



E^{MPTY} *P*^{ROMISES}

A Case Study of Restructuring and the Exclusion of
English Language Learners in
Two Brooklyn High Schools

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Advocates for Children
of New York

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Legal Defense
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Table of Contents

| | |
|--|-----------|
| Executive Summary & Recommendations | 4 |
| Introduction | 6 |
| Methodology | 7 |
| The Impact of Restructuring Lafayette and Tilden on ELLs | 8 |
| <u>I. The Closure of Lafayette and Tilden High Schools</u> | <u>8</u> |
| A. HISTORY OF LAFAYETTE AND TILDEN | 8 |
| B. ELL PROGRAMS | 9 |
| C. CLOSURES | 10 |
| D. COMMUNITY ADVOCACY AROUND THE CLOSURES | 11 |
| <u>II. The Fate of ELLs in the Restructuring of Lafayette and Tilden</u> | <u>13</u> |
| A. LIMITED ACCESS TO SMALL SCHOOLS ON LAFAYETTE AND TILDEN CAMPUSES | 13 |
| B. POOR SERVICES FOR ELLS IN SMALL SCHOOLS | 15 |
| C. SEGREGATION OF ELLS INTO LARGE SCHOOLS AND ELL-FOCUSED SMALL SCHOOLS | 22 |
| D. ELLS LEFT BEHIND: SERVICE CUTS AND PUSH OUTS | 26 |
| Conclusion and Recommendations | 28 |
| Endnotes | 30 |

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Executive Summary

Since 2002, the New York City Department of Education (DOE) has attempted to reverse the city's severe drop-out crisis through a large scale restructuring of high schools, focused mainly on closing large, comprehensive high schools and replacing them with small high schools that offer a more personalized learning environment. Unfortunately, this reform effort initially included a policy that allowed new small schools to exclude English Language Learners (ELLs), and many small schools still do not provide the programs that ELLs need. Lack of access to new and promising programs is reflected in ELL performance data. While the City's overall graduation rate climbed to 52.2% in 2007 from 46.5% in 2005, the rate for ELLs dropped from 28.5% to 23.5% over the same period.¹

To understand how the small schools movement has affected ELL students in New York City, we studied the restructuring of two large Brooklyn high schools – Lafayette High School in Bensonhurst and Tilden High School in East Flatbush. Through our investigation, we found that:

- In the years leading up to the DOE's decisions to close these schools, Tilden and Lafayette had a substantial number of ELL students, students with special needs and overaged and under-credited students.
- ELLs who remained in the schools that were phasing-out began to receive less support and fewer services and in some cases, were pushed into GED classes.
- Most of the small schools that replaced Tilden and Lafayette took very few, if any, ELL students or failed to provide them with legally mandated ELL programming.
- The closing of Tilden and Lafayette resulted in the loss of two large and diverse bilingual education programs, as no bilingual programs were created in the new small schools placed on those campuses.
- As Tilden and Lafayette began to phase-out, ELL enrollment in surrounding large high schools rose, which may put those schools at greater risk of being closed in the future.

The experiences of ELL students in Tilden and Lafayette and the new schools placed on their campuses show what happens when schools are closed without considering and planning for the needs of this population. As the DOE continues to close large schools to make way for an array of small high schools, ELL students—who experience some of the lowest graduation rates in the city—are left with fewer and fewer options or are simply left behind.

Recommendations

As it restructures high schools, the DOE must plan ahead to ensure that ELL students have a range of choices and opportunities comparable to other students and do not have to sacrifice the basic support that they need. We urge the DOE to take a comprehensive look at how ELLs are affected by the closure of large high schools and the corresponding elimination of bilingual education programs.

For each school that is to be closed, the DOE should develop a plan to make sure that:

- ELL students attending the phasing-out school are provided with the support, services and curricula that allow them to continue working toward a high school diploma, with additional intensive supports or guidance services if necessary;
- New small schools recruit and enroll ELL students, properly assess them, and offer them a diversity of quality ELL programming options; and
- Neighboring large schools are given additional support and resources to address the likely influx of ELL students.

The DOE should also explore creating or supporting high schools of varying sizes and configurations to ensure that ELLs and other high needs student populations that require a diversity of programming can participate and benefit from the DOE's high school reforms.

In 2002, Mayor Michael Bloomberg gained control of the New York City public schools and appointed Joel Klein as Chancellor of the New York City Department of Education (DOE). Under Klein's leadership, the DOE has attempted to reverse the city's severe drop-out crisis by creating hundreds of new, smaller schools. Unfortunately, many of these new schools have not accepted a proportionate number of students who are most at risk of dropping out, including English Language Learners (ELLs)² and students with special needs. The DOE's new small high schools, charter schools, and multiple pathways programs to serve overage students have all failed to account properly and adequately for the needs of ELLs and have, in many cases, excluded ELL students.³ This exclusion of ELLs has come at a severe cost. While the general graduation rate climbed to 52.2% in 2007 from 46.5% in 2005, the rate for ELLs dropped from 28.5% to 23.5% over the same period.⁴

The two high schools examined in this paper were closed as part of the DOE's broader small schools initiative. Between 2002 and 2007, the DOE closed 20 large high schools⁵ and opened 212 new small secondary schools.⁶ As the large schools were phased-out, new small schools were placed on their campuses. Until 2007, these new small schools were allowed to exclude ELLs and students with special needs during their first two years of operation.⁷ In 2006, Advocates for Children (AFC), the New York Immigration Coalition (NYIC) and the EMPIRE Collaborative⁸ released a report that exposed this exclusionary policy toward ELLs, asked the DOE to reverse it and requested that the DOE take additional measures to ensure that ELLs are not harmed by the small schools initiative.⁹ After releasing this report, the advocacy groups negotiated with the DOE to release a memo in June 2007, which effectively revoked this exclusionary policy with regard to ELL students.¹⁰

Despite reversing the exclusionary policy, the DOE did not take additional steps to ensure that ELLs had actual access to small schools. To understand how the small schools movement has affected ELL students on the ground, the Asian American Legal Defense and Education Fund (AALDEF) and AFC studied the restructuring of two large Brooklyn high schools – Lafayette High School in Bensonhurst and Tilden High School in East Flatbush. Both began to be phased-out and replaced with small schools in 2007. This report presents the results of our investigation and recommendations for the DOE to follow if it continues to close large high schools with large ELL populations.

Methodology

For purposes of this analysis, we limited our inquiry to eight large high schools and the five small schools¹¹ placed on the Tilden and Lafayette campuses during the 2007-08 school year. The eight large high schools include Tilden and Lafayette, as well as six large high schools surrounding them, including Clara Barton High School, Franklin Delano Roosevelt High School, James Madison High School, John Dewey High School, Midwood High School and New Utrecht High School. The small schools are Expeditionary Learning School for Community Leaders, High School for Sports Management, It Takes a Village Academy, Kurt Hahn Expeditionary Learning School and Life Academy High School for Film and Music. We completed our investigation at the end of the 2007-08 school year, but because two additional small schools were placed on the Tilden and Lafayette campuses during the 2008-09 school year—Cultural Academy of the Arts and Sciences and International High School at Lafayette—we collected limited data for those schools as well. Finally, we compiled ELL enrollment data in three large schools that began to phase-out in 2008-09—Franklin K. Lane, Canarsie High School and Far Rockaway High School—and two that will begin to phase-out in 2009-10—Bayard Rustin High School for Humanities and Louis D. Brandeis High School.

ELL student and teacher data was collected from a number of sources. System-wide ELL enrollment data for the 2007-08 school year was collected from the DOE's Automate the Schools (ATS) system as reported on schools' web pages as of July 2008.¹² ELL enrollment and teacher data for the eight large and five small schools was provided by the DOE in January 2009 in response to a July 2008 Freedom of Information Law Request made by AALDEF and AFC. Additional ELL and other student enrollment data for the eight large high schools we examined was provided by independent researchers Jennifer L. Jennings and Aaron M. Pallas. They gathered this information from the DOE's annual school supplements to the New York State school progress reports from 2002-06 for their report, *New York City's Small School Experiment*, to be published by the Annenberg Institute for School Reform in fall 2009. ELL enrollment data for the two additional small schools that opened during the 2008-09 school year was collected from each school's Comprehensive Education Plan, available on each school's web page. ELL enrollment data for the large schools that began to phase-out in 2008-09 and 2009-10 was collected from each school's Comprehensive Education Plan, available on each school's web page.

In addition to compiling enrollment data, we conducted interviews with school staff at Lafayette, Tilden, Dewey, New Utrecht, Life Academy and It Takes a Village Academy, in addition to staff at Flanbwayan Haitian Literacy Project, the Haitian American Bilingual Education Technical Assistance Center, and the United Chinese Association of Brooklyn. We also interviewed students and one parent from Lafayette, Tilden, Dewey, New Utrecht, High School of Sports Management and Expeditionary Learning Center for Community Leaders.

The Impact of Restructuring Lafayette and Tilden on ELLs

I. The Closure of Lafayette and Tilden High Schools

In December 2006, the DOE announced that Lafayette and Tilden high schools would be phased-out. Starting in the fall of 2007, these schools would no longer accept incoming ninth grade students and would close completely by June 2010 as current students graduated or transferred to other schools. At the time of the announcement, both schools had significant immigrant and ELL student populations. At Lafayette, 34% of students were ELLs and 8% were recent immigrant students.¹³ At Tilden, approximately 10% of students were ELLs and 23% were recent immigrant students.¹⁴ To meet these students' language needs, Tilden and Lafayette had well-developed English as a Second Language (ESL) and bilingual education programs.¹⁵ Tilden offered a Haitian-Creole bilingual program, and Lafayette offered a Chinese bilingual program. According to the *New York Times*, the closing of Lafayette and Tilden was projected to cause a loss of 800 seats in bilingual and ESL classes.¹⁶

In February 2007, the DOE announced the new small schools to be placed on the Lafayette and Tilden campuses.¹⁷ Expeditionary Learning School for Community Leaders, High School for Sports Management and Life Academy High School for Film and Music would be placed on the Lafayette campus, and It Takes a Village Academy and Kurt Hahn Expeditionary Learning School would be placed on the Tilden campus. Despite the significant number of ELL and immigrant students who then attended Lafayette and Tilden, none of the new small schools was to be geared towards ELL students or planned to offer bilingual education programs. Due to subsequent pressure from the school communities and advocacy groups and scrutiny from the media, the DOE changed its plan for one of the small schools slotted for the Tilden campus to include programs and services for ELL students. Later, for the 2008-09 school year, the DOE also moved an existing International High School to the Lafayette campus. While the late addition of the International High School helped to cushion the loss of 800 seats for ELL students, it was not sufficient to meet the needs of ELL and immigrant students once served by Tilden and Lafayette. The International High School provided only a limited number of seats for ELL students, utilized only one specific approach to teaching ELLs and could not serve or support the ELLs in the other small schools on the Lafayette campus.

A. History of Lafayette and Tilden

Established in 1939, Lafayette High School is located in Brooklyn's Bensonhurst neighborhood. For much of its history, Bensonhurst was a predominantly Italian enclave, and in more recent years the area has seen a sharp increase in other immigrant populations. In particular, Asian—Chinese and Pakistani—and Eastern European communities have blossomed in the neighborhood.¹⁸ During the 2006-07 school year,

shortly before phase-out commenced, Lafayette’s school population was 43.2% Black, 23.7% Latino, 22.8% Asian, 9.6% White, and 0.6% Native American.¹⁹ That year, although ELLs comprised 16% of New York City’s general public high school population,²⁰ 34% of Lafayette students were ELLs.²¹

Established in 1930, Samuel J. Tilden High School was created to provide a comprehensive program for students in the surrounding East Flatbush community.²² During the 2006-07 school year, Tilden’s student population was 91.9% Black, 5.9% Latino, 0.5% Asian, 0.7% White, and 0.9% Native American.²³ During that year, ELLs made up 10% of the student body, and about 23% of the student body were recent immigrant students.²⁴ Tilden’s ELL and immigrant student body was mostly from the Caribbean—especially Haiti—and various African countries, as East Flatbush is home to a large Caribbean and African immigrant population.²⁵

B. ELL Programs

While Lafayette and Tilden had below-average overall graduation rates and struggled to meet their students’ needs, a positive aspect of both schools was a large and diverse bilingual education and ESL program. Over the years, these schools experienced burgeoning ELL populations. Accordingly, sometimes through actions spurred by community complaints and intense public scrutiny, these schools developed multifaceted programs for their ELL students. Also, because Lafayette and Tilden were large high schools, they easily met the threshold number of students mandating the creation of bilingual education programs.²⁶

