***[Please note: This is a memorandum by a law student intern. It is intended to jump-start your own research. We have not Shepardized the cases or determined that the student’s analysis of the cases or other sources is correct.]***

**MEMORANDUM**

To: CAFL Appellate Panel Support Unit

From: [Law student intern – NE]

Date: December 10, 2018

Re: Due Process – adequate notice of DCF’s unfitness allegations (need for specific allegations of unfitness)

**QUESTIONS PRESENTED**

DCF often alleges many problematic behaviors in its initial G.L. c. 119, § 24 care and protection affidavit/petition against parents. Then, at trial, DCF throws everything it has against the parent, regardless of what it alleged a year or so earlier at the petition stage, hoping that something sticks. Often, DCF’s primary challenge to a parent’s fitness at trial has little to do with what it initially alleged. Indeed, sometimes it isn’t clear why a judge found a parent unfit until many months after trial, when the judge issued her findings; the judge’s findings may reflect a determination that a parent is unfit on a ground that even DCF thought to be baseless. Unfitness is, therefore, a moving target at trial; sometimes it’s only a target in hindsight.

G.L. c. 119, §§ 24, 26. Do parents have a statutory argument that trial must focus exclusively on DCF’s initial allegations – not on everything DCF *wants* to allege – or that DCF must, at least, amend its petition prior to trial to give parents a meaningful opportunity to rebut those allegations?

Due Process. Parents have procedural due process rights to notice, to be heard at a meaningful time and in a meaningful manner, and to rebut the state’s adverse allegations about their parenting. It is very difficult to rebut a moving target, and it is impossible to rebut unfitness allegations in hindsight. Does due process require that DCF state its allegations with particularity before trial so that parents have a reasonable opportunity to rebut them? And does due process therefore require that DCF be limited to proving those allegations at trial (instead of throwing other allegations against the wall and seeing what sticks)?

Preservation. If DCF alleges one basis of unfitness before trial (with enough time for the parent to prepare) but presents evidence at trial regarding an unrelated basis, what should a parent do in order to preserve the issue for appeal?

**BRIEF ANSWERS**

Statutory Basis. Parents have a statutory argument for limiting DCF to the allegations in its initial petition or in an amended petition. Section 26(b) of chapter 119 provides that, “[i]f the court finds the allegations in the petition proved within the meaning of this chapter, it may adjudge that the child is need of care and protection.” That section permits DCF to amend its petition by motion, although the amendment language suggests that amendment is proper in order to enable DCF to seek termination.

Due Process. Due Process requires that the state provide adequate notice of its allegations of unfitness such that the parents have a reasonable opportunity to rebut those allegations. Where an unfitness trial focuses on issues not pled – such that the parent had insufficient opportunity to rebut the allegations – due process is violated.

Preservation. In order to preserve this issue, parents facing “surprise” allegations at trial should request a continuance in order to prepare. In support of that request, parents should argue that a continuance is essential to preserve their statutory and due process rights (not that the judge has discretion to continue the trial).

**FACTS**

We represent Mother. Her children were removed from her home in December 2017. In its initial affidavit/petition, DCF stated that Mother was unfit based on her substance abuse and untreated mental health issues. DCF seems to recognize that these bases are weak, because the evidence after the first day of trial is that Mother has been sober and attending therapy diligently for the past year. But some of Mother’s testimony that first day led DCF in another direction, and now DCF’s primary argument – of which Mother had no meaningful notice – is that Mother failed to protect the children from exposure to domestic violence perpetrated by two of Mother’s boyfriends. We asked for a continuance based on the theory that Mother has had no meaningful time to rebut the DV allegations. The judge wants memoranda of law on the issue.

