STATE OF MICHIGAN

COURT OF APPEALS

MICHIGAN DEPARTMENT OF EDUCATION, Petitioner-Appellee, v GROSSE POINTE PUBLIC SCHOOLS, Respondent-Appellant.	FOR PUBLICATION May 5, 2005 9:05 a.m. No. 252288 Wayne Circuit Court LC No. 03-304444-AA
GROSSE POINTE PUBLIC SCHOOLS, Plaintiff-Appellant, v MICHIGAN DEPARTMENT OF EDUCATION, Defendant-Appellee.	No. 252428 Wayne Circuit Court LC No. 03-3-4443-CZ Official Reported Version

Before: Talbot, P.J., and Jansen and Gage, JJ.

TALBOT, P.J. (*dissenting*).

Because appellant has paid for, and D.G. has already received, an independent educational evaluation (IEE), there is no existing fact or right at issue, and appellant's claim is moot. I, therefore, respectfully dissent from the majority opinion because I would dismiss appellant's claims without reaching the merits of the issues.

The majority correctly points out that this Court may decide moot issues when "the issue is one of public significance that is likely to recur, yet evade judicial review." *Federated Publications, Inc v City of Lansing*, 467 Mich 98, 112; 649 NW2d 383 (2002). The doctrine of "capable of repetition, yet evading review," however, applies to prevent a case from being moot only when "'(1) the challenged action [is] in its duration too short to be fully litigated prior to its cessation or expiration, and (2) there [is] a reasonable expectation that the same complaining party [will] be subjected to the same action again.'" *Illinois State Bd of Elections v Socialist*

Workers Party, 440 US 173, 187; 99 S Ct 983; 59 L Ed 2d 230 (1979), quoting *Weinstein v Bradford*, 423 US 147, 149; 96 S Ct 347; 46 L Ed 2d 350 (1975).

Here, appellant has made no showing that the challenged action is too short in duration to be fully litigated or that there is a reasonable expectation that it will be subjected to the same action, i.e., by the same party, again. The majority's argument—that this issue "could evade review if school districts refused to pay" for IEEs for other special education students because students could "potentially" be done with school before the matter makes it through the judicial process—is unsupported by any facts and amounts to nothing more than speculation. *Ante* at ___. To avoid mootness under the doctrine of "capable of repetition, yet evading review," however, the likelihood of the issue recurring must be greater than mere speculation. *Super Tire Engineering Co v McCorkle*, 416 US 115, 123; 94 S Ct 1694; 40 L Ed 2d 1 (1974). The appropriate test is "'whether the facts alleged, under all the circumstances, show that there is a substantial controversy, between parties having adverse legal interests, of sufficient immediacy and reality to warrant the issuance of a declaratory judgment.'" *Id.* at 122, quoting *Maryland Casualty Co v Pacific Coal & Oil Co*, 312 US 270, 273; 61 S Ct 510; 85 L Ed 826 (1941).

Appellant points out in its brief on appeal that a due process hearing, a state level administrative appeal, and a subsequent civil action could cost it tens of thousands of dollars. Rather than incur these costs, appellant chose to pay for D.G.'s IEE and then bring an action in the circuit court for declaratory relief. By opting to pay for D.G.'s IEE and to forgo the due process hearing set out in 1999 AC, R 340.1724,[1] appellant has voluntarily removed the immediacy and reality from its claim that would give this Court the power to decide this issue. In so finding, I echo the majority that this Court may not "decide moot questions in the guise of giving declaratory relief." *Dep't of Social Services v Emmanuel Baptist Preschool*, 434 Mich 380, 470; 455 NW2d 1 (1990) (opinion of Boyle, J.).

If appellant wanted a full review of whether 1999 AC, R 340.1723c[2] required it to provide D.G. with an IEE at public expense, it should not have voluntarily paid for the IEE. Rule 340.1723c(2) gave appellant the option of requesting a due process hearing to administratively review its claims. Instead, appellant made a calculated business decision that requesting the due process hearing was not financially worthwhile and chose to pay the $125 for the IEE. Appellant cannot voluntarily settle its claims, bypass administrative review of the Michigan Department of Education's determination, and then seek redress from the courts to settle potential future claims.

I would dismiss appellant's appeal as moot.

/s/ Michael J. Talbot

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[1] As amended, effective June 6, 2002; available at <http://www.michigan.gov/orr> (accessed April 28, 2005).

[2] As amended, effective June 6, 2002; available at <http://www.michigan.gov/orr> (accessed April 28, 2005).