EVELEIGH, J., with whom VERTEFEUILLE, J., joins, concurring in part and dissenting in part. I agree with the majority's conclusion that "the state failed to prove that the defendant [Demetrice L. Lewis] had engaged in any activity, suspicious or otherwise, that would give rise to a reasonable inference that he planned to sell drugs at or within 1500 feet of [the proscribed area]." (Internal quotation marks omitted.) Therefore, I agree with part I of the opinion in which the majority affirms "the Appellate [Court's] . . . conclu[sion] that the defendant's conviction of sale of narcotics with intent to sell within 1500 feet of a school in violation of [General Statutes] § 21a-278a (b) was not supported by sufficient evidence and must be reversed." I disagree, however, with part II of the opinion, in which the majority concludes "that the state presented sufficient evidence to establish that the Timothy Dwight School was a public elementary or secondary school within the meaning of [General Statutes] § 21a-267 (c)." Therefore, I respectfully dissent with respect to part II of the majority opinion and concur in part I of the opinion.

I agree with the majority that "[§] 21a-267 (c) provides in relevant part: 'Any person who violates subsection (a) or (b) of this section in or on, or within one thousand five hundred feet of, the real property comprising a public or private elementary or secondary school and who is not enrolled as a student in such school shall be imprisoned for a term of one year . . . .' Thus, the classification of the school in question as an elementary or secondary school is an element of the offense that the state must establish beyond a reasonable doubt." In my view, however, the evidence was insufficient to prove a violation pursuant to this section. It is for this reason that I disagree with part II of the majority opinion.

Clifford Daniels, the district supervisor for the board of education of the city of New Haven, testified that the Timothy Dwight School is a school in his district. He also testified that it was a public school. He did not testify, however, that the school was either an elementary or a secondary school, as is required by §§ 21a-267 (c) and 21a-278 (b). Further, he failed to testify that the school was not a public preschool. A preschool does not come within the definition of an elementary or secondary school under the statutes. It is important to present a portion of Daniels' testimony in order to set the context of the majority's reliance on his testimony. The following exchange occurred between Daniels, the defendant, counsel and the court:

"[The Prosecutor]: On June 3, 2005, was the Timothy Dwight School a New Haven public school?

"[Daniels]: Yes.

"[The Prosecutor]: What are the grades or the ages of the children who attend the Timothy Dwight School?

"[Defense Counsel]: Objection, relevance. The ages of the children who attend the school, there's no relevance to that, Your Honor, the charges that this incident occurred within 1500 feet of the property of a school and they've had a witness from the city engineer's—

"The Court: How is it relevant, counsel?

"[The Prosecutor]: I'd like to be heard outside the presence of the jury, please.

"The Court: I don't think that's necessary. Sustained.

"[The Prosecutor]: Well, then I would like to respond.

"The Court: Sustained. Ask the next question.

"[The Prosecutor]: What grades?

"[Daniels]: The grades are from—

"[Defense Counsel]: Objection, again, relevance. It's a public—

"[The Prosecutor]: It's a necessary element, Your Honor, [of] § 21a-267 (c).

"The Court: The jury can be removed, please. The necessary element to § 21a-267 (c) is what?

"[The Prosecutor]: 'The real property comprising of public or private, elementary, secondary school and who is not enrolled as a student in such school.' The grades are not only relevant, but necessary for the state to be able to prove its count four.

"The Court: Well, how are they going to know how old? You mean that the defendant is not a student there.

"[The Prosecutor]: Yes.

"[Defense Counsel]: Your Honor, this took place on June 3, 2005. I think there's a foundational question as to whether the school was either in session and if—

"The Court: It doesn't matter if it's in session.

"[Defense Counsel]: If the state wants to ask what's the highest grade level of a student there and that they—that's a necessary element and I can see it being relevant, but not the ages of all who attend the school.

"[The Prosecutor]: And the last question that I asked, I did not ask the age. I asked the grade levels.

"[Defense Counsel]: The grade levels. But what's the highest grade? If the highest grade is fifth grade, it doesn't you know, they can see that [the defendant] probably isn't in the fifth [grade] enrolled at that school. I'm just worried about—I understand the state's burden of proof and I'm not going to try to prevent the state nor can I prevent the state from trying to prove its case.

