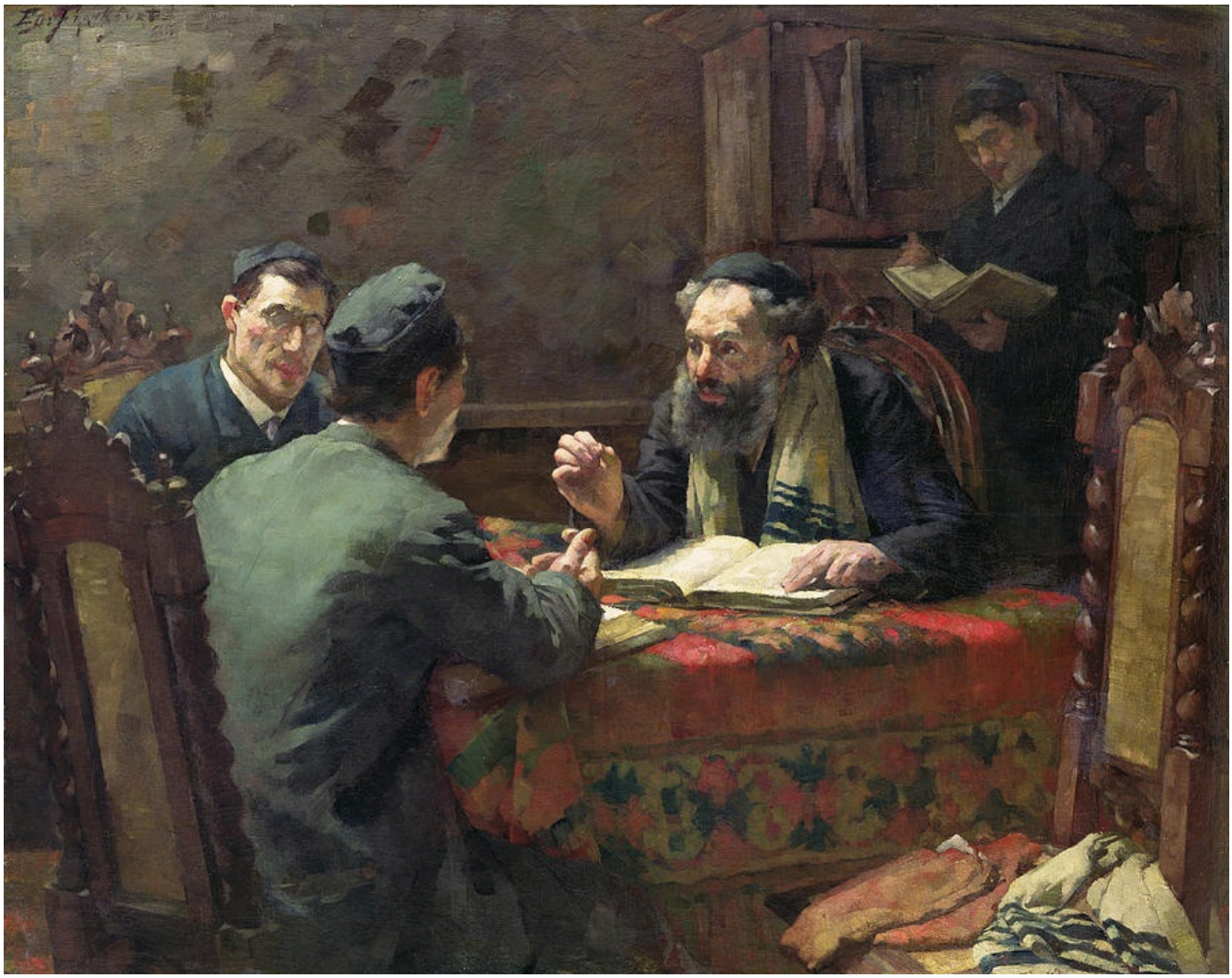
The Case Of Unpaid Yeshiva Tuition

Rabbi Itamar Rosensweig • May 12, 2024



Rabbi Itamar Rosensweig

The Case Of Unpaid Yeshiva Tuition

Introduction

The Beth Din of America recently decided a dispute regarding a father's tuition obligation to a yeshiva in Israel. This article presents the facts of the

case, the different approaches the *dayanim* considered in deciding it, and their halakhic conclusion.[1]

This article has three central goals. The first is to present readers with the principles of Jewish law that govern comparable cases involving similar contract disputes. On this level, the article sheds light on a fairly common type of dispute where two parties enter into an agreement without hammering out all of its terms. The *dayanim*'s analysis covers several core principles of Jewish law that govern such disputes.

Second, the article highlights the complex process of applying abstract principles of Jewish law to concrete cases. One of the more interesting features of the case under discussion is the range of principles that could be applied to decide the dispute. Small variations in the facts affect the selection of the appropriate legal principle and yield different outcomes.