**ANALYSIS**

1. **Section 26 of c. 119 only permits a care and protection adjudication if the specific allegations in the petition are proven (or if the petition is formally amended).**

Section 26(b) of chapter 119 provides that, “[i]f the court finds the allegations in the petition proved within the meaning of this chapter, it may adjudge that the child is in need of care and protection.” This suggests that the court cannot adjudicate the child in need of care and protection – or that a parent is unfit – if (a) the allegations in the petition are not proved, and (b) if DCF proves “bad” facts that it has not alleged.

Section 26(b) does permit DCF to amend its petition, by motion. The amendment language in that section focuses on amendment to permit DCF to seek termination, but presumably it would permit amendment to specify other/new grounds for a care and protection adjudication. Together, the language of § 26(b) regarding proof of the “allegations in the petition” and that section’s express amendment process suggest that DCF must prove its initial allegations or move to amend its petition with new allegations. Otherwise, the court cannot adjudicate a child in need of care and protection.

1. **As a matter of due process, parents are entitled to notice of DCF’s adverse allegations with enough time to be meaningfully heard in order to rebut them.**

**A. Parents are entitled to due process in care and protection proceedings.**

The Due Process Clause of the Fourteenth Amendment requires the government to provide citizens with notice and an opportunity to be heard before depriving them of life, liberty, or property. See Morrissey v. State Ballot Law Comm'n, 312 Mass. 121, 130 (1942). The amount of procedure required varies based on the context and the amount of deprivation. See Spence v. Gormley, 387 Mass. 258, 274 (1982). While care and protection proceedings are not afforded the same procedural protections as criminal cases, parents have a fundamental liberty interest in maintaining custody of their children. Care and Protection of Erin, 443 Mass. 567, 570 (2005); see Adoption of Mary, 414 Mass. 705, 708 (1993) (holding that removing a child from their parent’s custody is a “substantial” deprivation).

Parents must have notice and an opportunity to heard in a meaningful manner, which includes the opportunity to effectively rebut adverse allegations concerning their parenting. See Mary, 414 Mass. at 418; Adoption of Parker, 77 Mass. App. Ct. 619, 622 (2010); see also Adoption of Carla, 416 Mass. 510, 514(1993) (holding that admission of a child’s hearsay statements where child does not testify and judge has no other way to asses credibility of allegations denies parents opportunity to rebut); Care and Protection of Orazio, 68 Mass. App. Ct. 213, 221 (2007) (holding that judge’s sua sponte transformation of 72-hour hearing into trial on the merits violated due process, as the parties could not effectively rebut adverse allegations).

**B. Massachusetts law recognizes in both criminal and civil contexts that pleadings must lay out the allegations against a party with reasonable specificity, and that pleadings that mislead a litigant about the focus of the allegations against them violate due process.**

In the prison discipline context, the Supreme Court has recognized that prison officials must give the inmate a clear written statement of the particular charges in order to meet due process notice requirements; without that statement a defendant cannot prepare his defense. See Wolff v. McDonnell, 418 U.S. 539, 563-64 (1974) (“Part of the function of notice is to give the charged party a chance to marshal the facts in his defense and to clarify what the charges are.”). When the “nature of the charges or the evidence relied upon” evolves with the course of the investigation, the defendant is no longer properly notified. Id. at 564.[[1]](#footnote-1)

In circumstances less compelling than the possible permanent loss of a child, insufficient notice of allegations was deemed a deprivation of due process. For example, in the licensing context, notice must be given “with sufficient particularity to apprise the licensee of the charges to be met and enable him to prepare his case.” Foster from Gloucester, Inc. v. City Council of Gloucester, 10 Mass. App. Ct. 284, 289 (1980). Where the notice is *misleading* about what grounds or factual allegations the state will proceed on, the notice is inadequate. See Higgins v. Bd. of License Comm'rs of City of Quincy, 308 Mass. 142, 147 (1941) (holding that notice alleging “[b]reach of conditions of said permit” was not proper notice for charges that he fraudulently *obtained* the permit). A licensee seeking greater specificity regarding the reasons for license suspension must ask for it in order to preserve the issue. See Manchester v. Selectmen of Nantucket, 335 Mass. 156, 159 (1956) (holding that party received insufficient notice, but in failing to ask before trial for greater specificity about the allegations, forfeited her right to challenge license suspension).