However, it is . . . prejudicial to my client if it comes in that we've got eight year old kids attending this school and I think it's unfair and its prejudice to his right to a fair trial. So, if they need to ask it, I don't see any objection to asking what the highest grade level is at that school. But to ask the age of all the children who attend that school, I think that's prejudicial.

"[The Prosecutor]: And I've withdrawn that part of my question, Your Honor, I'm asking for the grade levels.

"[Defense Counsel]: All the grade levels. Why not the highest grade? The same result because it's the highest grade level.

"The Court: So then, you know, how are you going to make the proof that he's not a student there? Simply by saying that it goes up to the eighth grade and that's the oldest child that might be there? Is that what you—

"[The Prosecutor]: That's the inference that the jury can draw, Your Honor.

"The Court: Okay, I'm not saying that they can't. I'm just—

"[The Prosecutor]: I might as well address it right now, while the jury is not here. Assuming that Your Honor allows the witness to answer that question, what the grade levels are at the Timothy Dwight School, my next question will be whether this witness knows if the defendant is a student enrolled or was a student enrolled at that school on June 3, 2005.

"The Court: Well, does he know that?

"[The Prosecutor]: He does not. But I'm willing to ask that question anyway. He can answer truthfully, the way that he can answer the question.

"The Court: Is that an issue here?

"[Defense Counsel]: Your Honor—

"The Court: I mean are you willing to stipulate that he's not a student at Timothy Dwight School?

"[The Prosecutor]: I would accept the stipulation.

"[Defense Counsel]: Let me talk to [the prosecutor].

"The Court: The issue is not whether the school was open or closed. That makes no difference. The issue is: Are you a student at Timothy Dwight [School] or not? Are you willing to say, you know, the question is—you're not required to stipulate that he's a student at Timothy Dwight [School]. The state can go about proving that element however they think is necessary to prove that element. But I think that the prosecutor does bring up a point, if he's going to go about proving it that way, then I think the necessary bit of information he needs to glean is: What's the highest grade level? You can't say the oldest student because you don't know. But I will allow the question as to what the

highest grade level is.

"[The Prosecutor]: Just the highest grade level or can I ask the grade ranges?

"The Court: No, what's the point in the ranges. It's the highest grade level, you know.

"[Defense Counsel]: Your Honor, I prefer to stipulate. I understand the state's got its burden, but . . . it's still prejudicial to hear there are, you know, its fifth grade to sixth grade—

"The Court: I'm not letting that in. I'm letting in the highest grade level.

"[Defense Counsel]: Right. I understand that. But if we stipulate that [the defendant] was not a student at the school at the time, June 3rd—

"The Court: Then none of this is necessary.

"[Defense Counsel]: I'm willing to stipulate to that.

"The Defendant: I don't have a choice?

"[Defense Counsel]: No, you do have a choice.

"The Court: You have a choice, but, you know.

"The Defendant: My attorney said he could do it for me and I'm doing it. I'll stipulate.

"The Court: Well—

"The Defendant: I'll stipulate.

"[Defense Counsel]: You don't need to do anything. We'll stipulate. Do you understand . . . ?

"The Defendant: I'll stipulate.

"The Court: Well, let's draw up the stipulation now.

"[Defense Counsel]: Okay.

"The Court: Okay . . . [the] prosecutor and the defendant's counsel agree that . . . the defense stipulate[s] to the fact that the defendant was not a student at Timothy Dwight School on June 3, 2005.

"[Defense Counsel]: Fine. Acceptable to the defendant.

"[The Prosecutor]: Acceptable.

"The Court: Okay. So, let's write out the stipulation and let's enter it as an exhibit.

"[The Prosecutor]: Do you want defense counsel or do you want the defendant?

"The Court: [The] [d]efendant through his counsel and the state agree and stipulate that [the defendant] was not a student at Timothy Dwight School on June 3, 2005. Can you read it, please?