The third goal is to provide readers with insight into the work of the *beth din*—the types of cases that come before it, how the *dayanim* go about deciding a case, and types of considerations that guide the *dayanim's* final *pesak*.

The article unfolds as follows. Section I introduces the facts of the case. Section II summarizes the parties' claims. Section III sketches the three main approaches the *dayanim* considered in deciding the case. Sections IV through X present the principles of Jewish law that the *dayanim* weighed in their decision. Each section analyzes how the principle under consideration would yield a different outcome to the case and assesses whether the facts of the case warrant the principle under consideration.

I. The Facts

A father enrolled his son to attend yeshiva in Israel for *shanna aleph*. The yeshiva gave the father a form-contract for the year with a sticker price of $24,000 but immediately granted him a fifty percent discount for a total tuition amount of $12,000. The father signed the agreement, the son attended yeshiva for the year, and the father paid the $12,000.

Following *shanna aleph*, the son wanted to return to the yeshiva for *shanna bet*. The yeshiva sent the father a form-contract with a sticker price of $22,000 but granted him a $2,000 scholarship. The father refused to sign the contract. Instead, he informed the yeshiva that he will not pay $20,000 for *shanna bet* and that they'll have to work out better financial aid. The yeshiva acknowledged this, and replied that they would follow up. The yeshiva made several attempts to follow up, but they never got through to the father.

The son attended the yeshiva for the entire *shanna bet*, but the father did not make any payments. Several months after the conclusion of *shanna bet*, the yeshiva brought the father to a *din torah* to recover the unpaid tuition.

II. The Claims

The Yeshiva claimed that it was entitled to $22,000 for *shanna bet*–the full amount stated on its form-contract. It argued that the father is not entitled to the $2,000 scholarship because he failed to sign the agreement. Therefore he should be liable for the full tuition amount of the yeshiva's sticker price.

The father claimed that he does not owe the yeshiva anything for *shanna bet*. He argued that because he never signed the tuition contract, he never accepted liability towards the yeshiva. Therefore, he should not have to pay the yeshiva a penny.

III. The Beth Din's Deliberations: Three Approaches

The *dayanim* were tasked with determining the father's liability for *shannah bet*. In their deliberations, they considered three approaches to deciding the matter, each of which implicates a different principle of Jewish law. The first approach considers the possibility that there was no agreement between the yeshiva and the father but there are grounds to assign liability under the halakhic doctrine of *yored*. The principle of *yored* holds a beneficiary liable to compensate a benefit-conferrer even without a contract.

The second approach considers the possibility that indeed there was a binding contract for the amount of the yeshiva's last offer ($20,000). According to this approach, although the father failed to sign the written form-contract, he had implicitly accepted the yeshiva's last offer when he sent his son to the yeshiva. Since the father failed to secure an agreement for better financial aid and nevertheless sent his son, the contract price should be set by the last amount offered by the yeshiva.

The third approach considers the possibility that there was a binding contract between the parties for the son to attend the yeshiva, but there was no meeting of minds on the tuition price. When a contract omits one of its terms, the rule in Jewish law is generally that the missing provision should be determined based on customary practice. According to this approach, the *dayanim* would have to determine the relevant practice regarding tuition amounts for yeshiva in Israel.

Each of these approaches implicates a different principle of Jewish law, and each would yield a different outcome. The sections below outline the halakhic principles that underlie these approaches and explain the *dayanim's* deliberations in deciding which of these principles controls the case.

IV. Yored

The first principle the *dayanim* considered is *yored*. *Yored* derives from the Talmud's ruling (Bava Metzia 101a) regarding a benefit conferrer who enters (*yored le-tokh*) a property without the knowledge of the owner and improves it. The Talmud obligates the owner to pay for the benefit he received, even though he never solicited the benefit.[2] Authorities provide different methods for quantifying the amount of restitution. Depending on the facts of the case, the beneficiary may be liable to pay the going market rate of the service, the out-of-pocket expenses of the benefit conferrer, or the increased value to the property.[3] In some ways, *yored* parallels the common law doctrine of *quantum meruit*.

The *dayanim* considered whether they should hold the father liable under a theory of *yored*. Such an approach would hold that there was no contract between the father and the yeshiva for *shanna bet* because the father refused to sign the tuition agreement. Nevertheless, the yeshiva would be entitled under *yored* to be compensated *quantum meruit* for the benefit it conferred by providing a yearlong yeshiva experience.

