

VACATIONAL SCHOOL: MUST SHUTTERED SCHOOLS BE PAID?

When the best-laid plans of mice and men go awry.

Adapted from the writings of Dayan Yitzhak Grossman

In this article, we will consider whether parents are obligated to honor tuition commitments to schools that have temporarily closed.

The fundamental rule set forth by the Gemara is that if circumstances arise that prevent an employee from performing his work, he is not entitled to his wages, unless the circumstances were foreseeable by the employer but not by the employee.[1] This principle is explicitly applied by the *poskim* to the case of a parent who hired a tutor for his son and the child fell ill or died, *Rachmana litzlan*: The tutor is not entitled to his wages unless the child's illness is a frequent occurrence—and thus foreseeable to the parent—but the tutor was unfamiliar with the child's condition.[2]

An important exception is that if the wages were paid in advance, the employee is not obligated to refund them.[3]

The rationale for this is not entirely clear. Some *poskim* explain

that by paying in advance, the employer is tacitly granting the employee the right to retain his wages even if he is later unable to perform his job.[4]

This implies that the exception only obtains where the employer deliberately

paid in advance. There is an opinion that the exception only applies if the employer had the option to pay later and chose to pay in advance, but not where

the employee insisted on advance payment as a condition of his employment.[5]

Other *poskim*, however, explain that the question of whether the employee is entitled to his wages hinges on who has possession of

the money (*muchzak*), so if

the employee has possession he may retain the money regardless of how this came about.[6]

The *poskim* also

discuss the case where it was the tutor that fell ill and couldn't teach. Here, too, the basic rule is that he is not entitled to compensation,[7]

although some *poskim* maintain

here as well that if he received his wages in advance he may retain them,[8] though others disagree.[9]

There is an opinion that if the tutor can do at least some teaching, he is entitled to his full wages.[10]

The Maharil discusses a situation somewhat analogous to the current one, where a father employed a tutor for his son and then fled an outbreak of the plague along with his son. Maharil applies the above rule, that

because the father had no greater knowledge of the future than the tutor,

he is

not obligated to pay him.[11]

The Maharam

Padua[12]

discusses a similar case and rules similarly, but he qualifies that the father's exemption is due to the fact that not all the locals had fled. Had they all[13]

done so, he implies, the situation would be classified as a regional disaster (*makas*

medinah), in which Maharam

MeRotenberg rules that the tutor would be entitled to his wages. The latter also considers it a *makas medinah* if tutors

couldn't teach by government edict.[14] This application of *makas medinah* is, however, subject to considerable

controversy.[15] Additionally,

some *poskim* say that even in a

situation of *makas medinah*, the

tutor is only entitled to his wages if he had not fled prior to the student and was ready to teach.

In summary:

- An employee, including a teacher, is generally not entitled to compensation for work he does not perform, even if he is prevented from working by circumstances beyond his control. A parent would therefore not be liable to pay tuition for the period that his school was closed.
- If the employee was paid in advance, he may keep the money, although some *poskim* limit this to where the payment was made voluntarily by the employer. This is applicable to tuition that a parent paid before the closure.
- A school that continued to provide at least some form of teaching, e.g., by teleconference, would be entitled to its full tuition according to at least some opinions.
- The above notwithstanding, if school closures are universal throughout a region, the schools would be entitled to tuition, although there is an opinion that this would only apply if the schools were prepared to remain open and it was the parents' choice to keep their children home. Similarly, if the closures were mandated by the government, according to at least some *poskim* the schools would be entitled to tuition.

Note that our discussion only considers the default halachic principles, applicable in the absence of any express stipulation between the school and

parent or any prevailing custom. We also do not consider here the potentially-complicating factor that the parents' agreement is with the school and not directly with the teachers.

[1]Bava Metzia 76b-77a,
Tur and Shulchan Aruch C.M. 334:1

[2]
Ra'aviah and Maharam of Rothenberg, cited in Rosh B.M. ibid. #3 and Mordechai ibid. #345; Tur and S.A. ibid. 334:4. This is the normative halacha, although there are dissenting views: R' Yoel maintains that if the child dies R"l, the tutor is entitled to his wages (Mordechai #356), and Maharam had initially ruled that way before changing his mind (Mordechai #346). See Machanei Efraim, Hilchos Sechirus #4, #5, and #8 and Shu"t Nechpah Vakessef cheilek 1, C.M. #30 for extensive discussion of these views, and cf. Pis'chei Choshen, Hilchos Sechirus ch. 12 n. 30.

[3]Tosafos
ibid. 79b s.v. ee atah; Rosh ibid. #3; Terumas Hadeshen 1:329; Shach 334, end of 2; Erech Shai 334:1 s.v. mihu yesh cholkim; Shu"t Shevus Yaakov 1:176 (cited in Pis'chei Teshuvah 310:1); Shu"t Be'er Yitzchak C.M. siman 6 anaf 4. Cf. Shu"t Bris Avraham #34 (cited in Pis'chei Teshuvah 316:2).

[4]Tosafos
and Terumas Hadeshen ibid.

[5]Shu"t
Maharach Or Zarua
#66

[6]Erech
Shai ibid., and this is also the implication of Shevus Yaakov ibid.

[7]Rosh
ibid. #6; Mordechai ibid. #347; Rama ibid. 333:5

[8]Maharam,
 cited in sources in the previous note

[9]Schach
 ibid. s.k. 25. Cf. Pis'chei Choshen ibid. ch. 11 n. 50.

[10]Rikanti #50,
 cited in Kenesses Hagedolah
 C.M. 334, Hagahos Beis
 Yosef #38.
 Cf. Pis'chei Choshen ibid. ch. 11 n. 49.

[11]Shu"t Maharil
 #41,
 codified by Rama ibid. 334:1

[12]Shu"t Maharam
 Padua #86

[13]Shach
 ibid. s.k. 3 infers from Maharam Padua's language that a majority having
 fled
 is insufficient to invoke the classification of makas medinah, but the Shach
 himself
 disagrees. Cf. Pis'chei Choshen ibid. ch. 6 n. 35.

[14]Mordechai
 ibid. #343 and Hagahos Ashri ibid. 6:6, codified by Rama 321:1

[15]Maharam
 Padua himself maintains elsewhere (#39, in
 the context of a rental agreement), in apparent contradiction to his ruling
 here, that makas medinah does not require the payment of compensation
 for
 benefit not received. Cf. Darkei Moshe and Rama 321:1 (and Rama 312:17);
 Sema
 s.k. 6; Taz; Shach s.k. 1; Biur HaGra s.k. 7; Nesivos HaMishpat, Biurim, s.k.
 1; Shu"t She'eilas Shalom (Mahadura Kama) #73; Shu"t
 Zekan Aharon 2:143;
 Pis'chei Choshen ibid. ch. 6 n. 29; Shu"t Minchas Asher 2:120; and see the
 extensive list of contemporary discussions of this topic in R. Yehudah
 Zoldan, Mimon Hotzaos Tz'va'ios
 V'Ezrachios B'Ikvos Milchamah, fn. 2.