it was an error for the Superior Court to fail to require a statement of reasons from the juvenile court. The rules required the juvenile court to consider the enumerated factors and place its consideration of them on the record. Pa.R.J.C.P. 512(D), 42 Pa.C.S. § 6352(c). Failing that, the juvenile court was required to submit a statement explaining the reasons the order comports with the enumerated factors, as required by 1612(f). To be sufficient, a statement of reasons must balance the factors listed in Pa.R.J.C.P. 512(D), as referenced in Rule 1612(f).

The rules were amended to create an interconnected system which would provide transparency, ensure that juvenile courts considered certain factors before removing a child from his home, and provide meaningful appellate review where needed. The enumeration of factors upon which an out-of-home placement order is entered is critical to both lower



court decision making and appellate review. There can be no meaningful appellate review of a lower court's abuse of discretion where there is no record of its exercise of discretion.

Compliance with Rule 1612(f) is mandatory. It requires: (1) that the juvenile court provide a record of its reasons for ordering out-of-home placement which addresses the enumerated factors listed in Pa.R.J.C.P. 512(D); and (2) that the Superior Court require a statement of reasons addressing the enumerated factors where one otherwise does not exist.

**C. Substantive appellate review by the Superior Court is mandatory, not discretionary under Rule 1612.**

Rule 1612, "Review of Out-of-Home Placement in Juvenile Delinquency," states that when a child is ordered to out-of-home placement after being adjudicated delinquent, he or she "may file a petition for specialized review." Pa.R.A.P. 1612(a). This language creates a clear right to appeal, it gives children a right to be heard, not simply a right to petition. Once a right to appeal is established, the Superior Court has a mandatory obligation to consider the claims raised in the petition. It does not have discretion to decline to exercise its power to review the decision below.

Despite this clear mandate, the Superior Court has interpreted petitions for review under Rule 1612 and its predecessor as requests for

review which it may, in its discretion, refuse. Indeed, it has only issued two opinions addressing the rule since it was adopted in 2012: *In re D.W.*, 220 A.3d 573 (Pa. Super. 2019), and *Commonwealth v. K.M.-F.*, 117 A.3d 346 (Pa. Super. 2015). Both cases were decided under Rule 1770 and in both cases, the court treated the petition for review as one which called for an act of discretion, granting the petitions for review before affirming the lower courts' decisions. *D.W.*, 220 A.3d at 574 (“We grant expedited review and affirm.”), *K.M.-F.*, 117 A.3d at 349 (“[W]e grant the petition for review and affirm the juvenile court’s decision for out-of-home placement.”).

No opinion has specifically addressed Rule 1612 since it was adopted in 2020. However, the Superior Court’s decision to decline substantive review in N.E.M.’s case indicates that it continues to first determine whether or not to grant review of these petitions. This interpretation of the rule is in error.

Where the Rules of Appellate Procedure are not explicit, we rely upon the rules of statutory construction to interpret them. Pa.R.A.P. 107. The goal of interpretation is to “ascertain and effectuate the intention” of the drafters. 1 Pa.C.S. § 1921(a). The rules of statutory construction

provide a number of factors we can rely upon in ascertaining this intent, including, the use of similar terms in other provisions, the comments to the rule, the history, the reasons for the rule and the issue to be remedied. 1 Pa.C.S. §§ 1921(c), 1922, 1939. Every one of these factors demands the same interpretation of Rule 1612: the rule promises a right to review by the Superior Court.

The 2020 amendment to Rule 1770 renumbered it as Rule 1612, created Chapter 16, and amended the wording, which confirms the conclusion that it provides a right to expedited appellate review, not a request for the Superior Court to provide review. The procedural rules were amended in order to:

reorganize Chapter 15 and to create a new Chapter 16, with the goal of limiting Chapter 15 to traditional administrative agency appeals, certain other enumerated appeals from similar adjudications or other actions, and original jurisdiction actions against the Commonwealth.