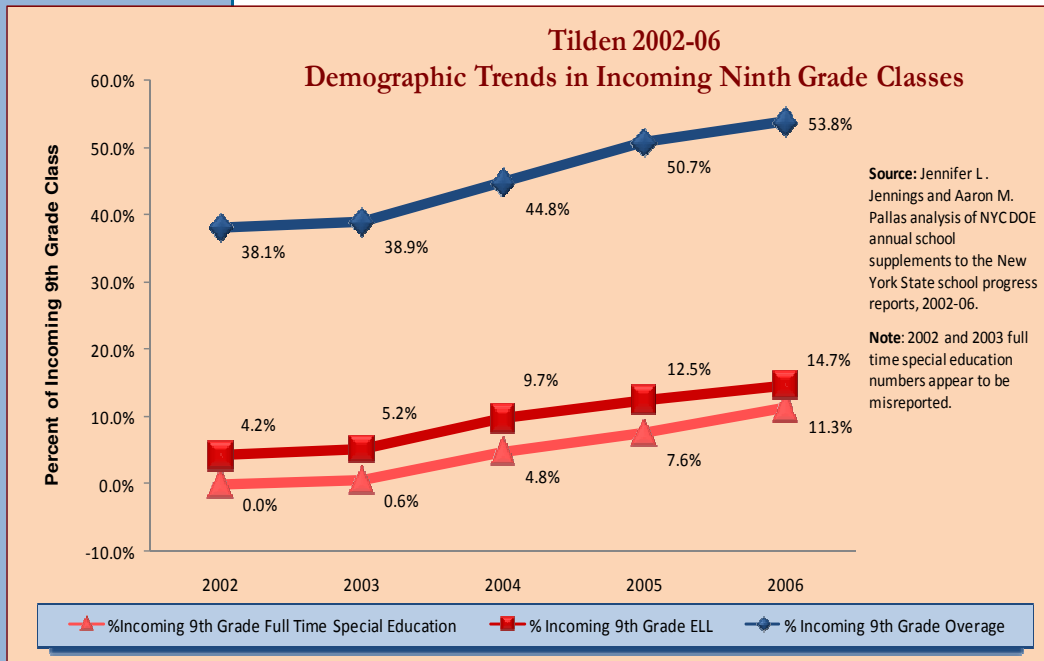
In the late 1990s and early 2000s, demographic changes in Bensonhurst and the explosion of Lafayette’s immigrant student population led to several highly publicized incidents of anti-Asian harassment and allegations that ELL students were not adequately served in the school.²⁷ In response, the United States Department of Justice (US DOJ) opened an investigation, which culminated with a consent decree between the US DOJ and DOE in 2004. The consent decree found that Lafayette “denied ELL students equal educational opportunities by failing to take appropriate action to overcome language barriers that impeded these students’ equal participation in the school’s instructional program[.]”²⁸ The consent decree mandated, among other things, adequate assessment and programmatic services for ELLs and interpretation for ELLs and their parents, as well as a mandated reporting and investigation process for incidents of bias-based harassment.²⁹ Since the consent decree was filed, AALDEF has worked with a local community-based organization, United Chinese Association of Brooklyn (UCA), to organize ELL students at Lafayette and monitor the school’s compliance with the consent decree and other laws protecting ELL students. Despite some continuing problems, AALDEF and UCA found that the school made gradual improvements in services for ELLs and curbing harassment. Prior to phase-out in 2007, Lafayette also maintained a Chinese bilingual program. In the 2006-07 school year, Lafayette’s Chinese bilingual program included ESL instruction, Native Language Arts and Social Studies. Previously, Lafayette also offered Chinese bilingual Science courses.³⁰

To meet the needs of a large Haitian immigrant student population, Tilden housed one of Brooklyn’s three high school bilingual Haitian-Creole programs in 2007.³¹ Tilden’s bilingual program included ESL instruction, Native Language Arts and core classes, such as Math, Science and Social Studies, in Haitian-Creole. Students in the bilingual program at Tilden, about 250 Haitian-Creole-speaking students in the 2006-07 school year, outperformed peers at comparable schools on various standardized tests.³² According to a Quality Review done by the DOE in the fall of 2006, ELLs at Tilden passed their Regents exams at a rate 25.3% higher than ELLs at similar schools.³³ Currently, there are very few Haitian-Creole bilingual programs left for high school students in the area. When Tilden closes in June 2010, Clara Barton High School will be the only high school in Brooklyn with a full Haitian-Creole bilingual program.³⁴

C. Closures

The DOE announced in December 2006 that both schools would begin to phase-out the following school year.³⁵ According to education officials, Tilden and Lafayette were slated to close because they had low four-year graduation rates, did a particularly poor job helping students who were already behind as incoming freshmen and were unpopular with prospective students.³⁶ The DOE also cited Tilden’s safety problems as another reason for closure.³⁷

Some of the problems in these schools were likely compounded by the closure of other large high schools in Brooklyn. In 2003, the DOE closed three large Brooklyn high schools, including Bushwick, George Wingate and Prospect Heights.³⁸ In 2004, two more large Brooklyn high schools, Harry Van Arsdale and Thomas Jefferson, closed their doors.³⁹ The closure of these schools had an almost immediate impact on enrollment at Tilden and Lafayette.

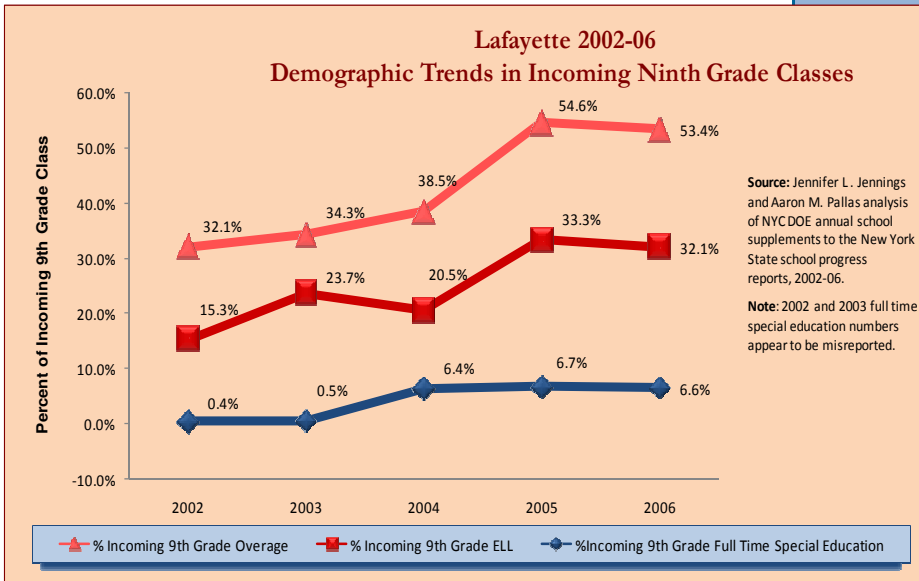


As these schools began to close, Tilden’s enrollment began to rise, as did the number of ELL, special education and overage students in its incoming ninth grade classes. As the *New York Times* reported in 2005, enrollment at Tilden soared in the 2003-04 and 2004-05 school years, such that Tilden’s enrollment was up 22% in 2005. The demographics of

these incoming students were also changing. For example, in 2004, Tilden’s incoming ninth grade class had 9.7% ELL students, which rose to 12.5% in 2005 and 14.7% in 2006.⁴⁰ Similarly, the percentage of full-time special education students entering the ninth grade class rose from 4.8% in 2004 to 7.6% in 2005, and 11.3% in 2006.⁴¹ Finally, the percentage of incoming ninth graders who were overage rose from 44.8% in 2004 to 50.7% in 2005, and 53.8% in 2006.⁴²

Lafayette experienced similar enrollment trends prior to its selection for closure. Lafayette’s incoming ninth grade ELL student population rose from 15.3% in 2002 to 32.1% in 2006.⁴³ Similarly, the percent of overage students entering the ninth grade class rose from 32.1% in 2002 to 53.4% in 2006.⁴⁴

The influx of students—and particularly of high needs students with little additional support—undoubtedly contributed to Tilden’s and Lafayette’s poor performance. Moreover, many of the reasons why the DOE selected these schools for closure were directly related to their inability to meet the demands of educating these increased numbers of high needs students.



D. Community Advocacy around the Closures

Due to concerns raised by ELL advocates about the exclusion of ELLs from small schools, the announcements that Tilden and Lafayette would restructure immediately raised concerns about the fate of ELLs during this process.

The immigrant community in Bensonhurst advocated vociferously for the placement of a small ELL-serving school at Lafayette upon phase-out, culminating in a large rally outside DOE headquarters on February 20, 2007.⁴⁵ Local educators and community partners submitted a proposal to DOE for a Bensonhurst-based ELL serving school—the World Vista International Studies Secondary School—but the DOE did not approve the proposal. According to the DOE, World Vista could not be placed at Lafayette because its administrative leadership currently worked at Lafayette, which apparently violated an informal DOE policy concerning new school leadership.⁴⁶ Despite the concerns of Bensonhurst’s immigrant community, three small schools with either no or only ad hoc services for ELLs were selected for placement on the Lafayette campus in the 2007-08 school year: High School of

Sports Management, the Expeditionary Learning School for Community Leaders and the Life Academy for Film and Music.

At Tilden, despite its low graduation rates and overcrowding, the school community was surprised by the phase-out announcement because it had seen a number of recent improvements. In 2005, Tilden received a new principal, Diane Varano, a graduate of the Leadership Academy,⁴⁷ a program the DOE started in 2003 to recruit, train and support new principals to work in high needs schools.⁴⁸ School staff felt the school was turning around under this new leadership.⁴⁹ In fact, a Quality Review Report done by DOE consultants just a few months before its announcement to close Tilden rated the school as proficient.⁵⁰ The report stated that the school's new principal put many programs and practices in place to address the needs of the school community and that her efforts and leadership received enthusiastic support from students, teachers, parents and her administrative staff.⁵¹ Due to these developments, many in the Tilden community disagreed with DOE's decision to close the school. The school community was surprised by the announcement also because no one in the school community, or even the DOE's administrative office for Region 6, which included Tilden, was consulted about closing the school before the decision was announced.⁵² After the DOE's announcement, a group of school community members, including parents, teachers, students and the United Federation of Teachers (UFT) formed a group called Save Our School Tilden (SOS Tilden) in order to protest the school's closing.⁵³ SOS Tilden met with local politicians, organized a large town hall meeting in Brooklyn in February 2007 where school community members spoke out against the closing and attended various DOE forums and meetings to speak out against the closure.

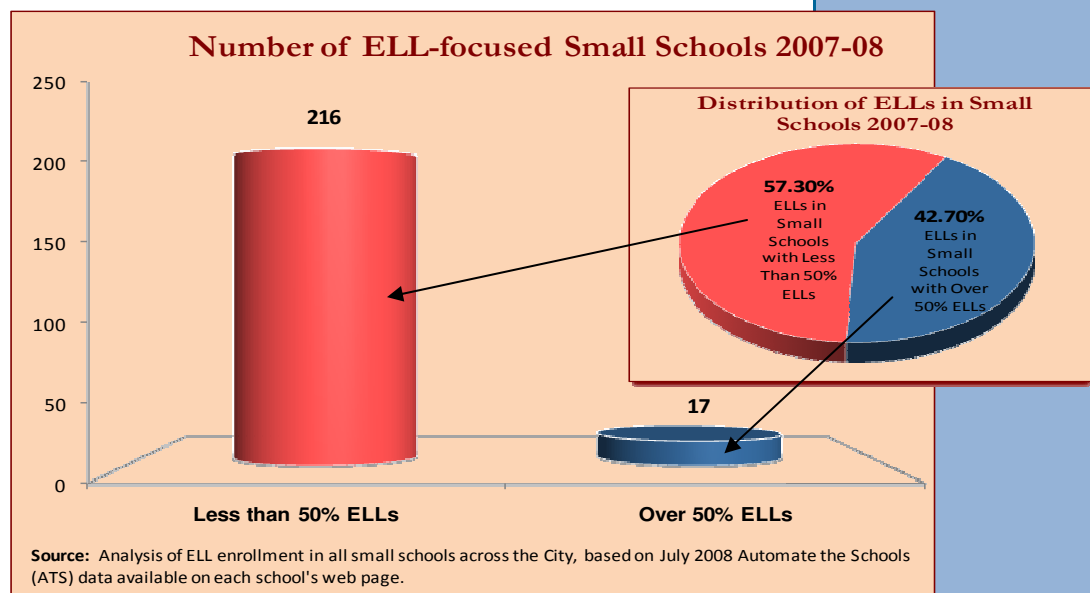
School staff also attempted to offer an alternative to the closing. As such, they proposed a plan to split the school into four academies, retaining the benefits of a large school—including more resources, extracurricular classes, and programming options—while adding the personal focus and academic attention of a small school through the smaller academies.⁵⁴ The DOE considered the proposal, but decided to move forward with its original plan to close the school and place two new small schools in the building. Taken together, the two new small schools the DOE selected for 2007-08 placement, It Takes a Village Academy and Kurt Hahn Expeditionary Learning School, would have less capacity to serve ELLs than Tilden. According to DOE projections, the two schools would initially enroll a total of 50 ELL students,⁵⁵ even though Tilden was serving 250 Haitian ELLs and traditionally accepted around 80 new ELL students each year.⁵⁶

II. The Fate of ELLs in the Restructuring of Lafayette and Tilden

Over the 2007-08 school year, we monitored ELL access to and services in the new small schools on the Tilden and Lafayette campuses. We also collected ELL enrollment data for the 2008-09 school year for the additional school placed on each campus that year. Overall, we found that the small schools provided limited access and/or reduced services for ELLs, with the result that ELLs were squeezed out of their buildings and into the remaining large high schools or high schools designed specifically for ELLs. In one case, ELLs were told they would have no choice but to attend GED programs if they could not graduate from their closing school in the next year.