Similarly, in Highland Tap of Boston, Inc., a tavern received a notice that the Mayor’s office was seeking to revoke the tavern’s entertainment license. 33 Mass. App. Ct. at 570. The notice stated that there had been several police reports alleging that Highland Tap’s management was “inadequate.” Id.[[2]](#footnote-2) The notice did not specify what license regulations had been violated. Id. At the actual hearing, the focus was still on the mismanagement of the property. Id. at 571. However, the license was ultimately revoked because Highland Tap violated the zoning laws and presented nude entertainment without a petition; neither complaint had been included in the notice. Id. at 570–71. The reviewing court held that the licensing authorities had deprived Highland Tap of due process. Id. at 571–72.

In Higgins, cited above, the licensee had received a notice alleging “[b]reach of conditions of said permit.” 308 Mass. at 147. The court held that “[t]he petitioner could properly assume that the only complaint that would be heard was whether he had committed any breach of the terms of his license, and he could also properly assume that, without warning to him, no other ground for the revocation would be asserted or heard.” Id. Thus, when his permit was revoked because he improperly *obtained* the license, the notice was inadequate. Id. at 147–48. (“The license could not be revoked for a cause different from that alleged in the notice.”).

### Finally, Massachusetts requires that tenants evicted from public housing receive notice “with reasonable particularity of the proposed action” so that the tenants can reasonably prepare their arguments. Spence v. O'Brien, 15 Mass. App. Ct. 489, 498 (1983) (citing Milton v. Mass. Bay Transp. Authy., 356 Mass. 467, 471 (1969)). Where the notice is vague and does not include *all* of the factual allegations against the tenant, the notice is inadequate. Cf. Escalera v. New York City Housing Auth., 425 F.2d 853, 862–63 (2d Cir. 1970) (“The purpose of requiring that notice be given to the tenant before the hearing is to insure that the tenant is adequately informed of the nature of the evidence against him so that he can effectively rebut that evidence.”) (cited in Spence, 15 Mass. App. Ct. at 498); Housing Auth. of King Cty. v. Saylors, 19 Wash. App. 871, 874, 578 P.2d 76 (Ct. App. Wash. 1978) (holding that notice which summarily stated tenants were in violation of lease section which prohibited “maintain[ing] a nuisance” was inadequate to allow tenants to prepare for hearing) (cited in Spence, 15 Mass. App. Ct. at 498).

In Escalera v. New York City Housing Auth., a tenant was evicted after being given a summary notice that she would be evicted because of “non-desirable conduct.” 425 F.2d at 862. The board reviewing Escalera’s case and making a decision on her eviction had before it an entire folder of evidence against her. Id. The Court of Appeals held that Escalera was entitled to notice of everything in her folder that the board would consider in making its decision. Id. Without such notice, she had no real opportunity to rebut the allegations. Id.

These Massachusetts precedents – particularly because they are civil cases and concern lesser deprivations than those in care and protection cases - suggest that parents are entitled to notice of the specific bases that DCF will allege (and the court will consider) at trial regarding parental unfitness.

**C. Other jurisdictions have recognized that a decision in a dependency/abuse & neglect case that relies on grounds or facts not properly pleaded by the child welfare agency – including cases where the allegations are unclear or misleading – violates due process.**