In their deliberations, the *dayanim* noted two complications with applying *yored* to the case before them. First, *poskim* debate whether *yored* applies to conferring Torah knowledge. Rashba rules (Resonsa Rashba 1:645) that a "*yored*" teacher who went ahead and taught a child Torah without having been contracted to provide the service is not entitled to compensation under *yored*. Rashba reasons that a Torah teacher is generally barred from receiving compensation for Torah teaching, and there is always a very strong presumption against such compensation.[4] Therefore, when he teaches Torah to a student without a binding contract, the beneficiary is entitled to enjoy the service for free, consistent with the teacher's halakhic obligation.[5]

Were the *dayanim* to decide the case based on *yored,* they would have to distinguish between the benefit the yeshiva conferred by providing room and board and meals and trips, and the benefit the yeshiva conferred by teaching Torah. The yeshiva would be entitled to collect under *yored* for the former but not for the latter. Under this approach, the *dayanim* would have to quantify the amount the yeshiva is entitled to collect for providing room and board, meals and trips. This might be the amount it cost the yeshiva to provide these goods or their fair market value.[6]

Applying *yored* to the case at hand raises a second complication. The parties to the *din torah*–the ones who signed the *shetar berurin* (arbitration agreement) and accepted the *beth din*'s jurisdiction–were the yeshiva and the father. Yet the direct beneficiary of the yeshiva's service appears to be the son, not the father. A straightforward application of *yored* would obligate *the son* to compensate the yeshiva for the benefits he received. A nineteen year old child is halakhically independent and responsible for his own actions, and there is scant basis to obligate the father for the benefits of his mature son. Since the son was not a party to the *din torah*, a decision from the *beth din* grounded in *yored* would be moot.[7]

The *dayanim* rejected *yored* on more fundamental grounds. They held that the facts of the case were inconsistent with *yored*. *Yored* applies when there is no contractual basis for the service, such as when a rogue actor provides a service without having been solicited for it. (Think of the kid down the block who, unsolicited, shovels the snow in front of your house and then demands payment.) In the instant case, however, the father clearly hired the yeshiva to educate his son. He had discussions with the yeshiva about enrolling his son to study there, he registered his son to attend, and he sent his son on a plane to study there for the year. In other words, the facts of the present case suggest that the father had hired the yeshiva to educate his son, in contrast to a case of *yored* where the benefit conferrer acts unilaterally without having been hired for the job.[8]

V. A Contractual Relationship

Jewish law does not require a written, signed agreement to create a binding contract. A contract is consummated when the worker begins performance after being instructed by the employer to provide the service.[9] Based on this, the *dayanim* held that the father had in fact hired the yeshiva, and the contract between them became binding when the yeshiva began teaching the son. The father's failure to sign the written tuition form does not vitiate the contract between them. It is true that there was no explicit agreement on the amount the father would pay for *shanna bet*, but that is just to say that the agreement failed to explicate one of its important terms.

When a term is omitted from a contract, Jewish law provides a variety of mechanisms for filling it in. One mechanism is to reconstruct the term based on custom (*minhag*). For example, if the contract omits the expected work hours, the hours are determined by the customary workday of that industry and area.[10] If the contract omits salary, the worker is entitled to a salary customary for someone in his profession and rank.[11] There are also other mechanisms for filling in omitted terms, as we'll discuss below. The central point is that the omission of tuition price does not vitiate the contract between

the father and the yeshiva. It just means that the *dayanim* have to assign a value to the tuition amount that was not explicitly agreed upon by the parties.

Based on this, the *beth din* concluded that the father had entered into a binding agreement with the yeshiva for *shanna bet*, even though there was no explicit agreement on the price of tuition. The *dayanim* now have to determine the price to assign to the contract.

VI. The Tosefta's First Mover Rule

To determine the tuition price, the *dayanim* first considered the possibility that the father may be bound to pay the amount last offered by the yeshiva ($20,000). This possibility stems from a rule codified in the Tosefta (Kiddushin 2:9) involving negotiations between a buyer and a seller who fail to agree on a price:

> "If the buyer says [I'll buy for] $100 and the seller says [I'll sell for] $200, and they each walk away from the sale [because they can't agree], if they later return and complete the sale without stating the price then it depends on who made the first move [to go forward with the sale after the stalemate]. If the buyer pursued the seller [to move forward with the sale], the price is that of the seller [$200]. If the seller pursued the buyer [to move forward with the sale], the price is that of the buyer [$100]."[12]

According to the Tosefta, the side that moves forward with the deal after a stalemate in negotiations (without coming to a new, explicit agreement) is deemed to have accepted the other side's last offer. The rationale for the Tosefta is intuitive. Since the other party has named their price and hasn't budged, the moving side is viewed as acquiescing to the other party's price.

Applying the Tosefta's principle to the present case, the yeshiva's last offer was for $20,000 ($22,000 sticker price with a $2,000 scholarship). When the father made the next move by sending his son to the yeshiva, it would seem, according to the Tosefta, that he accepted the yeshiva's last offer. On this approach, the father would be liable to pay $20,000 for *shanna bet*.