A. Limited Access to Small Schools on Lafayette and Tilden Campuses

During the 2007-08 school year, ELLs accounted for 12% of the small school population across the city, while they accounted for 16% of all high school students.⁵⁷ Furthermore, ELLs who were enrolled in small schools were concentrated in ELL-focused small schools.⁵⁸ For example, while there are over 200 small high schools citywide,⁵⁹ 43% of all ELLs enrolled in small schools were concentrated in 17 ELL-focused schools.⁶⁰ Thus, while ELL enrollment in small schools has increased since the exclusion policy was reversed in 2007, much of this increase is due to the creation of ELL-focused schools that are designed specifically to serve ELL students. As discussed below, two of the eventual seven small schools placed on the Tilden and Lafayette campuses by 2008-09 enrolled significant numbers of ELLs⁶¹ while the other five enrolled very few ELLs. The citywide trend of limited ELL access to small schools is exemplified by the low ELL enrollment in four of the five new small schools placed on the Tilden and Lafayette campuses in 2007,⁶⁷ as illustrated below:



Life Academy for Film and Music (Lafayette Campus)

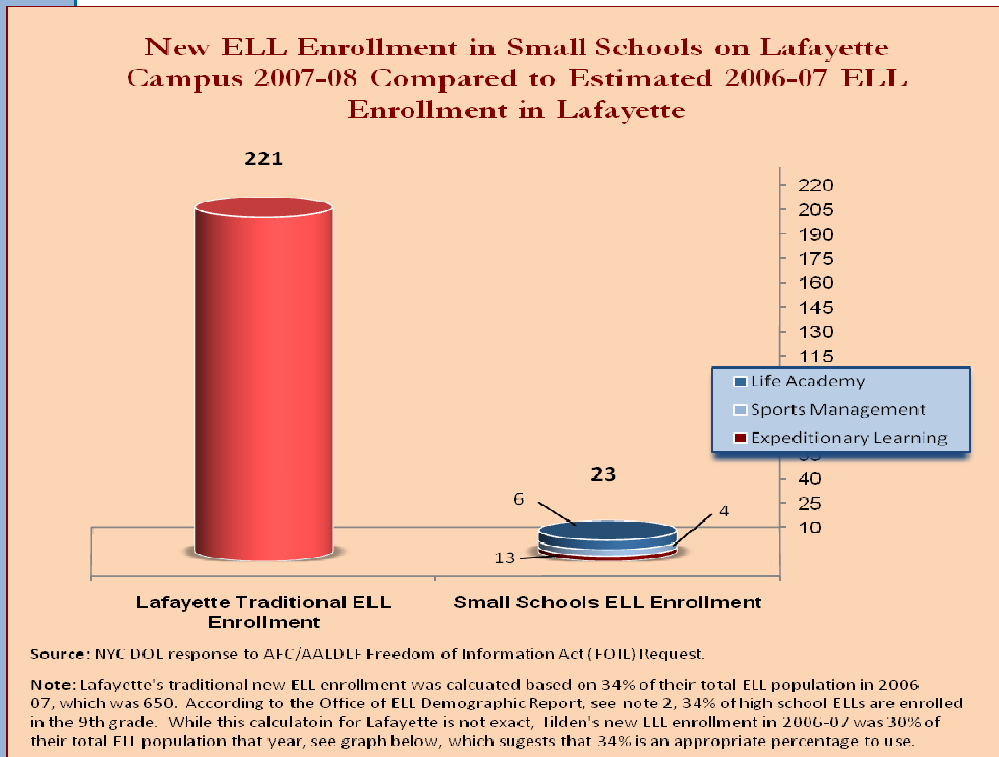
Life Academy school staff informed us that this school enrolled no ELLs in the 2007-08 school year.⁶³ However, DOE data indicates that six ELL students were actually enrolled in the school that year.⁶⁴ The fact that school staff did not even know about these students suggests that school administrators never identified the students as ELLs, despite the fact that they had ELL status. Whether the school had no ELL students or only six ELL students, this school accepted very few ELLs given the large immigrant neighborhood in which this new small school is located.

High School of Sports Management (Lafayette Campus)

Sports Management enrolled four ELL students during the 2007-08 school year.⁶⁵ On at least one occasion in November 2007, Sports Management asked Lafayette to admit a new eleventh grade ELL that Sports Management turned away. According to an email communication from the Office of Student Enrollment Planning and Operations (now called the Office of Student Enrollment) to Lafayette staff, Sports Management did not wish to enroll the student, explaining that “they do not have [an] ESL class.”⁶⁶ Such actions are in clear violation of a DOE memo issued in June 2007 stating that all schools must enroll ELL students in the same manner as they do other students, and must provide them with city and state mandated ELL services.⁶⁷

Expeditionary Learning Center for Community Leaders (Lafayette Campus)

Expeditionary Learning enrolled 13 ELL students during the 2007-08 school year.⁶⁸



While this school enrolled more ELL students than the other two small schools placed on the Lafayette campus that year, there was not a significant number of ELLs, given how many ELL students traditionally enrolled at Lafayette in previous years.

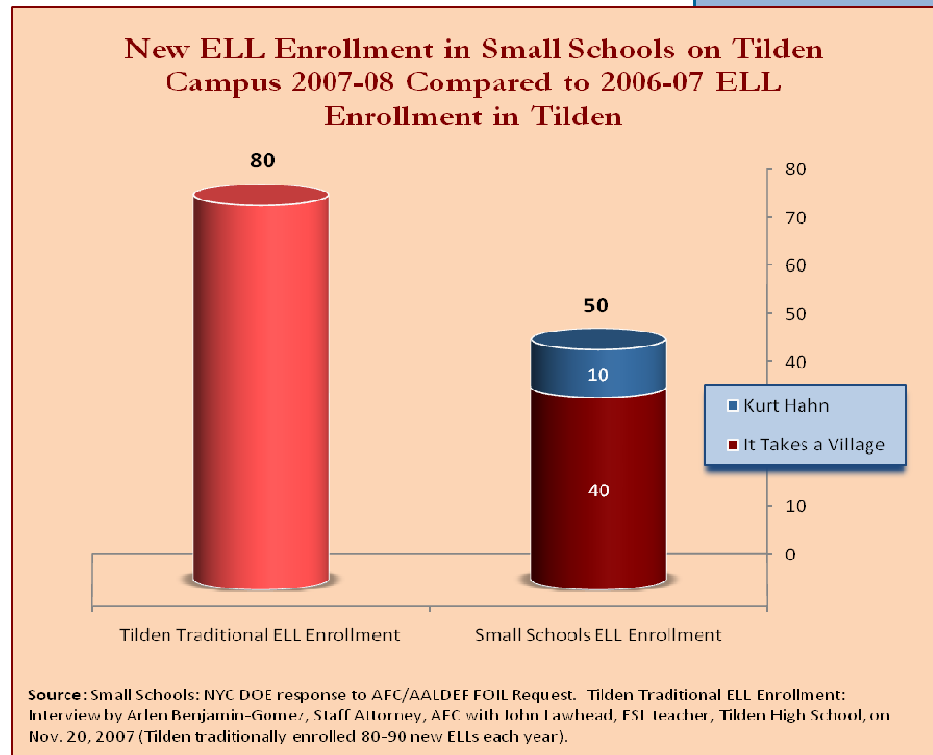
Kurt Hahn Expeditionary Learning School (Tilden Campus)

According to DOE data, Kurt Hahn had ten ELL students enrolled in the 2007-08 school year.⁶⁹ With nearly 80 ELL students historically enrolling in Tilden each school year,⁷⁰ for one of the two new small schools in the Tilden campus to accept only ten ELL students meant that ELLs who would have enrolled in Tilden would either concentrate in the other small school in the building⁷¹ or be forced to go to surrounding large high schools.

It Takes a Village Academy (Tilden Campus)

It Takes a Village enrolled 40 ELL students during the 2007-08 school year.⁷² The high number of ELL students enrolled in this school was likely a result of changes made by an ELL expert to the school’s original proposal approved by the DOE, discussed in detail below. A community organization in Brooklyn that works with older Haitian students informed us, for example, that this school conducted effective outreach to the Haitian community to inform potential Haitian students about the new school and its programs for ELLs.⁷³ The large number of ELLs in this school also speaks to the concentration of ELLs in ELL-focused schools, discussed below.

On the whole, therefore, the three new small schools that opened on the Lafayette campus in 2007 accepted 23 ELL students during their first year of operation, and the two new schools that opened on the Tilden campus accepted 50 ELL students during their first year. Considering the estimated 221⁷⁴ and the 80⁷⁵ new ELL students that traditionally enrolled in Lafayette and Tilden, respectively, 228 ELL students needed to find other high schools that would accept them.



B. Poor Services for ELLs in Small Schools

New York State education law requires schools to assess and identify ELL students and provide them with services to support language acquisition. Schools must screen all students to determine their English language skills, identify non-English proficient

students as ELL students, provide them with either ESL or bilingual education instruction to become proficient in English and annually evaluate ELLs to determine their progress and performance.⁷⁶ Under state law, any school with fewer than 20 ELLs of the same grade level and same native language must provide such students with either ESL or bilingual education.⁷⁷ Any school with an enrollment of 20 or more ELLs of the same grade level and same native language “shall provide such pupils with bilingual education.”⁷⁸ Additionally, state law provides that parents of ELLs have a right to choose which form of instruction their children receive, be it ESL or bilingual education.⁷⁹ New York state law and regulations also require that students are taught by a competent teacher and outline the requirements for permanent and provisional bilingual and ESL teacher certification.⁸⁰

Similar protections exist under federal law. The Equal Educational Opportunities Act provides that schools cannot deny equal educational opportunities by failing to “take appropriate action to overcome language barriers that impede equal participation by [their] students in [their] instructional programs.”⁸¹ “Appropriate action to overcome language barriers” has been interpreted by courts and the US DOJ to mean that school districts must, among other things, identify students who are not proficient in English, provide such students with a language acquisition program, provide resources to implement such program (including ESL teachers and materials) and provide the parents of ELLs with written or oral translations of important notices or documents.⁸² The No Child Left Behind Act of 2001 (NCLB) also requires schools to communicate with the parents of ELLs in their native language and provides for ELL programs to be taught by qualified teachers. Parental involvement requirements in NCLB state that schools “shall provide full opportunities for the participation of parents with limited English proficiency,” and provide information and school reports “in a format and, to the extent practicable, in a language such parents understand.”⁸³ Further, the Act sets deadlines for increased percentages of highly qualified teachers for the purpose of developing high-quality instructional programs for ELLs.⁸⁴

Despite these clear legal mandates, ELLs in small schools often do not receive appropriate language acquisition services. As shown above, ELLs enrolled in *non-ELL* focused small schools are typically in schools with very low percentages of ELLs. Due to their small size and limited staff, these schools often do not hire ELL teachers. In general, new small schools open with a first year class of 80 students.⁸⁵ Such schools can be hard pressed to create a self-contained class for ELLs without a sufficient number of students to justify a dedicated classroom and teacher for those students. Moreover, ELL students enter schools with varying degrees of English proficiency (i.e. beginning, intermediate, advanced), and thus grouping all of a school’s ELLs into only one class may not be possible or pedagogically effective. Hiring an ELL teacher to provide push-in services, in which an ESL teacher teams up with a content area teacher, is similarly difficult for a school with very few ELLs because a small school’s budget may limit the school’s ability to hire a teacher dedicated solely to serving the needs of a few students.⁸⁶ The experiences of ELL students in the five new small schools we examined that opened in 2007-08 illuminate these problems. Each of these schools failed to either: identify ELL students or assess their language needs, provide ELL students with appropriate ESL

instruction, or create bilingual education programs.

1. Failure to Identify and Assess ELLs

High School of Sports Management (Lafayette Campus)

The DOE’s online high school directory indicates that Sports Management provides students “an opportunity to engage in experiential learning opportunities working with professionals in the areas of Sports Marketing, Sports Writing, Sports Media, Sports Medicine and Sports Law.” The school’s focus on professional athletic management would seem to appeal to students – ELLs and mainstream students alike – with an avid interest in sports. Although, according to DOE data, the school enrolled four ELL students, anecdotal evidence indicates that Sports Management failed to identify and assess all ELLs enrolled in their school during the 2007-08 school year.

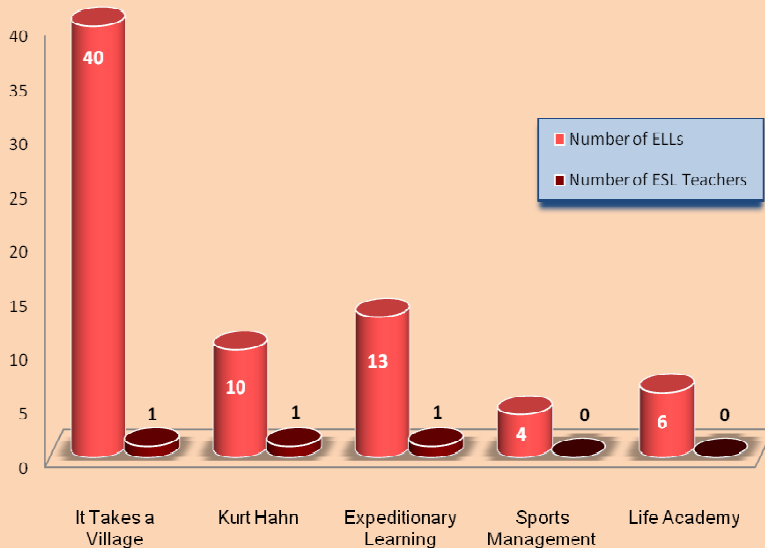
A recent immigrant student from Myanmar sought assistance from AALDEF reporting that she was placed at Sports Management apparently for no reason other than the school’s proximity to her home.⁸⁷ This student—who had no interest in sports or athletic management—struggled in her classes. In particular, she was confused by her Sports Journalism class, spending hours each night researching sports terms like “sabermetric” (baseball analysis using objective evidence like statistics) and “seamhead” (a term for an avid baseball fan) on the internet.⁸⁸ Although she struggled with her English, she was placed in a Spanish foreign language class as well.⁸⁹

Sports Management failed to assess this student’s English skills upon enrollment, and simply placed her in a mainstream curriculum. The student reported that at least one other immigrant student at Sports Management – a girl from China – was also placed in a mainstream curriculum, apparently without English assessment. Ultimately, the student with whom we spoke repatriated to Myanmar, but AALDEF alerted the DOE about this failure to identify and assess students in a letter to Chancellor Joel Klein dated December 20, 2007.⁹⁰

2. Failure to Provide ESL Instruction

Data from the 2007-08 school year reveals that small schools housed at Lafayette and Tilden had very few – if any – certified ESL teachers. Some had none at all, even though they had ELL students enrolled. It Takes a Village Academy, for example, had one certified ESL teacher for 40 ELL students, while the High School of Sports Management and Life Academy for Film and Music were both without *any* certified ELL teachers for the four and six ELL students at each school, respectively. Without teachers trained in ELL pedagogy, several of the small schools we investigated resorted to creating ad hoc ESL programs that often failed to comply with state and federal requirements. In two of the three schools placed on the Lafayette campus in

Lack of Certified ESL Teachers in
Small Schools 2007-08



Source: NYC DOE response to ALC/AALDEF FOIL Request.