46 Pa. Bull. 2518 (May 21, 2016). *See also, Commonwealth v. Carter*, 247 A.3d 27, 29 (Pa. Super. 2021). In the process, various petitions for review previously listed in Chapter 15 and other places were moved to Chapters 13 and 16. *See*, 46 Pa. Bull. 2518. Petitions which were “more similar to petitions for permission to appeal under Pa.R.A.P. 1311 than to direct

appeals under Chapter 15” were moved to Chapter 13. *Id.* Chapter 16 on the other hand was created to “provide[ ] a petition procedure for appellate review of certain discrete issues” that do not otherwise fall under “Chapters 9, 11, 13, or 15, but the chapter also is intended to provide the method for initiating any otherwise-authorized form of appellate review that does not fall within those chapters.” Pa.R.A.P. 1601. *See also*, 46 Pa. Bull. 2518. Rule 1612 was not included in Chapter 13 for a reason: it is not a petition seeking permission to appeal, it is simply an expedited procedure for an appeal of right.

In the process, a slight change was made to the wording in subsection (a) which also supports the interpretation that review is mandatory. Former Rule 1770(a) stated that when a child was placed out-of-home following an adjudication of delinquency, “the juvenile **may seek review of that order** pursuant to a petition for review under Chapter 15.” Pa.R.A.P. 1770(a) (emphasis added). Current Rule 1612 now states that in such circumstances “the juvenile **may file a petition** for specialized review.” Pa.R.A.P. 1612(a) (emphasis added).

In contrast, where appellate review is discretionary, this Court and the General Assembly have used explicit and clear language to say so.

Petitions filed under Chapter 13, to which Rule 1612 was specifically not relegated, are called “petition[s] for **permission** to appeal.” *See*, Pa.R.A.P. 1311, 1312 (emphasis added). This language leaves no room for doubt; petitions filed under Chapter 13 are requests for the Superior Court to allow the appeal. Rule 1312 specifically requires that these petitions include a statement of reasons for why the Superior Court should permit the appeal. Pa.R.A.P. 1312(a)(5). Similarly, Rule 1112 states that parties may petition this Court for “allowance” of appeal. Pa.R.A.P. 1112 (“Appeals by Allowance”). Petitions for allowance of appeal by this Court must also include a statement of reasons why this Court should permit the appeal. Pa.R.A.P. 1115(a)(6).

The General Assembly used similarly explicit language in the rule governing appellate review of sentences in criminal proceedings. 42 Pa.C.S. § 9781. Either party “may appeal as of right the legality of the sentence.” § 9781(a). However, the parties must “file a petition for allowance of appeal of the discretionary aspects of a sentence” which “may be granted at the discretion of the appellate court.” § 9781(b). Petitioners seeking review of the discretionary aspects of sentencing must include a statement of reasons why appeal should be granted. Pa.R.A.P. 2119(f).

No such parallel exists under Rule 1612. Nowhere in Chapter 16 does there appear any language to suggest that review of the claims raised is discretionary or that permission must be sought. Nor is there any requirement that petitioners file a statement of reasons why review should be granted. The lack of such limiting language demonstrates that Rule 1612 creates a right to appeal and does not grant the Superior Court the discretion to refuse review.

Furthermore, the intent behind the rule is clear. The history, discussed *supra*, demonstrates that this Court intended to give children access to meaningful appellate review. This Court stated in its Final Report on Implementation on Recommendations of the Interbranch Commission, that it adopted Rule 1770 in order to “establish an expedited appeal process for judicial orders of disposition following an adjudication of delinquency where a juvenile is removed from his or her home.” Final Report, *supra*, at 2.

As the Commission noted, “[b]ecause many dispositions are completed in 120 days or less,” timeliness is a crucial aspect of meaningful appellate review. Commission Report, at 55.

Appellate review by the Superior Court of Pennsylvania is essential to the proper functioning of

the juvenile justice system because it provides an aggrieved party an opportunity to seek review of the juvenile court judge's decision, and provides a mechanism to correct legal and procedural errors that may have been made by the judge. **To be meaningful, however, appellate review must be completed before the child's placement, or other disposition, has been completed.**

*Id.*, at 54-55. For this reason, a procedure was needed separate from a direct appeal under Pa.R.A.P. 341 which otherwise provides an appeal of right from final orders but takes much longer to effectuate. An expedited procedure has the potential to reduce harm by addressing the out-of-home placement order prior to the expiration of the child's placement.