VII. The Pischei Choshen's Rule

The *dayanim*, however, distinguished between the Tosefta's rule and the following rule codified by the *Pischei Choshen*:

> "If a worker says I want such and such amount in compensation and the employer responds 'we'll work out a price between us', it is as if they came to no agreement on

price."[13]

Whereas in the case of the Tosefta the two parties offer different prices and the moving party is deemed to have accepted his adversary's price, in the case of the *Pischei Choshen,* the employer is viewed as rejecting the worker's price and setting the expectation that the two parties will work out a compromise price downstream. Therefore, if the parties ultimately act on the agreement without finalizing a compromise price, the halakhah views it as a binding contract that lacks agreement price.[14]

The *dayanim* concluded that the facts before them were more analogous to the Pischei Choshen's case than to the Tosefta's. Had the father and the yeshiva each set their own price, after which they both walked away from the negotiating table, then when the father later moved to send his son to the yeshiva, the Tosefta rule would govern, and the father would be liable to pay $20,000. But the facts of the case are different. Recall the description of the facts:

The yeshiva sent the father a form-contract with a sticker price of $22,000 but granted the father a $2,000 scholarship. The father refused to sign the contract. Instead, he informed the yeshiva that he will not pay $20,000 for *shanna bet* and that they'll have to work out better financial aid. The yeshiva acknowledged this, and replied that they would follow up.

Because the father responded that the yeshiva will "have to work out better financial aid" and in the dayanim's assessment "the yeshiva acknowledged this," the *beth din* held that the father rejected the yeshiva's price and had set the expectation that the parties would work towards a new tuition number. Since they never arrived at one, the *dayanim* held that the parties had entered into a contract with no agreement on a tuition amount. In other words, the *dayanim* maintained that the facts of their case were analogous to the *Pischei Choshen's*, and consequently the *Pischei Choshen*'s rule should control rather than the Tosefta's. Therefore, the *beth din* held that the father was not bound to the yeshiva's last offer.

VIII. Minhag Ha-Medinah

When two parties enter into an employment or service agreement without agreeing in advance on a compensation amount, the general rule in halakhah is to fill in the amount based on custom.[15] The value assigned to the contract would be the value of comparable contracts for similar services involving similarly situated parties. Suppose you hired a high-schooler to babysit your children for the evening but never discussed

payment. The high-schooler would be entitled to receive the going babysitting rate for someone in their grade in that community at that time of year. Similarly, if a law firm were to hire a first year associate without specifying the salary, the associate would be entitled to the going rate for first year associates from comparable law schools working at comparable firms.

The *dayanim* considered applying this principle to the present case. According to this, the father would be obligated to pay the going rate for *shanna bet* at comparable yeshivot, for contracts involving similarly situated families. It turned out, however, that there was no compelling clear-cut practice about the going rate for *shanna bet* at this yeshiva or at comparable yeshivot. The evidence submitted from comparable yeshivot indicated that the actual tuition amounts vary widely based off a number of variables, including the yeshiva's financial situation on any given year, the scholarship needs of the student's family, the quality of the student, whether the yeshiva is looking to expand its student body, etc. The *dayanim* concluded that there was no decisive *minhag ha-medinah* regarding the going tuition amount for *shanna bet* at comparable yeshivot involving comparable families, and the *dayanim* did not want to concoct a number that lacked rigorous support in actual practice.[16]

IX. Past Practice Of The Parties

A different method for filling in unspecified provisions of a contract is to look to the past practice of the parties. The basis for this method is a ruling of Rivash (Responsa no. 475), codified in the Shulchan Arukh (Choshen Mishpat 333:8), regarding a chazan who had negotiated a contract with a community for one year. The contract contained negotiated terms such as exemptions from community obligations and taxes. At the end of the year, the chazan was hired for another year (by a new board of the same community), but the parties did not negotiate or specify the terms of the contract. Specifically, they did not negotiate or specify whether the chazan would be exempt from the communal obligations in the second year. The chazan and the community disagreed over whether the negotiated terms of the first year got incorporated by default into the agreement for the second year.

Rivash ruled in favor of the chazan, reasoning that where the parties fail to agree on explicit terms for the second year's contract, it should be governed by the terms of the first year. The most reasonable terms to fill in the contract with are those terms that the very same parties had agreed to the prior year for a comparable service.[17]

Following Rivash, the *dayanim* ruled that the unspecified tuition amount should be filled in by the past practice of the parties the prior year. Although the yeshiva had attempted to extract a higher tuition amount from the father for *shanna bet* ($20,000 compared to

$12,000 for *shanna aleph*), the father had rejected the yeshiva's offer, and the negotiations dropped off with the understanding that the parties would have to work out financial aid. The yeshiva accepted the son and gave him a full year of *shanna bet* education without finalizing a tuition agreement secured by the father's signature. It would have been fully within the yeshiva's rights to refuse the son admission until the father signed the agreement. So notwithstanding the yeshiva's desire to secure a higher tuition payment, it failed to do so. Since the parties entered into an agreement for *shanna bet* without agreeing on a tuition price, the *dayanim* held, per Rivash's rule, that the tuition amount should be the same as that which these very parties agreed to one year earlier, for *shanna aleph*. The *dayanim* ruled that the father was obligated to pay the yeshiva $12,000 for *shanna bet*, the same amount he agreed to pay for *shanna aleph*.