2007, we found that ELLs were sent to the phasing-out large high school for ESL services, or teachers gave ELLs “busy work” in lieu of a standard ESL curriculum.

High School of Sports Management (Lafayette Campus)

Sports Management had four ELL students enrolled in the 2007-08 school year, but had no certified ESL teacher. These students, therefore, did not receive ESL instruction or other ELL support services at Sports Management during their ninth grade year. AALDEF notified the DOE’s Office of English Language

Learners of this problem via email

on March 19, 2008.⁹¹ In the spring 2008 semester, Sports Management staff asked Lafayette High School to provide ELL services to their ELL students. The students were eventually scheduled to receive ESL instruction at Lafayette. However, according to Lafayette staff, it was unclear if these students were released from conflicting schedule obligations at Sports Management during those periods. While one of the four ELL students attended the Lafayette ESL class sporadically, the other three ELLs did not report to Lafayette for ESL classes with any regularity during the balance of that school year.⁹² Sending these students to another school to receive their ESL instruction was, therefore, not an effective solution to the lack of services in Sports Management. Further, given Lafayette’s impending closure, using Lafayette’s staff to provide ESL to small schools students on that campus is clearly not a long-term solution.

Expeditionary Learning Center for Community Leaders (Lafayette Campus)

The DOE’s online high school directory states that the Expeditionary Learning Center for Community Leaders provides “hands-on learning in the classroom and throughout New York City’s diverse neighborhoods, [allowing students to] participate in solving real world problems.”⁹³ Affiliated with Outward Bound, the school also offers a five-day wilderness course for hands-on outdoors oriented learning.⁹⁴ In September 2007, Expeditionary Learning appeared on a list entitled “New Schools with Enhanced Capacity to Serve English Language Learners,” along with five other new small schools.⁹⁵ The DOE distributed this document to advocates and service providers working with immigrant and language minority students.

Expeditionary Learning did enroll 13 ELL students,⁹⁶ and to the best of our

knowledge, properly assessed their English ability as required by state law.⁹⁷ In the 2007-08 school year, the school hired one ESL teacher and seemed to make genuine efforts to serve its ELLs. Despite these efforts, the school was ultimately ill-equipped to meet the needs of, or legal mandates for, its ELL students.

In the spring of 2008, three ELL students at Expeditionary Learning asked AALDEF for assistance in transferring to another school. The students were all freshmen who had been enrolled since the fall 2007 semester and who had tried unsuccessfully to transfer on their own. Two were intermediate ELLs, and one was a beginner. Each of them was enrolled in one ESL unit and one English Language Arts unit. This programming falls short of the requirements in New York state law, which requires that beginner ELLs receive three hours of ESL instruction and intermediate ELLs receive two hours of ESL instruction per school week.⁹⁸ The students also raised concerns about the quality of the instruction they received in their ESL and English Language Arts classes. They informed us that the ESL class provided very little actual English language instruction, but instead primarily provided United States history tutorial support. The homework assignments that students provided AALDEF from their ESL class reflect United States history content. For example, one reading assignment was entitled “Mom, Did You Vote?” and covered a lesson about female suffrage. Another, entitled “Overview of the 1920s” covered historical information about that decade.⁹⁹ While embedding subject matter content in ESL lessons is common and appropriate, the students reported that very little actual English language support or instruction was provided and, as a consequence, they struggled in these and other classes.

The three students also reported that what English language instruction they *did* receive was not tailored to each student’s ESL level. Expeditionary Learning indiscriminately placed beginner, intermediate and advanced level students in the same class and did not meaningfully differentiate instruction according to each student’s English ability. In fact, the students reported that English instruction was limited to occasional review of grammar handouts.¹⁰⁰ For example, one such handout looked at “Grammar in Context,” in relation to subjects and objects in sentence construction.¹⁰¹ The beginner ELL student informed us that he found this handout somewhat helpful, but the two intermediate students reported that it was too simple. In contrast, the United States history-oriented readings were too advanced for the beginner student.

In addition to problems with instruction, these students also reported that no bilingual staff were available to communicate with them or their parents in their native languages of Chinese and Burmese. Nor was telephonic interpretation or other interpretation offered.¹⁰² AALDEF informed the DOE’s Office of English Language Learners about the above programmatic problems in an email dated March 19, 2008.¹⁰³

Life Academy for Film and Music (Lafayette Campus)

While school staff reported that Life Academy had enrolled no ELL students during the 2007-08 school year, DOE data indicates that six ELL students were in fact enrolled. Because school staff informed us that no ELL students were enrolled, and because the school had no ESL teachers, it is probable that these students were not properly assessed or given any ESL instruction.

3. Failure to Provide Bilingual Education Programming

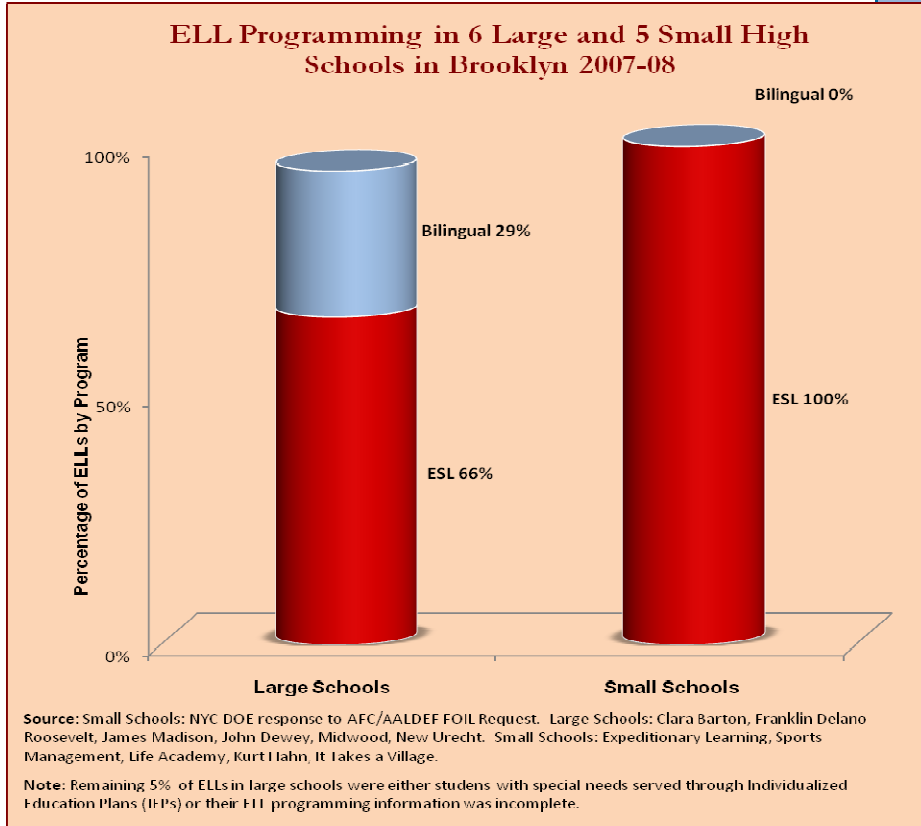
Perhaps most disconcerting about the closing of Lafayette and Tilden is the concomitant elimination of each school’s bilingual education programs. As discussed above, Lafayette’s Chinese bilingual program was enforced and improved by a federal consent decree and the bilingual program at Tilden was one of only three Haitian-Creole bilingual programs for high school students in Brooklyn. While state law requires schools with 20 or more high school ELL students in the same grade, who speak the same native language, to create a bilingual program,¹⁰⁴ we found that the small schools replacing Lafayette and Tilden either did not meet this threshold number, or if they did, they failed to create a program. The conversion of Lafayette and Tilden into small schools thus demonstrates how the shift from large, multi-service high schools to small schools directly corresponds with the loss of bilingual programs. As a result, ELLs in small schools have fewer language assistance options than in large high schools.

The loss of Tilden and Lafayette’s bilingual education programs is reflective of a citywide decline in bilingual programs. From 2002 to 2008, the percentage of ELLs enrolled in bilingual programs has steadily decreased from 37% to 22%.¹⁰⁵ Meanwhile, stand-alone ESL enrollment (without a bilingual content curriculum) has risen from 53% to 69%.¹⁰⁶ Additionally, in 2007-08, Brooklyn had the second lowest share of ELLs enrolled in bilingual education (after Staten Island) of all five boroughs.¹⁰⁷ The dismantling of bilingual programs at Lafayette and Tilden is part of, and helps explain, this larger trend of disappearing bilingual programs.

The right to bilingual education has been a hard-fought but well-established right for ELL students across the country and New York City in particular.¹⁰⁸ In addition to legal mandates requiring schools to create bilingual programs, research indicates that bilingual education more effectively prepares ELLs for academic success than English immersion.¹⁰⁹ Considering the high dropout rates and flagging test scores of ELLs in New York City,¹¹⁰ bilingual education should remain a viable option for parents and students.

Despite the thriving bilingual programs that existed in Tilden and Lafayette, thus far none of the small schools replacing these two high schools offers bilingual education. This gap causes a significant reduction in bilingual education options in the Bensonhurst and East Flatbush neighborhoods of Brooklyn. For example, of the over 2,800 ELLs enrolled in the six large high schools we examined that surround Tilden

and Lafayette in Brooklyn, 29% were enrolled in bilingual education, 66% in ESL, and 5% were ELL students with special needs with Individualized Education Plans (IEPs) or had incomplete ELL programming information. In sharp contrast, 100% of ELLs in the small schools we examined were enrolled in ESL, if anything, and *none* was in bilingual education.¹¹²



It Takes a Village Academy (Tilden Campus)

During Tilden’s restructuring, Region 6 ELL instructional support specialist Marina Vinitskaya learned there was no plan to serve ELL students in the schools slotted for placement in the Tilden campus. When Vinitskaya looked at the school’s original proposal, she was troubled by the lack of thought about how to meet ELL needs. For example, the school’s plan had no professional development for teachers working with ELLs, and in Vinitskaya’s opinion, the curriculum made insufficient use of language and literacy tools.¹¹³ Due to scrutiny from Vinitskaya and others, the plan for It Takes a Village was rewritten to account for the needs of ELL students. Vinitskaya got involved in this process and eventually became It Takes a Village’s new principal.¹¹⁴

When the school opened in the fall of 2007, it enrolled 40 ELL students, most of whom were Haitian-Creole-speaking. It also enrolled some French-, Funali-, Arabic- and Spanish-speaking students. According to community members in East Flatbush, the school made an effort to reach out to the local immigrant community to encourage ELL students to enroll in the school.¹¹⁵ The curriculum offered to ELLs combined ESL with content area instruction, and the school offered professional development to all staff on how to serve ELLs and provide appropriate language support. The school also shared a monetary grant with Tilden to provide a program for Students with Interrupted Formal Education (SIFE), including Saturday classes in Math, English and Science and computer programs that teach content area subjects

and literacy.¹¹⁶

Thanks to Vinitzkaya’s intervention in the creation of this school, It Takes a Village had a diverse array of services for ELL students, but the school did not offer a bilingual program. According to Vinitzkaya, not enough parents had asked for one. As discussed above, state law mandates that schools create bilingual programs if they enroll more than 20 students in the same grade who speak the same native language.¹¹⁷ The DOE has interpreted this mandate to mean that parents of 20 students in the same grade who speak the same language must “opt-in” to select a bilingual program – and that merely meeting the numerical enrollment threshold is insufficient.¹¹⁸ In It Takes a Village’s case, school staff report that at least 20 parents of Haitian-speaking ELLs *had* in fact opted-in to a bilingual program, but the school nonetheless did not create such a program.¹¹⁹

C. Segregation of ELLs into Large Schools and ELL-focused Small Schools

DOE data shows that ELLs are often concentrated in the relatively few small schools designed for them or in large comprehensive schools. While both of these school options often provide well-developed ELL programming, ELL students should not be limited to these schools. As of 2007-08, there were only 17 ELL-focused schools in all of New York City. Such a limited number of schools cannot serve the needs of the more than 41,000 ELL high school students in the City.¹²⁰ Moreover, ELLs should be able to choose from the wide variety of small schools based on their theme or curriculum, as other students can. In fact, the DOE’s 2007 memo on high school admissions states that all schools must admit ELLs in the same manner as other students and must plan to offer whatever ELL services parents choose at enrollment, whether or not that service model (i.e. ESL, bilingual education, dual language) is already offered in the chosen school.¹²¹ While large schools provide diverse programming options for ELLs, the examples of Tilden and Lafayette show that large schools often absorb additional ELLs and other high needs students when nearby large schools close down. As such, these schools may become overburdened and at risk for closure themselves. Thus, segregating ELLs into large schools is a problematic practice not only for those students, but for large schools as well.

1. ELL-focused Schools

As discussed above, many ELL students who are in small schools attend ELL-focused small schools. The International Network of Public Schools, for example, is a network of nine small schools in New York City (and one in California) that serve recent immigrant ELLs. These schools provide appropriate language support for ELL students and have a good track record of graduating ELL students. To limit ELLs to ELL-focused schools, however, segregates these students into a small handful of schools that cannot meet the needs of all New York City ELLs, limits ELL enrollment options to schools with capacity to meet their particular language needs and limits ELLs’ choice of instructional model as such schools do not typically provide bilingual education.