"[The Prosecutor]: February 7, 2005, the defendant through his counsel—

"The Court: Agree and stipulate that—

"[Defense Counsel]: Was not a student enrolled at the Timothy Dwight School.

"The Court: On June 3, 2005.

"[The Prosecutor]: Was not a student enrolled at the Timothy Dwight School. 'The defendant through his counsel agree and stipulate that the defendant . . . was not a student enrolled at the Timothy Dwight School on June 3, 2005.' I'm going to add, '[t]hat the state of Connecticut joins in this stipulation.'

"The Court: Let's see did you write one too, [defense counsel]?

"[Defense Counsel]: I did. 'The defendant through his counsel and the state agree and stipulate that [the defendant] was not a student enrolled at the Timothy Dwight School on June 3, 2005.'

"The Court: That would do it. So, sign—both sign on that.

"[Defense Counsel]: I just want to make sure you can read it. Can you read that?

"The Court: That is the stipulation. That is what you're agreeing to. That's what will be entered as a stipulation, however, subject to being—we'll keep that exhibit. Retype it word for word and you know we'll make it a more proper exhibit tomorrow. May I see it please?

"[Defense Counsel]: May I approach, Your Honor. I think the language is fine. I agree with the court.

"The Court: All right, I'm holding in my hand, it's a yellow piece of paper signed stipulation and it has, 'The defendant,' and then it has an arrow pointing 'through his counsel and the state agree and stipulate that [the defendant] was not a student enrolled at the Timothy Dwight School . . . on June 3, 2005.' Is that your stipulation, Mr. Prosecutor?

"[The Prosecutor]: It is, Your Honor.

"The Court: Is that yours, Mr. Defense Attorney?

"[Defense Counsel]: Yes, it is Your Honor.

"The Court: All right. This will be marked as court's exhibit. Is this our first?

"The Clerk: Yep.

"The Court: Court's exhibit 1. And it will be subject to retyping it, and re-signing so that it's not written in someone's hand and the jury can read it, although they'll be apprised of it.

"[The Prosecutor]: No objection, Your Honor.

"[Defense Counsel]: No objection, Your Honor.

"[The Prosecutor]: Before you bring the jury out, I can't remember and I don't want to re-ask the question

if I've already asked it. Did I ask whether the Timothy Dwight School is a public school? I can't remember that I did that or not.

"The Court: I believe that you did, but you can ask it again.

"[The Prosecutor]: Thank you.

"The Court: That's all right, you can ask it again.

"[The Prosecutor]: Thank you.

"The Court: That's all right. You can ask it again. Because you don't have anything else to ask him; is that right?

"[The Prosecutor]: No, I don't know if Your Honor is willing to inform the jury that we've entered into a stipulation.

"The Court: I don't need to now. They don't need to know that. You know if at the end of the trial, I instruct, you know, we can deal with it. Okay. Bring the jury back in.

"(Whereupon, jury panel enters the courtroom.)

"The Court: Counsel stipulate to the presence of all the jurors.

"[The Prosecutor]: Yes, Your Honor.

"[Defense Counsel]: Yes, Your Honor.

"The Court: Any further questions?

"[The Prosecutor]: One more question.

"[The Prosecutor]: Is the Timothy Dwight School a public school in the city of New Haven?

"[Daniels]: Yes.

"[The Prosecutor]: Thank you."

The majority indicates that "the jury could properly draw reasonable inferences from Daniels' statement 'The grades are from . . . .' " I disagree. In my view, the record is clear that the court, in the absence of the jury, indicated to counsel that it would allow the state to inquire as to the highest grade level at the school, but would not permit a question about the range of grades or the ages of the children. The fact that the partial response was not stricken from the record and the jury was not instructed to disregard the partial answer does not change the fact that the court would not allow the answer to this question. The initial question posed by the prosecutor, in the presence of the jury was: "What are the grades or the ages of the children who attend the Timothy Dwight School?" Defense counsel objected and the court entered the following ruling:

"[The Prosecutor]: I'd like to be heard outside the presence of the jury, please.

"The Court: I don't think that's necessary. Sustained.

"[The Prosecutor]: Well, then I would like to respond.

"The Court: Sustained. Ask the next question.