X. Minhag Ha-Medinah Vs. Past Practice

In their deliberations, the *dayanim* considered discounting the father's liability for *shanna bet* by some nominal amount in deference to the common practice that *shanna bet* tuition is usually lower than *shanna aleph*. Under this approach, the *beth din* would take the *shanna aleph* agreement as the baseline liability for *shanna bet* and discount it by some nominal amount ($12,000 – x or $12,000(.x)). But the *dayanim* ultimately concluded that to do so would conflate two different halakhic rules. It would conflate the rule that fills in unspecified contractual terms based on the past practice of the parties with the rule that fills it in based on external market custom (*minhag ha-medinah*). Since the *beth din* decided that Rivash's rule controlled, the tuition amount for *shanna bet* should be determined by the prior year's agreement—without consideration of the external market practice (*minhag*) to charge less for *shanna bet*.

The *dayanim* supported their decision to rule based on the prior year's agreement (*shanna aleph*), rather than by the external market practice (*minhag ha-medinah*), by citing the precedent set by R. Hai Gaon in a case involving a tenant who remained in a property beyond the original term of the lease. There was no new agreement between the landlord and the tenant regarding the amount of rent the tenant would have to pay for the extended term. R. Hai Gaon ruled that the tenant was liable to pay the same rate he paid during the term of the lease, even though the market for rental properties had gone up.[18] R. Hai Gaon's ruling points against conflating the rule that looks to the past practice of the parties with the rule that looks to the external marketplace. R. Hai Gaon did not increase the tenant's rent from the first year, even though the market for rental properties had gone up.

Hai Gaon's ruling suggests that, as between the past practice of the parties and the external practice of the marketplace, it is preferable to bind the parties to their past practice. That is why R. Hai Gaon held the tenant liable for the rent amount he agreed to the prior year rather than to the external marketplace custom for rental properties. The logic of R. Hai Gaon's position appears to be that unspecified terms of a contract should be filled in by a *beth din*'s best estimate of the parties' intentions in entering the agreement. If we know what these very parties agreed to under similar circumstances last year, it stands to reason that they would agree to the same terms this year. At a minimum, it's fair and equitable to hold the parties to the terms they themselves agreed to last year for the same type of service. R. Hai Gaon's position is that the past practice of these same parties amongst themselves is a better *minhag* to fill in the contract with than the practice of other actors in the external marketplace.

Consider the following analogy. Suppose you hired a babysitter on Monday night to watch your children for $18 an hour. Then on Wednesday night you hired the same babysitter again but you neglected to agree on the price in advance. It stands to reason that the unspecified price of the Wednesday agreement is $18, even if it happens to be that the going external market rate in the community for babysitting is $20 an hour. R. Hai Gaon maintains that the Monday agreement is more narrowly tailored and more relevant to determining the value of the Wednesday agreement than the external babysitting-market practice of others.

In the present case, the *dayanim* held that there was no clear-cut marketplace practice to generate a compelling amount of *shanna bet* tuition based on *minhag ha-medinah*. But even if there were, R. Hai Gaon's ruling regarding the tenant who stayed beyond the initial term of his lease and Rivash's ruling regarding the chazan who was hired for a second year suggest that the tuition agreement between these parties for *shanna aleph* constitutes a better basis for determining the *shanna bet* agreement than the practice of other parties regarding *shanna bet* tuition.

The *dayanim* ruled that the father was liable to pay $12,000 for *shanna bet*, the same amount he contractually obligated himself to pay for *shanna aleph*.

Conclusion

In summary, the *dayanim* weighed several approaches, each of which implicates a different principle of Jewish law and yields a different outcome. They first considered the principle of *yored*, which would entitle the yeshiva to be compensated for conferring the benefit of *shanna bet* on the student, even if it was not contractually hired to do so. *Yored* raised two interesting questions. First, regarding the amount of compensation, some authorities hold that *yored* does not apply to *talmud torah*, so the yeshiva would not be

able to recover for the Torah knowledge it conferred upon the student. This would limit the yeshiva's recovery to room and board, trips, and similar types of services. Second, regarding the jurisdiction of the *din torah*, if the adult son was the beneficiary of the yeshiva's services–and he was not a party to the *din torah*–the *beth din* could not impose liability on his father. *Yored* would also raise interesting questions about how to quantify the amount of restitution, whether it would be quantified by the yeshiva's costs or by the son's benefit.