International High School at Lafayette (Lafayette Campus)

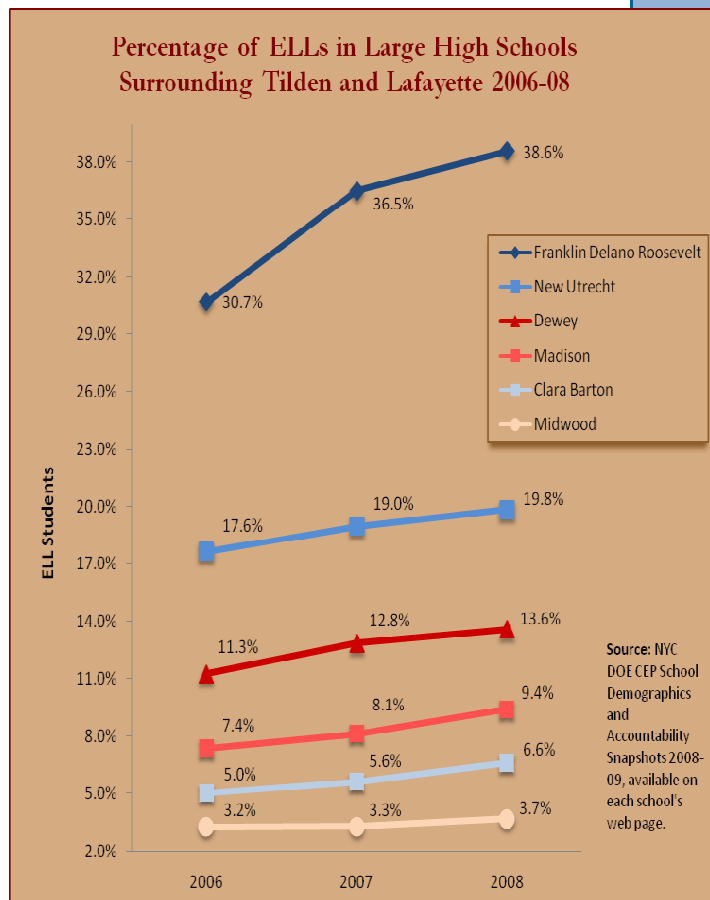
In the fall of 2008, the International High School at Lafayette was placed in the Lafayette building. This school provides specialized instruction for ELLs in an free-standing ESL format.¹²² The International High School’s materials state that “[o]ur mission is to provide quality education to recently arrived immigrants” and declare that while “[o]ur students come to us speaking very little English[,]” “90% of our graduates go on to college.”¹²³ Through “know your rights” workshops and other student outreach during the fall 2008 semester, AALDEF met with several Chinese ELL students of varying language ability enrolled at International High School. These students reported that they were satisfied with the school’s services and offerings.¹²⁴

The addition of this ELL-focused school to the Lafayette campus was a welcome development, dramatically expanding programmatic offerings for Bensonhurst ELLs. The International High School was previously placed in Brooklyn’s Canarsie neighborhood, which does not have a large immigrant population.¹²⁵ This school does not, however, solve the ELL access challenges at the other small schools on the Lafayette campus. ELLs should have the programmatic choice to select an ELL-focused school like the International High School, or one of the other themed small schools housed at Lafayette and elsewhere.

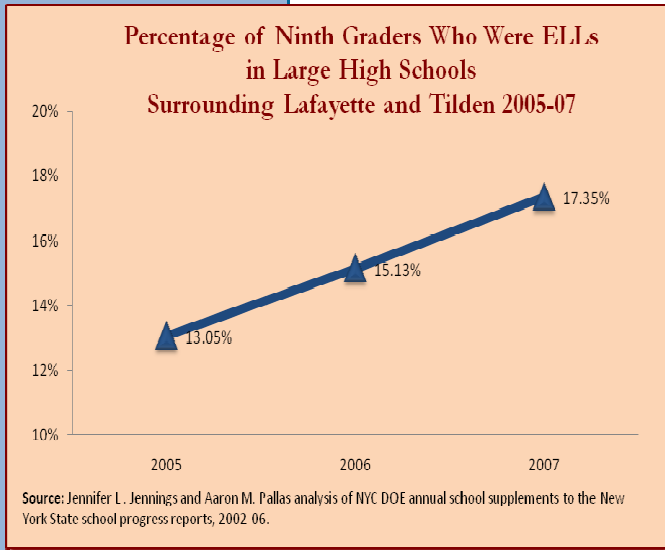
2. Large Schools Surrounding Lafayette and Tilden

According to the *New York Times*, the closing of Lafayette and Tilden created a loss of about 800 seats in bilingual and ESL classes.¹²⁶ While the small schools on both campuses enrolled few ELLs in fall 2007, ELL enrollment in surrounding large high schools increased. In the six large high schools surrounding Lafayette and Tilden, the overall percentage of ELLs in each school steadily grew from 2006 to 2007, and from 2007 to 2008.¹²⁷

A look at the percentage of ninth grade ELL students enrolling in these six large schools over the past several years shows a steady increase in ELL enrollment as Tilden and Lafayette closed down. On average, the percentage of ninth grade ELLs in



these schools rose from 13.05% in 2005 to 17.35% in 2007.¹²⁸ As the new schools on the Lafayette campus only accepted 23 incoming ninth grade ELLs, large schools



surrounding Lafayette were especially affected by the school's closure. For example, Franklin Delano Roosevelt went from having 30.2% ELLs in its incoming ninth grade class in 2005, to having 42.8% ELLs in its ninth grade class in 2007.¹²⁹ New Utrecht's ninth grade ELL population rose from 12.7% in 2005 to 21.6% in 2007, as did James Madison's from 8.1% in 2005 to 13.1% in 2007.¹³⁰ While John Dewey's ninth grade ELL class did not increase in 2007, their overall ELL population rose from 11.3% in 2006 to 12.8% in 2007 and 13.6% in 2008.¹³¹ Reports from students and teachers in two of these six schools also confirmed this trend.¹³² While the data does not show as dramatic an increase in the number of ELLs enrolling in large schools surrounding Tilden (such as Midwood and Clara Barton), this difference may be because small schools on the Tilden campus accepted a

larger number of ELL students than those on the Lafayette campus (50 ELL students in 2007-08). As mentioned previously, the greater ELL admission was largely due to one small school's concerted effort to attract and serve ELLs, and therefore, the ELLs on the Tilden campus were mostly concentrated in that school.¹³³

Three John Dewey ELLs we interviewed during the 2007-08 school year indicated they felt the *already* overcrowded school had gotten even more crowded that year. They reported difficulties walking in the halls between periods and stated the school was now more likely to hold security-related "lockdowns" or conduct periodic metal detector scans. They also observed that some classes had gotten more crowded. Whereas previously classes were no larger than 35-40, some classes had up to 60 students at the beginning of each semester. In such classes, some students were forced to sit on the ground at the side of the room due to a shortage of desks. However, the overcrowding has been somewhat ameliorated by a practice known as classroom "equalization," which consists of dropping students from overcrowded courses and placing them in less crowded courses in the same discipline.¹³⁴

A New Utrecht teacher we interviewed in the 2007-08 school year reported that he too felt the already overcrowded school was getting even more crowded. He stated that this made it more difficult to plan student class schedules appropriately. Due to the steady enrollment of new ELL students, he also expressed a desire for the DOE to provide more teacher training in ELL teaching methodology. This teacher further expressed concern that the DOE—intentionally or not—was turning certain large high schools (like New Utrecht) into "dumping grounds" for "vulnerable populations" and students who are "at risk."¹³⁵

Anecdotes from New Utrecht students corroborate the severe overcrowding at the school. The mother of one Expeditionary Learning student whom AALDEF helped transfer to New Utrecht indicated that her son did not have a lunch break at the

beginning of the school year, and that the school had “too many students” for every student to get a lunch period. The school informed her that other students also faced this predicament.¹³⁶ Further, other New Utrecht students we interviewed this school year said that even students who *do* have a lunch period sometimes opt to skip lunch due to severe overcrowding in the cafeteria and instead eat snacks from a vending machine to tide them over until the end of the day.¹³⁷

3. ELL Services in Large Schools

The lack of ELL services in the small high schools we examined stands in stark contrast to the availability of such services in large high schools. As one top DOE official recently said, “some of the large schools that closed had the best ELL programs,” and he further stated that they have not figured out how to serve ELLs in small schools.¹³⁸ In fact, several students AALDEF represented transferred to large schools when their small schools failed to offer them appropriate ELL services. Similarly, school staff at It Takes a Village (who formerly worked at Tilden High School) reported that in comparing the two schools, Tilden had many more ELL support services, including an ELL department with its own assistant principal, better counseling services for immigrant students, more bilingual staff and more ESL and bilingual education program options.¹³⁹ As the data discussed above indicates, while ELL programs are often well developed with diverse programming options in large schools, these schools may become increasingly overburdened and under-resourced as they bear the brunt of the closing of other large schools.

Tilden and Lafayette, as well as the surrounding large high schools we examined, all have or had large and diverse ELL programs. Franklin Delano Roosevelt High School, for example, had 18 certified ELL teachers to serve over 1,300 ELL students, and New Utrecht High School had eight certified ELL teachers to serve over 570 ELLs in the 2007-08 year. The six large high schools we examined have an average ELL population of 424 students, along with an average of seven certified ELL teachers, and some even had certified bilingual teachers. Furthermore, the large high schools we examined enroll ELL students in a variety of programs including ESL and bilingual education, as contemplated under state law.

After transferring to large high schools from small ones, ELLs represented by AALDEF were reportedly much happier and doing better in school this year. One ELL who transferred into Dewey, for example, reported that the class selection was more varied and better suited to her needs than at Expeditionary Learning.¹⁴⁰ The mother of another student who transferred to New Utrecht reported that her son is doing better in school and seemed to enjoy classes more because he could participate using either English or Chinese.¹⁴¹

While large schools tend to have better ELL programming, they are often overcrowded and under-resourced. Large schools with fewer resources per student, overcrowding and poor graduation rates may provide language acquisition services, but often do not meet the needs of ELL students in other ways. Moreover, the closing

of certain large schools creates increasing population pressure on other nearby large schools. These other large high schools inevitably absorb ELLs who cannot be served by the new small schools replacing the dismantled schools. The data above also indicates that nearby large schools take in other higher needs students as well when a large school closes. Thus, schools with capacity to offer ELLs with appropriate language programming are themselves at risk of closure as an influx of higher needs students and overcrowding tax such schools' overall performance. The result is that ELLs may be pushed from one large closing school to another.

D. ELLs Left Behind: Service Cuts and Push Outs

ELL students tend to need extra support and more than four years to graduate,¹⁴² but as large schools phase-out, they may cut resources and services for this population. ELLs may nevertheless remain in their closing schools, having few attractive alternatives. As the schools' final closure dates approach, remaining ELLs must graduate, transfer, or leave high school. For hard-to-place students, the path of least resistance for the closing schools may be to push their ELLs out of the school system completely, as illustrated below.

ELL students remaining in Lafayette and Tilden began to feel the effects of the closure early on. In 2007-08, the first year of the school's phase-out, an ESL teacher at Tilden reported that many students sought transfers out of the school, and transfers were granted to roughly 100 students. According to school staff, priority was given to students who were on track to graduate in four years.¹⁴³ Thus, ELLs who were already identified as struggling were left behind in the closing schools. School staff also reported that fewer ESL classes were offered in the school starting in 2007-08.¹⁴⁴ As a result, students began to receive several different levels of ESL instruction in the same classroom and were no longer separated by whether they were beginning, intermediate or advanced ELLs. While such groupings may be appropriate for intermediate and advanced ELLs, some beginner ELLs were placed in advanced ESL classes because there were no longer ESL classes for beginners.

ELL students at Lafayette also began to see the effects of the closing. AALDEF collected reports that Lafayette staff approached Chinese ELLs¹⁴⁵ enrolled in bilingual education in the beginning of the 2008-09 school year and informed them that Lafayette no longer had a Chinese bilingual program. The students learned they would have to transfer to another school if they wished to remain in bilingual education. Alternatively, they were offered an opportunity to remain at Lafayette and enroll in an ESL-only program. Most, if not all, of the students chose to remain at Lafayette in the ESL-only program.

In addition to shrinking ELL programming in anticipation of the school's closure, Tilden has already taken steps to push remaining ELL students out of school altogether. This school year, AFC visited three ESL classes at Tilden. Students in those classes informed AFC that school staff had told them they had to start taking French GED classes after school and on the weekends. Students had been told they

would be suspended or receive detention if they did not attend the GED program. When AFC inquired about this problem, a school staff member admitted that he told students they would be suspended for not attending the GED program as a way to “push” them into the program.¹⁴⁶ Students and school staff informed us that Tilden had unilaterally enrolled almost 50 ELLs into these GED classes after sending them a letter “congratulating” the students on being selected for French GED classes and suggesting that a GED was equivalent to a high school diploma.¹⁴⁷

Many students were upset about being forced into this GED program as they wanted to graduate with a regular high school diploma. One student enrolled in the GED program, for example, was aiming for an Advanced Regents diploma – an honors diploma that requires the passage of additional Regents exams.¹⁴⁸ Another student was inexplicably forced to take these French GED classes although his native language was not French, and he did not speak French.¹⁴⁹ A few of the students with whom we spoke were especially upset as they were under 18 years old—one student was 16 years old and another was 17 years old—and were thus below the age at which a student is legally permitted to be discharged to a GED program.¹⁵⁰

Despite laws prohibiting Tilden’s practices,¹⁵¹ students who did not attend the GED program were punished for their non-attendance. Several students received report cards with failing grades for the GED classes that they did not want to take. In response, 10 students wrote a petition to the school administrators stating that they did not want to take the GED classes and wanted a high school diploma, and further requesting that the program be removed from their report cards. AFC submitted a letter to the Office of Legal Services of the DOE on May 22, 2009 alerting them to this problem at Tilden.¹⁵² As a result, the GED classes were removed from the schedules of those 10 students, and the school distributed a “know your rights” flyer to the remaining students in the GED classes informing them about their right to graduate with a high school diploma.¹⁵³

In addition to being pushed into GED classes, students reported that, based on information from school staff, they understood that they had to either graduate with a Regents diploma or get a GED by June 2010, when the school will close.¹⁵⁴ Many students with whom we spoke, however, were 19 years old or younger and thus were legally entitled to continue in a public school until they reach age 21 – even if that is after Tilden’s closure. Yet students were told by school staff that they would not be able to transfer to another school because they had too many credits, had not passed enough Regents exams or were too old, and thus no other school would take them. When we informed a school staff member who was giving this misinformation to students about their right to continue in school until age 21, however, he simply replied, “If they do not graduate by the time we close, we look bad.”¹⁵⁵

As Tilden is phasing out, therefore, ELLs have been left in the school with declining services, been pushed into GED programs and been told they cannot transfer to another school where they can complete their high school diploma. The fate of the ELLs remaining in Tilden raises the question whether these illegal and exclusionary practices are occurring in other schools that are phasing out throughout the city.