Other states have held that a parent who has lost custody of her child based on grounds or allegations not pled has been deprived of due process. See Lawrence v. Arkansas Dep't of Human Servs., 548 S.W.3d 192, 198 (Ark. 2018) (“This court will not affirm a termination of parental rights based on grounds that were not pled because it would result in a violation of the parent's due-process rights.”); D.W.Q. v. A.B., 200 So. 3d 87, 88 (Fla. 5th Dist. Ct. App. 2015) (error to terminate the father’s parental rights based on a ground not pled by petitioner-mother; “[I]t is a denial of procedural due process rights of notice and a fair hearing” to terminate parental rights on a ground not pleaded.”) (citations omitted); In re Jason P.S., 537 N.W.2d 47, 50 (Wis. Ct. App. 1995) (termination reversed: “[W]hen the State warns a parent that his or her rights to a child may be lost because of the parent’s future conduct, if the State substantially changes the type of conduct that may lead to the loss of rights without notice to the parent, the State applies a fundamentally unfair procedure. That is what has happened here.”); In re N.P., No. 49A04-1703-JC-446, 2017 WL 3568609, at \*4–\*5 (Ind. Ct. App. Aug. 8, 2017) (holding there had been a violation of due process where CHINS petition alleged terrible conditions in the home, but the state removed the children based on evidence brought at trial regarding parents’ mental health); L.A.G. v. Dep’t of Child & Fam. Servs., 963 So.2d 725, 726 (Fla. 3rd Dist. Ct. App. 2007) (“holding that the termination order violates due process because it was based on grounds not asserted in the termination petition and noting that the first time the ground used to terminate appeared was in the written termination order).

Misleading or insufficiently specific pleadings also violate due process. New Jersey Div. of Youth & Family Servs. v. B.M., 993 A.2d 258, 264 (N.J. App. Div. 2010) (notice that alleged abuse and neglect of newborn but did not warn parents that the child had fetal alcohol syndrome was a violation of due process). Adding grounds during trial also deprives parents of due process where the original pleadings did not give notice that the parents would have to defend on those grounds. See Roberto F. v. Arizona Dep't of Econ. Sec., 301 P.3d 211, 221 (Ariz. Ct. App. 2013) (trial court's allowing of foster parents to amend, on fourth day of five-day trial, their intervenors' petition to allege abandonment of children by father denied father his due process rights to notice and opportunity to prepare a defense); In re T.C., 37 P.3d 70, 75 (Mont. 2001) (allowing the agency to amend its pleadings to add a new ground for termination after the termination hearing offended due process; “[a]llowing a party to amend the pleadings creates a question of due process in cases where the defendant may not have had an adequate opportunity to prepare her case on the new issues raised by the amended pleadings.”).

**CONCLUSION**

Section 26(b) requires that the petitioner prove the facts alleged in the petition in order to secure a care and protection adjudication. This suggests that DCF cannot prove un-alleged facts in order to obtain an adjudication.

Further, due process requires that parents have notice of adverse allegations against them as well as a fair opportunity to rebut those adverse allegations. They lack that essential notice and fair opportunity to rebut if DCF need not allege the bases of unfitness or if DCF changes its allegations at (or after) trial. Massachusetts case law on general notice principles supports this view, as do dependency/abuse and neglect cases in other jurisdictions.

In order to preserve this issue, parents should object to the lack of specific allegations before trial; they should also object to DCF’s attempts at trial to raise adverse allegations of which the parent had no notice. If the court permits DCF to argue parental unfitness on grounds it has not alleged, the parent should request a continuance in order to have a meaningful opportunity to attempt to rebut the new allegations. The failure to object and ask for a continuance may lead to waiver of this issue.

1. See also Holland v. Oliver, 350 F. Supp. 485, 487 (E.D. Va. 1972) (holding that due process was violated by giving an inmate only one-hour notice of the basis for his rule violation; among the due process protections for inmates in such hearings, the “hearing must be preceded by notice in writing of the substance of the factual charge of misconduct.”). [↑](#footnote-ref-1)
2. “Other allegations concerned a drug arrest, failure to post various licenses and a board of health certificate, and failure to provide a receipt for a cover charge.” Highland Tap of Boston, Inc., 33 Mass. App. Ct. at 570. [↑](#footnote-ref-2)