The *dayanim* ultimately rejected *yored* because they determined that it was incompatible with the facts of the case. *Yored* applies when there is no contractual relationship between the parties, no agreement to hire and work. In the present case, however, the *dayanim* found that there was a meeting of the minds between the father and the yeshiva. The parties were in agreement that the yeshiva would provide its services and that the son would enroll and study there for the year.

Given that there was a contractual relationship, the *dayanim* had to determine the amount of tuition, the price of the contract. They first entertained the possibility, based on the Tosefta, that the father is deemed to have accepted the yeshiva's last offer on the table for $20,000. The father was arguably the first mover to act under the agreement by sending his son to the yeshiva, which according to the Tosefta is tantamount to accepting the yeshiva's last bid. But the *dayanim* rejected this approach because they felt their case was more analogous to that of the Pischei Choshen, whereby the father's counter to the yeshiva that 'it would have to work out better financial aid' is tantamount to his countering that they'll compromise on a price downstream. According to the Pischei Choshen, that case is distinguishable from the Tosefta's and is halakhically equivalent to a contract with no agreement on price.

Given the contractual relationship and the omission of price, the *dayanim* had to determine which price to insert into the contract: the external marketplace custom or the past practice of the parties from *shanna aleph*? The *dayanim* went with the past practice of the parties from *shanna aleph*, $12,000. They were skeptical that a decisive marketplace custom could be established regarding the going rate for *shanna bet* for comparable contracts with similar yeshivot. More importantly, the rulings of Rivash and R. Hai Gaon suggest that the past practice of the parties is preferable to an external marketplace custom involving other actors.

The present analysis of Jewish law applies to a host of cases that occur frequently: Babysitters get hired for the evening without agreeing on rates in advance, eager snow shovelers clear sidewalks without getting explicit approval from homeowners, and students are sent to yeshivot and schools without signed tuition agreements. The

principles surveyed in this article illuminate how Jewish law approaches such cases. The article also shows how these abstract principles of law could be applied to provide elegant, decisive, and fair resolutions to such disputes.

On a different plane, the present analysis reflects the careful work of the *dayanim* weighing between principles and assessing which best applies to the facts of the case before them. Mastering theoretical halakhic principles is one thing. Determining how, and which, halakhic principles apply to a concrete set of facts is another. Each principle yields a different outcome, and subtle nuances in the fact pattern could be decisive in favoring one principle over another. Consider how slight variations in the facts of the present case decide between the Tosefta's rule, which would yield an award of $20,000 and the Pischei Choshen's rule, which yields an award of $12,000.

The *dayanim's* ruling also reflects the *beth din*'s commitment to issuing decisions that are compelling, objective, and clear—not only in their halakhic reasoning but also in how they arrive at the monetary amount of the judgment. The *dayanim*'s decision appealed to the tuition price that the parties themselves had agreed to the prior year. Rather than pursuing what would be at best a speculative and subjective number representing an average tuition amount for *shanna bet* at other yeshivot based on incomplete data and information, the *dayanim* decided the case based on the objective amount that the parties themselves had agreed to one year earlier.

NOTES

[1] All identifying information has been removed or altered to preserve the confidentiality of the proceedings and the privacy of the parties.

[2] Talmud Bavli Bava Metzia 101a:

> איתמר, היורד לתוך שדה חבירו ונטעה שלא ברשות, אמר רב: שמין לו, וידו על התחתונה. ושמואל אמר: אומדין כמה אדם רוצה ליתן בשדה זו לנוטעה.

For a general statement, see Shulchan Arukh Choshen Mishpat 264:4

> וכן כל אדם שעושה עם חבירו פעולה או טובה, לא יוכל לומר: בחנם עשית עמדי הואיל ולא צויתיך, אלא צריך ליתן לו שכרו (ר"ן פ' שני דייני גזירות).

Yored presupposes that the beneficiary actually benefited from the service. If he can demonstrate that he derived no benefit from the service, he would not be obligated to pay.

[3] For the different methods of evaluation, see Talmud Bavli Bava Metzia 101a; Rashi Bava Metzia 101a s.v. *yado* and s.v. *galita*; Tosefta Ketubot 8:10; Tosefta Bava Kama 10:7; Me'or Ha-Gadol Bava Metzia 58b; Sefer Ha-Mekach le-Rav Hai Gaon 7:18; Rashba Bava Metzia 101a; and Rambam Gezelah Chapter 10.

[4] See Talmud Bavli Nedarim 37a:

כתיב: ואותי צוה ה' בעת ההיא ללמד אתכם, וכתיב: ראה למדתי אתכם חוקים ומשפטים כאשר צוני ה', מה אני בחנם אף אתם נמי בחנם.

See also Rambam Talmud Torah 1:7.

[5] Responsa Rashba no. 1:645:

המלמד בן חבירו שלא מדעת האב אין האב חייב לשלם לו.