Conclusion and Recommendations

Despite the concerns that the school communities and advocates raised around the closing of Lafayette and Tilden high schools, the DOE moved forward with its plans to phase-out these schools and replace them with schools that did not sufficiently take into account the needs of Brooklyn's ELL student population. As predicted, these actions have effectively segregated ELLs into large, overburdened schools or the relatively few small schools that are designed to serve them, and have denied many ELL students equal access to the educational opportunities offered by the wide variety of new small schools.

This year, top DOE officials have claimed that ELL access to small schools is on the rise and that there has been a culture shift in new small schools such that they now want to accept ELL students.¹⁵⁶ Even assuming the accuracy of this claim, the negative impact of high school restructuring policies and practices that have excluded ELL students since 2002 cannot be reversed. The DOE will not get a second chance with the hundreds, probably thousands, of ELL students who have not received proper ELL services, have been forced to attend large failing high schools and have been pushed out of school. As the DOE moves forward with its plans to close down more large high schools, meeting the needs of ELLs must be part of the plan, instead of just an afterthought.

In 2007, the DOE announced that three new large high schools—Franklin K. Lane, Canarsie High School and Far Rockaway High School—would phase-out starting fall 2008, and in 2008, the DOE announced that two more large high schools—Bayard Rustin High School for Humanities and Louis D. Brandeis High School—would phase-out starting fall 2009. All of these schools, with the exception of Canarsie, had or have large ELL populations. Franklin K. Lane had 23.9% ELLs in 2005-06, 27.5% in 2006-07 and 31.6% in 2007-08, and Far Rockaway had 11.8% ELLs in 2005-06, 13% in 2006-07 and 14.8% in 2007-08.¹⁵⁷ Both of these schools also had many ELLs enrolled in bilingual programs: 565 ELLs in Franklin K. Lane in 2007-08 and 100 ELLs in Far Rockaway during the same year.¹⁵⁸ The schools that will close in fall 2009 also have had large ELL populations and bilingual programs in the years prior to the phase-out announcement. Bayard Rustin had 25.4% ELLs in 2006, 27.2% in 2007 and 22.8% in 2008 and Brandeis had 27% ELLs, 30.3% and 28.8% during those years.¹⁵⁹ During the 2008-09 school year, Bayard Rustin had 165 ELL students enrolled in bilingual education, and Brandeis had 420 ELLs enrolled in bilingual education.¹⁶⁰ As the DOE closes down these four high schools and replaces them with small schools, the exclusionary policies and practices that occurred on Tilden and Lafayette campuses must not be repeated. The DOE must consider and plan for the full effect of closing a large school on the school's ELL population, including the ELL students left behind in the closing school, new ELL students who wish to enroll in the building and ELL students who will inevitably enroll in large schools surrounding the closing one.

Specifically, we recommend the following:

Closing Schools

The DOE must ensure that ELL programming in the closing school is left intact as the school phases out and must provide oversight to ensure that the closing school does not implement illegal exclusionary practices. Moreover, ELL students, and other high needs students, should be given the option to transfer to other schools, especially if they are not on track to graduate before the school will close its doors. Allowing students to transfer into the new schools in the building should also be considered.

New Small Schools

New small schools that are placed in a restructured campus must have a plan for how they will serve ELL students. All small schools should anticipate receiving ELL students and should hire ESL and/or bilingual certified teachers to meet their needs. Small schools in a building should explore sharing resources to hire ESL teachers or create a bilingual program if they do not have a sufficient number of ELL students to provide these services on their own. Furthermore, the DOE should design small schools with the student population the large school once served in mind and should make every effort to retain ELL services, such as bilingual programs with good track records, that existed in the closing school. In order to ensure that bilingual programs are not lost and that ELL students continue to have the right to ESL or bilingual education programs, more bilingual programs must be developed in new small schools. The DOE should specifically solicit applications for schools with bilingual programs. In order to ensure that ELLs have access to small schools, the DOE should allow small schools to hold open seats for new immigrant students who enroll throughout the school year, translate all new school materials, ensure that interpreters are provided at new school fairs and open houses and advise guidance counselors from feeder middle schools about the ELL programs in new schools.

Surrounding Large Schools

Large schools that surround a closing high school must be given additional resources and support to ensure that they can serve an influx of ELL students, and other high needs students, as a result of a school closing. The DOE should also ensure that these schools do not become overcrowded by making all efforts to ensure that small schools accept and serve ELLs.

Other School Options

Finally, the DOE should explore more high school sizes and configurations to meet the needs of ELL and other student populations that require a diversity of programming and benefit from the resources that exist in large comprehensive schools. Schools that can combine this diversity of programming with the small learning environment of small schools are ideal for ELL students, who require a broad array of programming and support services.

¹ Meredith Kolodner, *English-only rise in New York City high school graduation rates*, N.Y. Daily News, Feb. 22, 2009, http://www.nydailynews.com/ny_local/education/2009/02/23/2009-02-23_englishonly_rise_in_new_york_city_high_s.html (last visited June 2009) [hereinafter Kolodner, *English-only rise in graduation rates*].

² English Language Learners (ELLs) are students who come from homes where a language other than English is spoken, and who score below a State-designated level of proficiency on a test of English language skills. See Office of English Language Learners (Office of ELLs), New York City Department of Education (NYC DOE), *New York City's English Language Learners: Demographics*, Summer 2008, at 3, http://schools.nyc.gov/NR/rdonlyres/3A4AEC4C-14BD-49C4-B2E6-8EDF5D873BE4/42968/2008_DemoReportFINAL.pdf (last visited June 2009) [hereinafter, NYC DOE, *New York City's English Language Learners*].

³ See Juan Gonzalez, *Test numbers too good to be true, hide achievement gap of poor students, some veteran educators say*, N.Y. Daily News, May 8, 2009, http://www.nydailynews.com/ny_local/education/2009/05/08/2009-05-08_city_test_numbers_too_good_to_be_true_hide_achievement_gap_of_poor_students_some.html (last visited June 2009); Vanessa Witenko, *Most vulnerable students shut out of charter schools*, Inside Schools, May 19, 2009, <http://insideschools.org/blog/?url=http://insideschools.org/blog/2009/05/19/most-vulnerable-students-shut-out-of-charter-schools/> (last visited June 2009); Advocates for Children (AFC), *Dead Ends: the Need for More Pathways to Graduation for Overage, Under-Credited Students in New York City*, Dec. 2007, http://www.advocatesforchildren.org/pubs/dead_ends.pdf (last visited June 2009).

⁴ Meredith Kolodner, *H.S. Slated for Phase-Out: Teachers Battle To Keep Tilden Open*, Chief-Leader, Feb. 16, 2007, <http://www.thechief-leader.com/news/2007/0216/news/014.html> (last visited June 2009) [hereinafter, Kolodner, *H.S. Slated for Phase-Out*].

⁵ Jennifer L. Jennings and Aaron M. Pallas, *New York City's Small School Experiment*, Annenberg Institute for School Reform, (forthcoming Fall 2009) [hereinafter Jennings, *New York City's Small School Experiment*].

⁶ As of Sept. 2006, the DOE had opened 197 new secondary schools, the majority of which were located in the Bronx, Brooklyn and Manhattan. See Briefing Paper, Human Services Division, Committee on Education, New York City Council, "Oversight: The Department of Education's Small Schools Initiative: Issues and Concerns," Feb. 16, 2007, at 3 (on file with AFC). In 2007, another 15 new secondary schools opened. See Inside Schools, *A peek at the new small schools*, Feb. 13, 2007, <http://insideschools.org/index12.php?ar=v&sid=427> (last visited June 2009).

⁷ On Mar. 8, 2006, David Bloomfield, from the Citywide Council on High Schools, filed a complaint with the United States Department of Education, Office for Civil Rights alleging that small schools excluded ELLs and students with special needs. See Elissa Gootman, *City's New Small Schools Are Focus of a Bias Inquiry*, N.Y. Times, June 16, 2006, <http://www.nytimes.com/2006/06/16/nyregion/16schools.html> (last visited June 2009). For more on the exclusion of students with special needs from small schools, see New York Lawyers for the Public Interest, *Small Schools, Few Choices: How New York City's High School Reform Effort Left Students with Disabilities Behind*, Oct. 2006, http://www.nylpi.org/images/FE/chain234siteType8/site203/client/DLC%20-%20Education%20-%20High_School_Report.pdf (last visited June 2009).

⁸ The EMPIRE Collaborative is a coalition of community-based organizations, which at the time included: Chhaya Community Development Corporation, Chinese Progressive Association, Chinese-American Planning Council, Council of Peoples Organization,

Haitian Americans United for Progress, Make the Road by Walking, and the Metropolitan Russian American Parents Association.

⁹ AFC, the New York Immigration Coalition (NYIC) and the EMPIRE Collaborative, *So Many Schools, So Few Options: How Mayor Bloomberg's Small School Reforms Deny Full Access to English Language Learners*, at 7, 2006, <http://www.advocatesforchildren.org/pubs/2005/ellsmallschools06.pdf> (last visited June 2009).

¹⁰ Memorandum from Andres A. Alonso, Deputy Chancellor for Teaching and Learning, NYC DOE to High School Principals regarding English Language Learner Admissions and Service Policy, on June 6, 2007 (on file with AFC) [hereinafter NYC DOE, Memo to High School Principals re ELL Admissions and Services].

¹¹ In this paper, we define small schools as high schools with grades 9-12 that had 500 students or less or schools with grades 6-12 that had 875 students or less, but not transfer high schools, charter schools or large schools that are phasing out.

¹² For data collected through this source, we have defined small schools as high schools in the 2007-08 school year with grades 9-12 that had 500 students or less or schools with grades 6-12 that had 875 students or less, but not transfer high schools, charter schools or large schools that are phasing out. For schools with grades 6-12, we have proportionately reduced the enrollment data to exclude grades 6-8.

¹³ NYC DOE, *CEP School Demographics and Accountability Snapshot 2007-2008*, Lafayette High School, http://schools.nyc.gov/documents/oaosi/cepdata/2007-08/cepdata_K400.pdf (last visited June 2009) [hereinafter, NYC DOE, *Lafayette CEP School Demographics and Accountability*].

¹⁴ Kolodner, *H.S. Slated for Phase-Out*, *supra* note 4.

¹⁵ In New York City, ELLs are entitled to receive language acquisition support in one of three program options: ESL, bilingual education—called Transitional Bilingual Education (TBE), or dual language. See Office of ELLs, NYC DOE, *Language Allocation Policy Guidelines: The LAP Handbook for ELL Programs*, Summer 2008, at 5-9, http://schools.nyc.gov/NR/rdonlyres/615A4A76-D334-464F-B8A5-AC5BFE058724/45367/LAPGuidelines_7_29_2008.pdf (last visited June 2009).

¹⁶ Samuel G. Freedman, *On Different Pages With Bilingual Education*, N.Y. Times, Feb. 14, 2007, <http://www.nytimes.com/2007/02/14/education/14education.html> (last visited June 2009) [hereinafter, Freedman, *On Different Pages*].

¹⁷ *Id.*

¹⁸ Yilu Zhao, *Doing Battle to Stay in High School*, N.Y. Times, July 8, 2008, <http://www.nytimes.com/2001/07/08/nyregion/doing-battle-to-stay-in-high-school.html?scp=1&sq=Immigrants%20Battle%20to%20Stay%20in%20High%20School&st=cse> (last visited June 2009).

¹⁹ NYC DOE, *Lafayette CEP School Demographics and Accountability*, *supra* note 13.

²⁰ Analysis of ELL enrollment in grades 9-12, compared to total high school population as of January 2008. In the 2007-08 school year there were 41,061 ELLs in grades 9-12, see NYC DOE, *New York City's English Language Learners*, *supra* note 2, at 5, as compared to 255,791 high school students total, NYC DOE, ATS Register (as of January 2008) (note: the total number of high school students excludes special education students).

²¹ NYC DOE, *Lafayette CEP School Demographics and Accountability*, *supra* note 13.

²² Inside Schools, *Review of Tilden High School*, June 2003, <http://insideschools.org/index12.php?fs=793&str=H.S.%20415%20Samuel%20J.%20Tilden%20High...&formtype=name?fs=793&str=H.S.%20415%20Samuel%20J.%20Tilden%20High...>

[20High...&formtype=name&all=y](#) (last visited June 2009).

²³ NYC DOE, *CEP School Demographics and Accountability Snapshot 2007-2008*, Tilden High School, http://schools.nyc.gov/documents/oaosi/cepdata/2007-08/cepdata_K415.pdf (last visited June 2009).

²⁴ Kolodner, *H.S. Slated for Phase-Out*, *supra* note 4.

²⁵ Emily Miksic, *Haitian Creole at Tilden High School: What Do Small Schools Offer?*, May 8, 2007 (unpublished paper, Teachers College, Columbia University), <http://nycfaces.blogspot.com/2007/05/haitians.html> (last visited June 2009) [hereinafter, Miksic, *Haitian Creole at Tilden High School*].

²⁶ *See infra* pages 15-16.

²⁷ Carl Campanile, *Now it's a Federal Case*, N.Y. Post, Aug. 23, 2001 (on file with AALDEF).