"[The Prosecutor]: What grades?

"[Daniels]: The grades are from—

"[Defense Counsel]: Objection, again, relevance. . . .

* * *

"The Court: . . . But I will allow the question as to what the highest grade level is.

"[The Prosecutor]: Just the highest grade level or can I ask the grade ranges?

"The Court: No, what's the point in the ranges. It's the highest grade level, you know.

"[Defense Counsel]: Your Honor, I prefer to stipulate. I understand the state's got its burden, but . . . it's still prejudicial to hear there are, you know, it's fifth grade to sixth grade—

"The Court: I'm not letting that in. I'm letting in the highest grade level."

Clearly, this is part of the same question to which the objection was previously sustained. Even though the state is well aware of the court's ruling on the record, it still argues that the answer should stand on appeal. The majority accepts this proposition and uses it as a basis for reversing the judgment of the Appellate Court. It seems more than a bit incongruous to me that, once a court's ruling sustaining an objection is made on the record, we should now use part of the answer that was incomplete before the jury, as a basis for our opinion. Although the court did not sustain the objection to the question in front of the jury, it is likely that the jurors realized that the objection was sustained, since the question was similar to the prior question to which an objection was sustained, and the prosecutor asked a new question when the jury returned. See *State* v. *Lyons*, 43 Conn. App. 704, 713, 686 A.2d 128 (1996) (noting court implicitly sustained certain objections), cert. denied, 240 Conn. 906, 688 A.2d 335 (1997). Thus, in a case wherein the plaintiff gave a partial answer to a question before defense counsel could object, the Supreme Court did not require counsel to move to strike the answer after the objection was sustained. "The only basis upon which the plaintiff can claim error in the ruling of the trial court in setting aside the verdict is that the jury could, in the absence of a motion to strike out, properly consider the testimony. That is not the law in this jurisdiction." *Hackenson* v. *Waterbury*, 124 Conn. 679, 684, 2 A.2d 215 (1938). In the present case, the fact that the court's ruling did not entirely occur in the presence of the jury, under the circumstances of this case, should not make a difference. We should

follow the precedent established in *Hackenson*.

In my view, this partial testimony is not only inadequate, but also suggests an approach to appellate review to which we should not subscribe. Further, the court charged the jury as follows: "You are to consider only such evidence as was admitted. And if some evidence was given but stricken from the record or if some evidence was offered and refused, you must not consider it and you must dismiss it from your minds." I would place the partial answer "[t]he grades are from," in light of the court's explicit rulings, in the category of evidence offered and refused. It should not, pursuant to the court's instructions, have been considered by the jury, and we should not consider it on appeal.

There is yet another basis to reject this partial answer as providing sufficient evidence of the nature of the school. We are left to speculate what the entire answer may have been. Was it: the grades are from ten to twelve? Was it: the grades are from one to six? Certainly, either of these answers would have satisfied the state's burden of proof. To the contrary, however, if the answer was, "the grades are from preschool age three to preschool age five," such an answer would not have satisfied the state's burden of proof. We are left to speculate regarding the full answer that Daniels would have supplied.

General Statutes § 10-4 (a) provides that the state board of education has general supervision and control over "preschool, elementary and secondary education, special education, vocational education and adult education . . . ." In other statutes, as explained by the Appellate Court, "the legislature includes kindergarten when discussing elementary education but does not include preschool. See General Statutes § 10-145d (f) (under state board regulations for teacher certification, endorsement to teach elementary education valid for kindergarten through grade six, inclusive); General Statutes § 10-273a (town transporting children to elementary school including kindergarten may seek reimbursement for transportation cost). Because public schools exist that are neither elementary schools nor secondary schools, Daniels' testimony that the Timothy Dwight School was a public school was not sufficient to support a finding that the conduct occurred within 1500 feet of an elementary or secondary school." *State* v. *Lewis*, 113 Conn. App. 731, 743–44, 967 A.2d 618 (2009). I agree with the Appellate Court.