Shulchan Arukh Choshen Mishpat 335:1

המלמד עם בן חבירו שלא מדעת האב, יש אומרים דחייב לשלם לו כדין היורד לתוך שדה של חבירו שלא ברשות, שיתבאר לקמן סימן שע"ה (מרדכי שם והגהות מרדכי), ויש חולקין (תשובת רשב"א סימן תרמ"ה).

See Shakh Choshen Mishpat 335:3 who argues that the halakhah follows Rashba's opinion.

המלמד עם בן חבירו שלא מדעת י"א דחייב כו'. ולפע"ד ליכא למ"ד הכי דלא קאמר מהר"מ במרדכי ובהגמ"ר שם ע"ז דלא גרע מיורד לתוך שדה חבירו שלא ברשות היינו לומר דכמו דהתם משלם לו כיון נהנה ה"נ הכא כיון דא"ל למוד עם בני וגלי דעתי' דניחא ליה משלם מה שנהנה ואפי' תימא דדעת מהר"מ כמ"ש הרב מ"מ לפענ"ד עיקר כהרשב"א דראייתו ברורה מש"ס פ' אין בין המודר דף ל"ז ע"א.

Of course, when the teacher is contractually hired to teach Torah, and the contract provides for payment, the teacher is entitled to enforce payment.

[6] The method of compensation will depend on how the *yored* case is conceptualized (*yored be-reshut*, *yored shelo be-reshut*, *sadeh ha-asuyah lita, gila da'ato de-nicha leih*).

[7] For the requirement of the parties to accept the *beth din*'s jurisdiction, see Rabbi Yona Reiss, "Jewish Law, Civil Procedure: A Comparative Study", *Journal of the Beth Din of America* I (2012), pp. 18-21.

This complication of jurisdiction only arises if the basis for compensation is *yored*. If there were a binding agreement between the father and the yeshiva, the obligation to

pay would fall squarely on the father.

[8] This distinction is clearly acknowledged in Shulchan Arukh Choshen Mishpat 335:1. Rama distinguishes between a case of *yored* and a case of contract that fails to specify price. Regarding *yored*, Rama writes:

המלמד עם בן חבירו שלא מדעת האב, יש אומרים דחייב לשלם לו כדין היורד לתוך שדה של חבירו שלא ברשות, שיתבאר לקמן סימן שע"ה (מרדכי שם והגהות מרדכי), ויש חולקין (תשובת רשב"א סימן תרמ"ה).

In the next line, Rama considers a case of contract that omits price:

ואם אחד אומר למלמד: למוד עם בני, ולא קצב לו שכירות, צריך ליתן לו כפי מה שנותנים אחרים (מרדכי הנ"ל בשם מהר"ם).

Rama captures two differences between the case of *yored* and the case of contract. First, whereas compensation for *yored* services in the case of *talmud torah* is controversial, it appears to be universally accepted in the case of contract. In contrast to *yored,* a contractual obligation creates an enforceable legal obligation to pay a teacher for Torah teaching, even if the teacher is duty-bound to provide it for free.

Second, the compensation amount for the contract case is determined by the standard going rate for the service (*kefi mah she-notnim acherim*), whereas the amount under *yored* may vary based on the type of *yored* case (see above n. 5 and n.2).

[9] See Responsa Rivash 475:

שאין שכירות הפועל צריך שטר ולא קנין, אלא כל שעשה הפועל מלאכתו חייב השוכר לתת לו משלם שכרו שהתנו עמו.

Ramban Bava Metzia 76b:

כיון שהתחילו במלאכה נתחייב מעכשיו ליתן להם שכרן משלם כמו שקבל עליו, שכשם ששאר הדברים נקנין בקנין כך שכירות פועלים נקנית בהתחלת מלאכה.

See also Shakh Choshen Mishpat 333:11 and Pitchei Choshen Sekhirut 7:3.

[10] Shulchan Arukh Choshen Mishpat 333:1-2. See also Talmud Bavli Bava Metzia 83a.

[11] See Pitchei Choshen Sekhirut 8:3-4:

לא פסק עמו שכרו, נותן לו כפי מנהג המדינה.

And note 11 therein:

ומ"מ נראה שהולכים לפי סוג העבודה והמקצוע, ולא כפחות ממש, ועוד נראה שאם יש דירוג מקצועי נותן לו לפי הדירוג, אף על פי שיש יחידים המשכירים עצמם בזול.

See also Shulchan Arukh Choshen Mishpat 335:1:

אם אחד אומר למלמד: למוד עם בני, ולא קצב לו שכירות, צריך ליתן לו כפי מה שנותנים אחרים (מרדכי הנ"ל בשם מהר"ם).