²⁸ *United States v. City of New York*, No. CV-04-248 (E.D.N.Y. June 29, 2004).

²⁹ *Id.*

³⁰ Interview by Khin Mai Aung, Staff Attorney, Asian American Legal Defense and Education Fund (AALDEF) with anonymous former staff member, Lafayette High School, on May 21, 2009.

³¹ Miksic, *Haitian Creole at Tilden High School*, *supra* note 25.

³² Freedman, *On Different Pages*, *supra* note 16.

³³ Gail Robinson, *Save Our (Big) Schools*, *Gotham Gazette*, Mar. 21, 2007, <http://www.gothamgazette.com/blogs/wonkster/2007/03/21/save-our-big-schools/> (last visited June 2009).

³⁴ While a list of TBE programs on the NYC DOE website suggests that there are currently three Haitian-Creole TBE programs in high schools in Brooklyn, including at Dewey, Clara Barton and Tilden, in an ESL teacher at Dewey told us that the Haitian-Creole bilingual program had stopped two years prior, reportedly due to low numbers of parents requesting it. Interview by Arlen Benjamin-Gomez, Staff Attorney, AFC and Khin Mai Aung, Staff Attorney, AALDEF with anonymous staff member, John Dewey High School, on May 8, 2008. Similarly a teacher at Clara Barton informed us that there is no bilingual program this school year at the school. Interview by Arlen Benjamin-Gomez, Staff Attorney, AFC with anonymous staff member, Clara Barton High School, on June 4, 2009. TBE list available at: <http://schools.nyc.gov/NR/rdonlyres/90EC9B10-88FF-4A06-98BC-23CC495032C9/44295/TBE2008.pdf> (last visited June 2009). According to an ESL teacher at Midwood High School, there is a bilingual Haitian-Creole program there for ninth grade students only, despite the fact that it is not on the NYC DOE's list. Interview by Arlen Benjamin-Gomez, Staff Attorney, AFC with anonymous staff member, Midwood High School, on Apr. 25, 2009.

³⁵ Elissa Gootman, *Lafayette Among 5 High Schools to Close*, N.Y. Times, Dec. 12, 2006, <http://www.nytimes.com/2006/12/12/nyregion/12school.html?fta=y> (last visited June 2009) [hereinafter Gootman, *Lafayette Among 5 High Schools to Close*].

³⁶ *Id.*; Interview by Khin Mai Aung, Staff Attorney, AALDEF with anonymous former staff member, Lafayette High School, on May 21, 2009.

³⁷ Gootman, *Lafayette Among 5 High Schools to Close*, *supra* note 35.

³⁸ Jennings, *New York City's Small School Experiment*, *supra* note 5.

³⁹ *Id.*

⁴⁰ *Id.*

⁴¹ *Id.*

⁴² *Id.*

⁴³ *Id.*

⁴⁴ *Id.*

⁴⁵ Interview by Khin Mai Aung, Staff Attorney, AALDEF with Steve Chung, Co-President, United Chinese Association of Brooklyn, on June 5, 2009.

⁴⁶ Meeting with Khin Mai Aung, Staff Attorney, AALDEF, Steve Chung, and other community advocates with Josh Thomases, currently Chief Academic Officer, Office of Portfolio Development, NYC DOE, on Mar. 9, 2007.

⁴⁷ Norman Scott, *School Scope: Tilden, Lafayette and South Shore: Don't Close Those Schools, Fix Them!*, Wave, Jan. 12, 2007, <http://www.rockawave.com/news/2007/0112/Columnists/081.html> (last visited June 2009).

⁴⁸ New York City Leadership Academy, <http://www.nycleadershipacademy.org/who-we-are> (last visited June 2009); see also Elissa Gootman, *Principals Younger and Freer, but Raise Doubts in the Schools*, N.Y. Times, May 25, 2009, <http://www.nytimes.com/2009/05/26/nyregion/26principals.html?ref=education> (last visited June 2009).

⁴⁹ Kolodner, *H.S. Slated for Phase-Out*, *supra* note 4.

⁵⁰ Office of Accountability, NYC DOE, *Tilden High School Quality Review Report 2006-2007*, http://schools.nyc.gov/OA/SchoolReports/2006-07/QR_K415.pdf (last visited June 2009).

⁵¹ *Id.*

⁵² Michele De Meglio, *Tilden H.S. Faithful Buck DOE Phase Out: Many Say They Were Shut Out of Decision*, Courier Life Publications, Feb. 15, 2007 (on file with AFC).

⁵³ See Jessica Siegel, *Small Order*, Village Voice, Apr. 3, 2007, <http://www.villagevoice.com/2007-04-03/art/small-order/> (last visited June 2009).

⁵⁴ Meredith Kolodner, *Tilden Teachers Bid to Revamp School*, Chief-Leader, June 29, 2007, <http://www.thechief-leader.com/news/2007/0629/news/014.html> (last visited June 2009) [hereinafter, Kolodner, *Tilden Teachers Bid to Revamp School*].

⁵⁵ Freedman, *On Different Pages*, *supra* note 16.

⁵⁶ Interview by Arlen Benjamin-Gomez, Staff Attorney, AFC with John Lawhead, ESL teacher, Tilden High School, on Nov. 20, 2007 (Tilden traditionally enrolled 80-90 new ELLs each year); see also Kolodner, *Tilden Teachers Bid to Revamp School*, *supra* note 54 (75 new ELLs were enrolled in Tilden during the 2006-07 school year).

⁵⁷ See *supra* note 20.

⁵⁸ We define an “ELL-focused school” as a school with a student body comprised of over 50% ELLs.

⁵⁹ For the purposes of this analysis we used the NYC DOE, High School Directory, 2007-08, and defined small schools as schools in the 2007-08 school year with grades 9-12 that have 500 students or less or schools with grades 6-12 that have 875 students or less, but not transfer high schools, charter schools and large schools that are phasing out. For schools with grades 6-12, we proportionately reduced the enrollment data to exclude grades 6-8.

⁶⁰ Schools include: Dual Language & Asian Studies High School, Gregorio Luperon High School for Science and Mathematics, Manhattan International High School and Manhattan Bridges High School, Bronx International High School, New World High School, International Community High School, International School of Liberal Arts, Kingsbridge International High School and Academy for Language and Technology, Flushing International High School, Pan American International High School and International High School at LaGuardia Community College, Brooklyn International High School, International High School at Kingsborough Community College,

International High School at Prospect Heights and Multicultural High School.

⁶¹ The International School at Lafayette enrolls only ELL students, thus 100% of new students are ELLs. It Takes a Village enrolled 40 ELLs during the 2007-08 school year, comprising about 40% of their overall student body.

⁶² An additional small school opened in each campus during the 2008-09 school year: International High School at Lafayette and Cultural Academy for the Arts and Sciences on the Tilden campus. While these schools opened after our investigation was completed, *see infra* pages 22-23 for more information on the International school; the Cultural Academy for the Arts and Sciences enrolled one ELL student during the 2008-09 school year, *see* NYC DOE, *CEP School Demographics and Accountability Snapshot 2008-2009*, Cultural Academy for the Arts and Sciences, http://schools.nyc.gov/documents/oaosi/cepdata/2008-09/cepdata_K629.pdf (last visited June 2009).

⁶³ Interview by Khin Mai Aung, Staff Attorney, AALDEF with anonymous staff member, Life Academy for Film and Music, on Mar. 21, 2008.

⁶⁴ NYC DOE response to AFC and AALDEF July 2008 Freedom of Information Law (FOIL) Request [hereinafter NYC DOE, *FOIL Response*].

⁶⁵ *Id.*

⁶⁶ Email from anonymous staff, Office of Student Enrollment Planning and Operations, NYC DOE, to anonymous staff, Lafayette High School, Nov. 8, 2008 (on file with author).

⁶⁷ NYC DOE, Memo to High School Principals re: ELL Admissions and Services, *supra* note 10; *see also infra* pages 15-16 for a discussion of state mandated ELL services.

⁶⁸ NYC DOE, *FOIL Response*, *supra* note 64.

⁶⁹ *Id.*

⁷⁰ *See supra* note 56.

⁷¹ *See supra* note 61.

⁷² NYC DOE, *FOIL Response*, *supra* note 64.

⁷³ Interview by Arlen Benjamin-Gomez, Staff Attorney, AFC with Darnell Benoit, Director, Flanbwayan Haitian Literacy Project, on Apr. 2, 2009.

⁷⁴ Traditional new ELL enrollment for Lafayette was calculated based on 34% of Lafayette's total ELL population in 2006-07, which was 650. *See Freedom, On Different Pages*, *supra* note 16. In 2007-08, 34% of high school ELLs were ninth graders. *See* NYC DOE, *New York City's English Language Learners*, *supra* note 2, at 5. Therefore, we used this percentage to estimate the number of new ninth grade ELLs that traditionally enrolled in Lafayette. While this is an estimate, the number of new ELLs that enrolled in Tilden was 30% of their total ELL population, *see supra* note 56, further suggesting that the percentage we used to estimate Lafayette's traditional new ELL enrollment is reliable.

⁷⁵ *See supra* note 56.

⁷⁶ N.Y. Comp. Codes R. & Regs. tit. 8, §§ 117, 154 (West 2009).

⁷⁷ *Id.* § 154.3(g)(2).

⁷⁸ *Id.* § 154.3(g)(1).

⁷⁹ *Id.* § 154.3(k).

⁸⁰ N.Y. Educ. Law §§ 3001, 3204 (McKinney 2009); N.Y. Comp. Codes R. & Regs. tit. 8, §§ 80-2.9, 80-2.10 (West 2009).

⁸¹ Equal Educational Opportunities Act of 1974, 20 U.S.C. § 1703(f) (2006).

⁸² See *Id.*; see also U.S. Department of Justice, Civil Rights Division, *Discrimination Against English Language Learner Students*, <http://www.usdoj.gov/crt/edo/ellpage.php> (last visited June 2009); Settlement Agreement between the United States and North Plainfield Board of Education, Sept. 3, 2004, <http://www.usdoj.gov/crt/edo/documents/nplainfieldor.pdf> (last visited June 2009); Settlement Agreement between the United States and Bound Brook, N.J. Board of Education, Oct. 16, 2003, <http://www.usdoj.gov/crt/edo/documents/bbrookag.pdf> (last visited June 2009).

⁸³ See No Child Left Behind Act, 20 U.S.C. § 6318 (2006).

⁸⁴ *Id.* §§ 6319, 6812 (2006). Presumably such highly qualified teachers of ELLs would, at a minimum, be certified ELL instructors.

⁸⁵ The average enrollment for small schools that opened in the fall of 2007, with only a ninth grade, was eighty students in Oct. 2007. Analysis of January 2008 Automate the Schools (ATS) data available on each school's web page. Educators in small schools have also informed us that target first year enrollment number for a new small school is between 100 and 110 students. Interview by Arlen Benjamin-Gomez, Staff Attorney, AFC with anonymous small school administrator, on Oct. 3, 2008.

⁸⁶ Fifty-nine small schools in New York City had five or fewer ELL students enrolled as of July 2008. Analysis of July 2008 Automate the Schools (ATS) data available on each school's web page.

⁸⁷ Interview by Khin Mai Aung, Staff Attorney, AALDEF with anonymous student, High School of Sports Management, on Oct. 19, 2007.

⁸⁸ See Selena Roberts, *Football is Booming at Baseball's Expense*, N.Y. Times, Oct. 15, 2007, <http://www.nytimes.com/2007/10/15/sports/ncaaf/football/15roberts.html?n=Top/Reference/Times%20Topics/People/R/Roberts,%20Selena> (last visited June 2009).

⁸⁹ Interview by Susan Li, Intern, AALDEF with anonymous student, High School of Sports Management, on Oct. 17, 2007.

⁹⁰ Letter from Khin Mai Aung, Staff Attorney, AALDEF, to Joel I. Klein, Chancellor, NYC DOE, Dec 20, 2007.

⁹¹ Email from Khin Mai Aung, Staff Attorney, AALDEF, to Jose De La Cruz, ELL Compliance and Performance Specialist, Brooklyn Lead, Office of ELLs, NYC DOE, Mar. 19, 2008 (on file with author). In this email, AALDEF also informed DOE of 8 special education students at Sports Management who were not getting appropriate services.

⁹² Interview by Khin Mai Aung, Staff Attorney, AALDEF with anonymous former staff member, Lafayette High School, on May 21, 2009.

⁹³ NYC DOE, *Expeditionary Learning School for Community Leaders*, High School Directory, <http://schools.nyc.gov/ChoicesEnrollment/High/Directories/school/?sid=1673> (last visited June 2009).

⁹⁴ *Id.*

⁹⁵ School Enrollment Offices, NYC DOE, *New Schools with Enhanced Capacity to Serve English Language Learners ELL Students*, Sep. 21, 2007, <http://school.nyc.gov/offices/StudentEnroll/default.htm> (last visited Oct. 2007, offline as of June 2009) (on file with AALDEF) [hereinafter, NYC DOE, *New Schools with Enhanced Capacity*].

⁹⁶ NYC DOE, *FOIL Response*, *supra* note 64.

⁹⁷ Interview by Khin Mai Aung, Staff Attorney, AALDEF with anonymous students, Expeditionary Learning School for Community Leaders, on June 11, 2008.

⁹⁸ N.Y. Comp. Codes R. & Regs. tit. 8, §154.2 (West 2009); Email from Jose De La Cruz, ELL Compliance and Performance Specialist, Brooklyn Lead, Office of ELLs,

NYC DOE, to Khin Mai Aung, Staff Attorney, AALDEF, June 20, 2008 (on file with author).

⁹⁹ “Mom Did You Vote?”, Homework Assignment, ELL program at Expeditionary Learning School for Community Leaders (on file with AALDEF); “Overview of the 1920s,” Homework Assignment, ELL program at Expeditionary Learning School for Community Leaders (on file with AALDEF).