The state does not dispute the Appellate Court's opinion that there are other public schools that do not come within the definition of elementary or secondary schools, such as preschools. Instead, the state argues, and the majority accepts, that the evidence in this case was sufficient because the jury could infer from Daniels' partial answer "[t]he grades are from," that he had to be referring to a school with grades, which would not

include preschools or schools devoted solely to adult education. As indicated previously, in my view, we should not be considering this phrase in light of the trial court's express ruling that it would not allow it. Even if we should consider it, however, I agree with the defendant's contention that "neither [General Statutes] § 10-220 (a) nor the partial answer supplied any evidence as to what type of school Timothy Dwight School was and the state's claim to the contrary is utterly without merit." Section 10-220 (a) requires local boards of education to maintain elementary and secondary schools. Daniels, however, never testified that the only schools that fell within his supervision were elementary and secondary schools. A juror would not be expected to have knowledge of this particular statute. See *United States* v. *Hall*, 152 F.3d 381, 410 (5th Cir. 1998) (juror is not expected to know law). Further, as indicated by the Appellate Court, there are public preschools in Connecticut that do not come within the definition of an elementary school. In many educational statutes, the legislature refers to preschool education separately from elementary and secondary education. See General Statutes § 10-4 (a) (state board of education supervises educational interests of state, including "preschool, elementary and secondary education"). Thus, in my view, §§ 21a-278a (b) and 21a-267 (c) are violated only if the prohibited acts occur within 1500 feet of an elementary or secondary school, and not a preschool. The clear language of § 21a-267 (c) refers to "real property comprising a public or private elementary or secondary school . . . ."

The jury was left with an incomplete answer prior to the recess. When court reconvened, the prosecutor asked a different question. The jury was later instructed in the court's final charge that "if some evidence was offered and refused, you must not consider it and you must dismiss it from your minds." The jury is presumed to follow the court's instructions; *State* v. *Bausman*, 162 Conn. 308, 314, 294 A.2d 312 (1972); but since the court precluded the jury from considering the unfinished answer, and because it is not properly considered as "evidence" (because it was offered and refused), it cannot be the basis for concluding that the state met its burden of proof. Further, because Daniels did not finish his answer and did not affirmatively state that there were actually grades at the school, it is unknown what his complete answer would have been, or if he would have verified that the school had grades. In my view, the majority's conclusion that the jury could infer that the school was an elementary or secondary school on the basis of Daniels' incomplete answers crosses the boundary between reasonable inferences and sheer speculation. The prosecutor never asked the question that would have established the state's burden of proof. If the prosecutor had asked the question that the court would have allowed regarding the highest grade in the

school, in my view, it might have been sufficient for the jury to have found whether the school was an elementary or secondary school. The incomplete answer "[t]he grades are from" should not form the basis for reversing the Appellate Court's decision.

The majority indicates that, "[e]ven assuming that the trial court partially sustained the defendant's objection, however, the parties' discussion with the trial court occurred while the jury was excused." I respectfully disagree. The first question, in the presence of the jury, incorporated the inquiry regarding the grades at the school. The court twice sustained the objection to this question and instructed the prosecutor to move on. The next question was "[w]hat grades?" Daniels then started his answer and defense counsel objected. This sequence of events occurred in the presence of the jury. In the absence of the jury, the court indicated that it would not allow the question when it stated: "No, what's the point in the ranges. It's the highest grade level, you know. . . . I'm not letting that in." When the jury returned, a different question was asked. Therefore, in my view, part of the court's ruling did occur in the presence of the jury.

Accordingly, in my view, we should not consider a partial answer, made in response to a question to which the court had sustained an objection, as a basis for our decision. There was insufficient evidence in the record of the defendant's intent to sell narcotics at the location of his arrest, as is required under § 21a-278a (b). Further, there was insufficient evidence that the Timothy Dwight School was an elementary or secondary school, as required by § 21a-267 (c). Therefore, I concur with the majority as to part I of its opinion affirming the judgment of the Appellate Court that the state failed to carry its burden to support a conviction under § 21a-278a (b). I respectfully dissent from part II of the majority opinion, however, because I would also affirm the judgment of the Appellate Court that there was insufficient evidence presented that the Timothy Dwight School was an elementary or secondary school, as is required to support a conviction under § 21a-267 (c).