For the general principle that omitted contractual terms should be filled in based on custom, see Talmud Bavli Bava Metzia 104a *darshinan lashon hedyot*. For a discussion of this principle, see Itamar Rosensweig, "Minhag Ha-Sochrim: Jewish Law's Incorporation of Commercial Custom and Marketplace Norms" *Journal of the Beth Din of America* 3, pp. 63 – 65.

[12] Tosefta Kiddushin 2:9 (Lieberman):

זה אומ' במנה וזה אומ' במאתים והלך זה לביתו וזה לביתו ואחר כך תבעו זה את זה אם הלוקח תבע את המוכר ייעשו דברי מוכר ואם המוכר תבע את הלוקח ייעשו דברי לוקח.

The Shulchan Arukh codifies the Tosefta's rule in Choshen Mishpat 221:1:

המבקש לקנות מחבירו מקח, מוכר אומר: במאתים אני מוכר לך, והלוקח אומר: איני לוקח אלא במנה, והלך זה לביתו וזה לביתו, ואחר כך נתקבצו ומשך זה החפץ סתם, אם המוכר הוא שתבע הלוקח ונתן לו החפץ, אינו נותן אלא מנה. ואם הלוקח הוא שבא ומשך החפץ סתם, חייב ליתן ק"ק.

[13] Pitchei Choshen Sekhirut 8:5:

אמר לו הפועל שרוצה בשכרו כך וכך, ואמר לו בעל הבית נתפשר בינינו, הרי זה כאילו לא התנו כלל על השכירות.

[14] Pitchei Choshen distinguishes between the rule he codifies and that of the Tosefta. See Pitchei Choshen Sekhirut Chapter 8 note 13. There appear to be two differences between the cases. First, in the Tosefta's case there is a firm counter offer with a fixed price but not in the case of the Pitchei Choshen. Second, in the case of the Pitchei Choshen there is a bid to compromise, but not in the case of the Tosefta. According to the Pitchei Choshen, these differences are sufficient to distinguish the Tosefta's case, where the first mover is deemed to have accepted the other party's offer, from the case he presents, which is treated as though there was no agreement on price. See the text and note of the Pitchei Choshen Sekhirut 8:5 and note 13:

אמר לו הפועל שרוצה בשכרו כך וכך, ואמר לו בעל הבית נתפשר בינינו, הרי זה כאילו לא התנו כלל על השכירות... ואם בעה"ב אמר כך והפועל אמר כך ונפרדו ושוב הסכימו שיעבוד ולא קצצו, נראה דדמיא לסימן רכא (סעיף א) ותלוי מי בא למי, שאם הפועל בא אצל בעה"ב הרי מסתמא הסכים לדבריו, ואם בעה"ב בא לפועל הרי הסכים למה שאמר.

[15] Pitchei Choshen Sekhirut 8:3-4:

לא פסק עמו שכרו, נותן לו כפי מנהג המדינה.

Maharam of Rothenburg ruled this way in a strikingly similar case. See Mordechai Bava Metzia 346:

נשאל להר"מ מלמד שאמר לו בעה"ב למוד בני ולא נדר לו שום דבר ולאחר הזמן לא רצה ליתן לו שום דבר הואיל שלא נדר לו כלום והשיב שצריך ליתן לו לפי הזמן שלמד הן רב הן מעט כמו שרגילין ליתן לו במקום אחר.

Shulchan Arukh codifies Maharam's ruling in Choshen Mishpat 335:1:

אם אחד אומר למלמד: למוד עם בני, ולא קצב לו שכירות, צריך ליתן לו כפי מה שנותנים אחרים (מרדכי הנ"ל בשם מהר"ם).

[16] For the idea that a *minhag* must be pervasive and consistent, see Shulchan Arukh Choshen Mishpat 331:1:

ואינו קרוי מנהג אלא דבר השכיח ונעשה הרבה פעמים, אבל דבר שאינו נעשה רק פעם אחת או שני פעמים אינו קרוי מנהג (ריב"ש סי' תע"ה).

[17] Shulchan Arukh Choshen Mishpat 333:8:

שליח צבור שהשכיר עצמו עם מנהיגי העיר לשנה בתנאי כך וכך, ואחר כך השכיר עצמו לבני העיר הזאת עם מנהיגים שניים, ולא התנה, ודאי על תנאי הראשון השכיר עצמו.

[18] R. Hai Gaon's ruling is recorded in Responsa Rivash no. 475:

כתב רב האיי גאון ז"ל בתשובה שהמשכיר בית לחבירו לשנה לסך ידוע, ועמד שם יותר שאינו חייב לפרוע ממה שעמד, אלא כמו סך השנה הראשונה כיון ששתקו, ואף על פי שהוקר שכירות הבתים.

See also Shakh Choshen Mishpat 312 no. 10.

Of course, if the lease agreement contained a holdover tenant clause stating how much the tenant would have to pay if he remained beyond the lease, he would be obligated to pay that amount.