The harm to be remedied also demands mandatory review under the rule's expedited timeline. Before these rules were adopted, wrongfully placed children and their families had no recourse:

The Interbranch Commission on Juvenile Justice heard testimony from parents of children who appeared in former Judge Ciavarella's courtroom, who asserted they contacted a variety of governmental agencies and private organizations in an effort to free their children from unjust detention and placement. These efforts were often made at great expense to the parents, but they rarely achieved success. After seemingly exhausting all options in the county and the state, parents reported seeking assistance from advocacy groups in New Jersey, and as far away as Texas.

... Parents should not have to exhaust their resources and search throughout the United States to find ways to protect the constitutional rights of their children. Additional steps should be taken to ensure that juveniles understand their appellate rights and are able to take advantage of the right to appeal.

Commission Report, at 54. The Commission additionally provided examples of wrongly placed children who never filed an appeal because they were told the child would be out of placement before the appeal was finished. *Id.* at 22. Without an expedited procedure, no review is meaningful. The words of the families who spoke before the Commission made it obvious the harm that comes from the lack of oversight.

Even beyond the tragedy that occurred in Luzerne County, the Commission's fear that without expedited process children are effectively without appellate recourse is demonstrated by a review of the scant few cases which substantively evaluate out-of-home placement decisions. Counsel was able to locate fewer than 20 cases which substantively address the removal of children from the home following an adjudication of delinquency, including two which address petitions filed pursuant to Rule 1770.<sup>7</sup> In every single instance but one, an unpublished opinion from

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<sup>7</sup> *In re D.W.*, 220 A.3d 573 (Pa. Super. 2019) (petition filed pursuant to Pa.R.A.P.



2014, the out-of-home placement order was affirmed. In addition, counsel was able to locate half a dozen cases in which the issue was rendered moot by the child's release prior to the conclusion of the direct appeal.<sup>8</sup>

It is easy to understand why so few cases have addressed the issue over the years: without expedited process, it is all but futile to do so. Every appellate attorney representing children adjudicated in delinquency proceedings has had the experience of explaining to a child that appellate review will not help them to get out of placement, because the Superior Court will not address their case until their out-of-home placement is already over. Unless review under Rule 1612 is treated as an expedited procedure for an appeal of right, children will have no appellate recourse and there will be no real oversight of juvenile courts' exercise of discretion.

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1770.), *Commonwealth v. K.M.-F.*, 117 A.3d 346 (Pa. Super. 2015) (petition filed pursuant to Pa.R.A.P. 1770), *In re C.R.*, 113 A.3d 328, 337 (Pa. Super. 2015), *In re D.S.*, 37 A.3d 1202, 1203 (Pa. Super. 2011), *In re L.A.*, 853 A.2d 388, 394 (Pa. Super. 2004), *In re A.D.*, 771 A.2d 45, 53 (Pa. Super. 2001) (*en banc*), *In re J.C.*, 751 A.2d 1178, 1181 (Pa. Super. 2000), *In re Love*, 646 A.2d 1233, 1238 (Pa. Super. 1994). Additionally, counsel was able to locate 11 unpublished decisions which address the issue.

<sup>8</sup> *In re R.D.*, 44 A.3d 657, 680 (2012), *In Int. of McDonough*, 430 A.2d 308, 313 (Pa. Super. 1981), *In Int. of DelSignore*, 375 A.2d 803, 807 (Pa. Super. 1977). Additionally, counsel was able to locate 3 unpublished decisions in which the issue was rendered moot by the child's release from placement.

**D. Juvenile courts need guidance, and written explanations are needed from the Superior Court to provide a clearer understanding of when out-of-home placements may be ordered.**

The value of meaningful appellate review is (at least) twofold: it provides oversight (addressed *supra*), and it provides guidance to the lower courts. Guidance is desperately needed for judges and litigants alike to better understand the requirements and restrictions on juvenile judges' exercise of discretion. Written explanations are needed from the Superior Court to provide this guidance to the lower courts in applying the rules and weighing the enumerated factors.