¹⁰⁰ “Unit 8: Wh-Questions: Subject and Object,” Grammar Exercise, ELL program at Expeditionary Learning School for Community Leaders (on file with AALDEF).

¹⁰¹ *Id.*

¹⁰² The failure to provide translation and interpretation violates both the Equal Educational Opportunities Act of 1974, 20 USC § 1703(f) (2006), and the NYC DOE Chancellor’s Regulation A-663.

¹⁰³ Email from Khin Mai Aung, Staff Attorney, AALDEF, to Jose De La Cruz, ELL Compliance and Performance Specialist, Brooklyn Lead, Office of ELLs, NYC DOE, Mar. 19, 2008 (on file with author).

¹⁰⁴ N.Y. Comp. Codes R. & Regs. tit. 8, § 154.3(g)(1) (West 2009).

¹⁰⁵ NYC DOE, *New York City’s English Language Learners*, *supra* note 2, at 6.

¹⁰⁶ *Id.*

¹⁰⁷ *Id.*

¹⁰⁸ In 1974, *Lau v. Nichols* was brought on behalf of Chinese-speaking students in San Francisco, in which the United States Supreme Court established the right to bilingual education for students who do not speak English. 414 U.S. 563. In 1972, the Puerto Rican Legal Defense and Education Fund (PRLDEF) brought a case with *Aspira* on behalf of Spanish-speaking students in New York City (*Aspira v. New York City Board of Education*) which resulted in a consent decree that established the right to bilingual education for ELLs and was later codified by N.Y. Comp. Codes R. & Regs. tit. 8, § 154 (West 2009).

¹⁰⁹ Kellie Rolstad et al., *The Big Picture: A Meta-Analysis of Program Effectiveness Research on English Language Learners*, Educational Policy, Sept. 2005, at 19.

¹¹⁰ Kolodner, *English-only rise in graduation rates*, *supra* note 1; Office of ELLs, NYC DOE, *Diverse Learners on the Road to Success: The Performance of New York City’s ELLs*, 2009, <http://schools.nyc.gov/NR/rdonlyres/3B377E6B-5E22-4E63-A4DA-2B7FD14E5D62/57000/ELLPerformanceReport2009.pdf> (last visited June 2009) [hereinafter NYC DOE, *Performance of New York City’s ELLs*].

¹¹¹ Depending on an ELL students’ special education needs, ESL and/or bilingual education instruction may be inappropriate for them. Thus, some ELL students with special needs are exempt from ESL/bilingual education if this is indicated on their Individualized Education Plan (IEP). See Office of Special Education Initiatives, NYC DOE, *Standard Operating Procedures Manual: The Referral, Evaluation, and Placement of School-Age Students with Disabilities*, Feb. 2009, at 90-1, <http://schools.nyc.gov/NR/rdonlyres/5F3A5562-563C-4870-871F-BB9156EEE60B/0/03062009SOPM.pdf> (last visited June 2009).

¹¹² NYC DOE, *FOIL Response*, *supra* note 64.

¹¹³ Interview by Arlen Benjamin-Gomez, Staff Attorney, AFC with Marina Vinitskaya, Principal, It Takes a Village Academy, on May 6, 2008.

¹¹⁴ *Id.*

¹¹⁵ See *supra* note 73.

¹¹⁶ Interview by Arlen Benjamin-Gomez, Staff Attorney, AFC with Marina Vinitskaya, Principal, It Takes a Village Academy, on May 6, 2008.

¹¹⁷ According to DOE policy, in elementary and middle school grades, a school must create a bilingual program when 15 or more students who speak the same native language are in the same grade or in two contiguous grades. See Office of ELLs, NYC DOE, *Principles for Planning and Implementing a Language Allocation Policy*, Summer 2008, at 2, http://schools.nyc.gov/NR/rdonlyres/615A4A76-D334-464F-B8A5-AC5BFE058724/45368/LAPPrinciples_7_2008.pdf (last visited June 2009).

¹¹⁸ NYC DOE, Memo to High School Principals re: ELL Admissions and Services, *supra* note 10.

¹¹⁹ Interview by Arlen Benjamin-Gomez, Staff Attorney, AFC with anonymous school staff, It Takes a Village Academy, on May 6, 2008. In July 2008, AALDEF and AFC submitted a FOIL request to the NYC DOE for data that reflected, among other things, parent choices with regard to ELL programming. As of the release of this report the NYC DOE failed to release the parental choice data.

¹²⁰ Office of ELLs, NYC DOE, *Designing Better High Schools for ELLs*, Spring 2008, at 1, http://schools.nyc.gov/NR/rdonlyres/E5BF4C47-6C62-4D67-8449-6AC894F3E0A4/39554/HSResearchSummary_2008_FINALReadOnly.pdf (last visited June 2009).

¹²¹ See NYC DOE, Memo to High School Principals re ELL Admissions and Services, *supra* note 10.

¹²² Internationals Network for Public Schools, *Opening the Doors to the American Dream: Our Schools*, <http://www.internationalsnps.org/ourschools.php> (last visited June 2009).

¹²³ International Network for Public Schools, *Mission and History*, <http://www.internationalsnps.org/pdfs/presskit.pdf> (last visited June 2009).

¹²⁴ Interview by Khin Mai Aung, Staff Attorney, AALDEF with anonymous students, International High School at Lafayette, Nov. 7, 2008 and Nov. 14, 2008.

¹²⁵ See Neil S. Freedman, *New High School Has District International Flavor*, Canarsie Courier, Sept. 9, 2005, <http://www.canarsiecourier.com/news/2005/0929/TopStories/015.html> (last visited June 2009). Of the more than 1,400 students served by local Canarsie High School between 2005 and 2008, fewer than 150 were ELLs. NYC DOE, *CEP School Demographics and Accountability Snapshot 2007-2008*, Canarsie High School, <http://schools.nyc.gov/SchoolPortals/18/K500/AboutUs/Statistics/default.htm> (last visited June 2009); NYC DOE, *CEP School Demographics and Accountability Snapshot 2008-2009*, Canarsie High School, <http://schools.nyc.gov/SchoolPortals/18/K500/AboutUs/Statistics/default.htm> (last visited June 2009). This indicates that immigrants residing in Canarsie may not be limited English proficient. When International High School was located in Canarsie, it had less than 100 students. Many of these students faced long commutes and safety concerns. At its new location on the Lafayette campus, over 300 students have enrolled – tripling its enrollment. See Inside Schools, *Review of International High School at Lafayette*, Nov. 2007 and Sept. 2008, <http://insideschools.org/index12.php?fs=792> (last visited June 2009).

¹²⁶ Freedman, *On Different Pages*, *supra* note 16.

¹²⁷ NYC DOE, *CEP School Demographics and Accountability Snapshots 2008-2009* (available on each school's web portal). Schools include: Clara Barton, Franklin Delano Roosevelt, James Madison, John Dewey, Midwood and New Utrecht high schools.

¹²⁸ For 2005 and 2006 data, see Jennings, *New York City's Small School Experiment*, *supra* note 5. For 2007 data, see NYC DOE, *FOIL Response*, *supra* note 64. Note: 2007 data reflects of the percentage of all 9th graders who were ELLs that school year (incoming and held over), while 2005 and 2006 data reflects only the percentage of incoming 9th graders who were ELLs.

¹²⁹ Jennings, *New York City's Small School Experiment*, *supra* note 5; NYC DOE, *FOIL Response*, *supra* note 64.

¹³⁰ *Id.*

¹³¹ As recent immigrant ELLs arrive to this country at various age levels, new immigrant high school students may enroll in any high school grade level. Thus, overall ELL numbers reflect not only new ninth grade ELL enrollment, but can capture new ELL enrollment in all grade levels.

¹³² While we have data for all of the six large schools surrounding Lafayette and Tilden, we were only able to speak with students and teachers from two of those schools, John Dewey and New Utrecht.

¹³³ *See supra* note 61.

¹³⁴ Interview by Khin Mai Aung, Staff Attorney, AALDEF with anonymous students, John Dewey High School, on June 30, 2008.

¹³⁵ Interview by Khin Mai Aung, Staff Attorney, AALDEF with anonymous staff member, New Utrecht High School, on Aug. 12, 2007.

¹³⁶ Email from Mabel Tso, Community Organizer, AALDEF, to Khin Mai Aung, Staff Attorney, AALDEF, Sept. 24, 2008 (regarding anonymous New Utrecht High School student) (on file with author).

¹³⁷ Interview by Khin Mai Aung, Staff Attorney, AALDEF with Douglas Lin, student, New Utrecht High School, on Oct. 17, 2008.

¹³⁸ Community Education Council (CEC) District 6, Forum on Mayoral Control, Apr. 3, 2009.

¹³⁹ Interview by Arlen Benjamin-Gomez, Staff Attorney, AFC with anonymous staff member, It Takes a Village Academy, on May 6, 2008.

¹⁴⁰ Email from anonymous student, John Dewey High School, to Khin Mai Aung, Staff Attorney, AALDEF, Apr. 21, 2009 (on file with author).

¹⁴¹ Email from Mabel Tso, Community Organizer, AALDEF, to Khin Mai Aung, Staff Attorney, AALDEF, Sept. 18, 2008 (regarding anonymous New Utrecht High School student) (on file with author).

¹⁴² NYC DOE, *Performance of New York City's ELLs*, *supra* note 110, at 22.

¹⁴³ Interview by Arlen Benjamin-Gomez, Staff Attorney, AFC with John Lawhead, ESL teacher, Tilden High School, on Nov. 20, 2007.

¹⁴⁴ *Id.*

¹⁴⁵ AALDEF's reports indicate that around 20 eleventh and twelfth grade ELLs were enrolled in bilingual education in the beginning of the 2008-09 school year. Email from Vincci Tai, Intern, AALDEF, to Khin Mai Aung, Staff Attorney, AALDEF, Feb. 16, 2009 (regarding Lafayette High School bilingual program) (on file with author).

¹⁴⁶ Observations from visit by Arlen Benjamin-Gomez and Christie Hill, Staff Attorneys, AFC, to ESL classes, Tilden High School and interview by Arlen Benjamin-Gomez and Christie Hill with anonymous students, Tilden High School, on Apr. 28, 2009.

¹⁴⁷ While obtaining a GED can be a useful way for some young people to gain entry to employment or higher education, research shows that students earning a GED are not likely to obtain the same benefits as a holder of a high school diploma, and it is important that students with special education needs are not unnecessarily forced into this option. *See* Gary Orfield, et al., *Losing Our Future: How Minority Youth are Being Left Behind by the Graduation Rate Crisis*, Civil Rights Project at Harvard University, Mar. 11, 2004, <http://www.urban.org/url.cfm?ID=410936> (last visited June 2009).

¹⁴⁸ Observations from visit by Arlen Benjamin-Gomez and Christie Hill, Staff Attorneys, AFC, to ESL classes, Tilden High School and interview by Arlen Benjamin-Gomez and Christie Hill with anonymous students, Tilden High School, on Apr. 28, 2009.

¹⁴⁹ *Id.*

¹⁵⁰ In New York City, students are required to stay in school until the year they turn 17, and that they have a right to stay in school until the end of the year in which they turn 21 or earn a regular diploma. NYC DOE, Chancellor's Regulation A-101; *see also* N.Y. Educ. Law § 3202 (McKinney 2009).

¹⁵¹ Targeting ELL students in particular for a GED program may also amount to national origin discrimination, as native English-speakers were not unilaterally enrolled in GED classes or targeted to be pushed-out of school. *See* Title VI of the Civil Rights Act of 1964, 42 U.S.C. § 2000d (2006). Additionally, under the Equal Educational Opportunities Act of 1974, Tilden's actions may have amounted to a failure to take appropriate steps to ensure that their ELL students were allowed to participate equally in high school. *See* Equal Educational Opportunities Act of 1974, 20 U.S.C § 1703(f) (2006).

¹⁵² Letter from Rebecca Shore, Litigation Director, AFC, to Judy Nathan, First Deputy Counsel, Office of the General Counsel, NYC DOE, on May 22, 2009.

¹⁵³ Email from John Lawhead, ESL teacher, Tilden High School, to Arlen Benjamin-Gomez, Staff Attorney, AFC, June 8, 2009 (on file with author).

¹⁵⁴ Observations from visit by Arlen Benjamin-Gomez and Christie Hill, Staff Attorneys, AFC, to ESL classes, Tilden High School and interview by Arlen Benjamin-Gomez and Christie Hill with anonymous students, Tilden High School, on Apr. 28, 2009.

¹⁵⁵ Interview by Arlen Benjamin-Gomez and Christie Hill, Staff Attorneys, AFC with anonymous guidance counselor, Tilden High School, on April 28, 2009.

¹⁵⁶ NYIC, ELL Taskforce, meeting with Joel I. Klein, Chancellor, NYC DOE, and other NYC DOE officials, on Mar. 10, 2009.

¹⁵⁷ NYC DOE, *CEP School Demographics and Accountability Snapshot 2008-2009*, Franklin K. Lane High School, http://schools.nyc.gov/documents/oaosi/cepdata/2008-09/cepdata_K420.pdf (last visited June 2009); NYC DOE, *CEP School Demographics and Accountability Snapshot 2008-2009*, Far Rockaway High School, http://schools.nyc.gov/documents/oaosi/cepdata/2008-09/cepdata_Q465.pdf (last visited June 2009).

¹⁵⁸ *Id.*

¹⁵⁹ NYC DOE, *CEP School Demographics and Accountability Snapshot 2008-2009*, Bayard Rustin High School for Humanities, http://schools.nyc.gov/documents/oaosi/cepdata/2008-09/cepdata_M440.pdf

(last visited June 2009); NYC DOE, *CEP School Demographics and Accountability Snapshot 2008-2009*, Louis D. Brandeis High School, http://schools.nyc.gov/documents/oaosi/cepdata/2008-09/cepdata_M470.pdf (last visited June 2009).

¹⁶⁰ *Id.*



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