SCHALLER, J., dissenting. I respectfully disagree with the majority's conclusion on the issue concerning the remand.[1] Both parties claim on appeal that a remand is improper, although for different reasons. As the majority notes, the plaintiff contends that the trial court, applying a subjective test, should have concluded as a matter of law that no adverse impact was established because the department of public health and addiction services (department)[2] rejected the only allegation of harm, namely, intimidation of the patient. The department argues that the court should have applied an objective test to assess whether there was an adverse impact on the victim and that, under that test, the record establishes an adverse impact.

In its memorandum of decision, the trial court determined that an element of whether resident abuse occurred is an explicit finding as to ''how or if such language affected the patient.'' The court stated that its ''interpretation of resident abuse under [General Statutes § 20-102cc (a)][3] includes some form of adverse impact, whether physical, mental or emotional, upon the resident. This accords with the policy behind [§ 20-102cc (a)]: To protect the frail and elderly [who] reside in long-term facilities from mental and physical mis-

treatment by the staff.'' Neither the plaintiff nor the department takes issue with this determination. After concluding that a specific finding of adverse impact was required, the court ruled that such adverse impact should be determined on the basis of the subjective perceptions and reactions of the resident.

The majority identifies the key issue here as whether a subjective test or an objective test is appropriate to determine whether resident abuse has caused adverse impact on a particular resident. The majority agrees with the trial court's determination that a subjective test is appropriate for this purpose and that a remand is necessary so that the department can engage in further fact-finding on the basis of the existing record on the issue of adverse impact.

This is an issue of first impression, and no Connecticut precedent has been furnished or found to guide us in our determination of whether a subjective test or an objective test should be applied. While I understand the reasons supporting the majority's choice of a subjective test, I respectfully submit that an objective test would better serve all parties in this and other such cases.

The department recites numerous reasons why an objective test is preferable to a subjective test. I believe those reasons are well founded in experience and common wisdom. A subjective test would mean that comatose or unconscious residents, or patients with Alzheimer's disease or other diseases causing loss of cognitive functioning would be unable to express subjective responses to claimed abuse. If a victim had diminished capacity to hear or comprehend particular conduct, no abuse could be established because no harm in the subjective sense could be established. The department argues that ''an objective test is required in identifying abusive conduct regardless of the resident's ability to perceive because of the patently deleterious impact such conduct would have on other residents and staff. In other words, unchecked abusive conduct directed at residents who cannot perceive it nevertheless would inevitably result in the creation of a 'hostile environment' within any given nursing facility.'' Finally, an objective test eliminates the difficulties of proof when the victims have mental deficits or have died before the hearing process is completed. On the other hand, as the Kentucky Court of Appeals pointed out in a similar case, ''Many times, the aging process reduces otherwise active, alert, and oriented patients to varying degrees or states of confusion or dementia. It is no secret that many people experience a reversion to childlike behavior in their later years. This is a condition commonly witnessed in a nursing home setting where the vast majority of patients are infirm due to advanced age. It is also no secret, as undesirable as it may be, that oftentimes a stern tone of voice becomes necessary to get a patient's attention or to impress upon him the

need to follow instructions or exercise caution, much the way as is often necessary in dealing with young children.'' *Kentucky Board of Nursing* v. *Ward*, 890 S.W.2d 641, 644 (Ky. App. 1994). If a subjective test is in place, nurses and nurse's aides would be vulnerable to liability on the basis of claims of adverse impact by complainants whose reactions and responses might well be unduly affected or altered by their particular mental or emotional condition and which might, as a result, be unpredictable or arbitrary, resulting in a disproportionate penalty for the conduct of the caregiver in question.

For these reasons, an objective test for adverse impact would provide greater fairness and consistency for all parties involved in the process, residents and nurse's aides alike. Accordingly, I would adopt the standard of an objective test that is consistent with and in furtherance of the purpose of § 20-102cc (a), that is, whether an alert and rational person in the resident's position, taking into account all the circumstances existing, would have experienced physical harm, pain or mental anguish as a result of the specific conduct of the nurse's aide.

In this case, the parties should have an opportunity to present evidence and argument concerning whether any adverse impact was produced by the conduct of the plaintiff on the basis of the application of an objective test. The department hearing officer should be directed to give full and reasoned consideration to all material facts and issues in determining whether any adverse impact could reasonably be determined to result from the plaintiff's conduct, which consisted of the use on one occasion of vulgar and inappropriate language, under all the circumstances surrounding the incident. See *Hearns* v. *District of Columbia Dept. of Consumer & Regulatory Affairs*, 704 A.2d 1181 (D.C. App. 1997); *Kentucky Board of Nursing* v. *Ward*, supra, 890 S.W.2d 643 (''[w]hat must be questioned is whether, given *all* the facts . . . reasonable men would have been induced to convict [the nurse] of verbal abuse based on her comment to [the resident], a consideration of all the facts, and application of the pertinent statutes''). (Emphasis in original) As one judge has noted, ''[T]he issue before us is a difficult one, and . . . too much is at stake here for this court to permit [the plaintiff's] livelihood to be destroyed or impaired without a . . . reasoned application by the agency of the law to the facts.'' *Hearns* v. *District of Columbia Dept. of Consumer & Regulatory Affairs*, supra, 1186 (*Schwelb, J.*, dissenting).

Accordingly, I respectfully dissent from the majority's conclusion as to the remand to the trial court. I would order the trial court to remand this case to the department for further proceedings consistent with this opinion.

[1] The plaintiff raises numerous troubling issues in her appeal. In particular,

the issue of intent or wilfulness, discussed in part IV of the majority opinion, would deserve consideration had it been properly preserved in the trial court proceedings. See *Hearns* v. *District of Columbia Dept. of Consumer & Regulatory Affairs*, 704 A.2d 1181, 1182–83 (D.C. App. 1997) (discussing petitioner's claim that government failed to establish she either wilfully or intentionally abused resident).

Furthermore, although I agree with the majority that the language of Public Acts 1993, No. 93-121, § 4, which went into effect on June 14, 1993, and subsequently was codified as General Statutes § 20-102cc (a), was adequate to inform the plaintiff of the type of conduct that could result in the commissioner of public health making a finding of resident abuse, the plaintiff's argument does not go unheard. The Connecticut legislature gave the commissioner the authority pursuant to Public Acts 1993, No. 93-121, § 6, subsequently codified as General Statutes § 20-102ee, to adopt regulations concerning the regulation of nurse's aides. Other states have specifically adopted measures identifying the behavior that constitutes resident abuse. See, e.g., *Gogebic Medical Care Facility* v. *AFSCME Local 992, AFL-CIO*, 209 Mich. App. 693, 695, 531 N.W.2d 728, appeal denied, 450 Mich. 951, 549 N.W.2d 560 (1995). Because the issue of what constitutes resident abuse is a difficult one, I believe that the commissioner should consider adopting regulations to give nurse's aides, such as the plaintiff, more precise notice of the type of conduct that is inappropriate.

[2] The department of public health and addiction services is now known as the department of public health. See footnote 2 of the majority opinion.

[3] Public Acts 1993, No. 93-121, § 4, which went into effect on June 14, 1993, subsequently was codified as General Statutes § 20-102cc (a). See footnote 3 of the majority opinion.