As things stand now, juvenile courts have very few written memorandum opinions to guide them in their application of the law. In contrast to the hundreds of cases which exhaustively analyze every aspect of a sentencing judge's exercise of discretion in adult cases, there exists a scant handful of cases which substantively review a juvenile court's order committing a delinquent child to out-of-home placement. For example, a Westlaw search for "discretionary aspects of sentencing" in Pennsylvania state jurisdiction yields 6,706 cases.

On the other hand, as noted *supra*, only a handful of opinions substantively analyze out-of-home placement decisions in juvenile

delinquency cases. Only two opinions have been issued by the Superior Court addressing a petition for review filed under Rule 1612 and its predecessor. Written explanations are needed from the Superior Court to aid the juvenile courts in making out-of-home placement decisions.

This dearth of written opinions does not stem from a lack of need for review. Out-of-home placements made up 5.5% of all initial delinquency dispositions in 2021. The Juvenile Court Judges' Commission, 2021 Juvenile Court Annual Report, p. 23.<sup>9</sup> Of the total 12,290 total initial dispositions entered in 2021, 670 of those dispositional orders were for out-of-home placement. *Id.* at 27. When placement orders originating in dispositional review hearings are added, the number jumps up to 1,269 children ordered to placement in 2021. *Id.* at 36. 1,236 of those children were committed to out-of-home placements for more than 28 days. Pa. Juv. Cts., Pa. Juv. Probation Depts., Statewide Outcome Measures, 2022 Pennsylvania Juvenile Justice System Outcomes, p. 12.<sup>10</sup> In fact, the median length of placement in 2021 was 8.9 months. *Id.* Only one of those placement orders was reviewed in a written opinion by the Superior

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<sup>9</sup> Available at <https://www.jcjc.pa.gov/Pages/default.aspx>.

<sup>10</sup> Available at <https://www.jcjc.pa.gov/Pages/default.aspx> (Rev. 05/23/2023).

Court, as a result of a direct appeal. *Int. of J.A.D.-B.*, 283 A.3d 412 (Pa. Super. 2022) (Unpublished).

A mandate from this Court is needed to ensure that the Superior Court provides meaningful appellate review under Rule 1612. Meaningful appellate review must include, if not a written memorandum opinion in every case, then at least some form of analysis which can be relied upon by future courts. Where the juvenile court has submitted a legally correct and well analyzed statement of reasons in compliance with 42 Pa.C.S. § 6352(c), Pa.R.J.C.P. 512(D) and Rule 1612(f), the Superior Court could simply adopt that statement and include it with the opinion. *See, e.g., In re D.S.*, 37 A.3d 1202, 1203 (Pa. Super. 2011), *In re A.D.*, 771 A.2d 45, 53 (Pa. Super. 2001) (*en banc*).

The clarification of these procedures will affect thousands of children. A growth in the caselaw in this area would provide both judges and litigants with predictability and guidance going forward. N.E.M.'s case is a prime example of how juvenile court judges continue to commit children without evidence and fail to consider the enumerated factors.

Requiring the requested guidance would harmonize the practice among juvenile courts across the state. It would benefit the parties by

providing a greater level of predictability. It would benefit the judiciary by providing clear guidelines for the application of discretion.

N.E.M. asks this Court to (1) reinforce the clear mandate that the juvenile courts must consider the enumerated factors and clearly state their reasons upon entering a disposition by finding that the Superior Court erred in failing to require this crucial information on appeal, (2) clarify that Rule 1612 provides children with an expedited procedure for an appeal of right and is not intended as a petition seeking review and (3) ensure appellate review is meaningful and provides guidance to juvenile courts by requiring a written explanation of decision from the Superior Court. Any other reading would render the rule meaningless.

**II. Though N.E.M. Has Been Released From Out-Of-Home Placement, And The Matter Is Technically Moot As To Him, This Court Should Address The Issue On The Merits Because It Is Likely To Recur Yet Capable Of Repeatedly Evading Review, And It Involves An Issue Of Important Public Interest.**

This appeal was taken upon the denial of N.E.M.'s petition for specialized review of out-of-home placement. N.E.M. was released from placement on May 23, 2023, 11 months and one day from the date of his arrest on June 22, 2022. As N.E.M. has been released from placement, his petition is technically moot.

This Court should decide the issue on the merits, nonetheless. “The mootness doctrine requires that an actual case or controversy must be extant at all stages of review, not merely at the time the complaint is filed.” *Pub. Def.’s Off. of Venango Cnty. v. Venango Cnty. Ct. of Common Pleas*, 893 A.2d 1275, 1279 (Pa. 2006) (citing *Pap’s A.M. v. City of Erie*, 812 A.2d 591, 599–600 (Pa. 2002) (citations omitted)). However,

Exceptions to this principle are made where the conduct complained of is capable of repetition yet likely to evade review, where the case involves issues important to the public interest or where a party will suffer some detriment without the court’s decision.

*Id.* at 1279–80 (citing *Sierra Club v. Pennsylvania PUC*, 702 A.2d 1131, 1135 (1996), *affirmed*, *Sierra Club v. PUC*, 731 A.2d 133 (Pa. 1999)).

The procedure and situation here parallel that of *Commonwealth v. Sloan*, 907 A.2d 460, 464 (Pa. 2006), in which a petition for review was filed in the Superior Court pursuant to Chapter 15 of the Rules of Appellate Procedure<sup>11</sup> following the denial of a motion for release pursuant to Pa.R.Crim.P. 600(E). In that case, this Court determined:

The instant appeal presents an issue of public importance that this Court has yet to address,

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<sup>11</sup> Following the 2020 reorganization, discussed *supra*, a similar petition would today be filed under Pa.R.A.P. 1610.

regarding whether an accused who is incarcerated for more than 180 days is entitled to unconditional release pursuant to Rule 600(E). Moreover, the issue is likely to recur anytime an accused is subjected to pretrial bail conditions after being incarcerated for more than 180 days. However, it is likely to evade review because the Commonwealth must bring all criminal cases, like this one, to trial within 365 days or face a defense motion for dismissal with prejudice. *See* Pa.R.C.P. 600(A)(3) and 600(G). It would be a rare case where a defendant could petition for relief under Rule 600(E) after 180 days of incarceration, have it addressed by the trial court, and petition for review to the Superior Court and this Court before the underlying criminal case is brought to trial or the expiration of Rule 600(G)'s 365 days, requiring dismissal with prejudice. Accordingly, we grant review of Appellant's petition and review the issue he raises.

*Sloan*, 907 A.2d at 465. *See also, Commonwealth v. Dixon*, 907 A.2d 468, 472–73 (Pa. 2006) (drawing the same conclusion where a direct appeal was filed following denial of a Rule 600(E) motion for release).

This case clearly involves a matter of great public interest, as discussed, *supra*. Furthermore, given the slow pace of appellate review and relatively short length of juvenile placements, also discussed, *supra*, the matter will likely always evade review if exception is not made. This Court should address the issues of this case on the merits.

## CONCLUSION

For the foregoing reasons, this Court should find the question presented is not moot, address the question on its merits, reverse the judgment of the Superior Court denying Appellant's Petition for Review, and remand the matter to the Superior Court to dismiss the Petition as moot.

Respectfully submitted,

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**CERTIFICATION OF COMPLIANCE WITH RULE 2135**

I do hereby certify on this 26th day of June, 2023, that the Brief For Appellant filed in the above captioned case on this day does not exceed 14,000 words. Using the word processor used to prepare this document, the word count is 8,027 as counted by Microsoft Word.

Respectfully submitted,

*/S/*

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Chief, Appeals Division  
KEISHA HUDSON, Chief Defender

**CERTIFICATION OF COMPLIANCE WITH RULE 127, PA.R.A.P.**

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.

Respectfully submitted,

/S/

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