

DuaneMorris®

www.duanemorris.com

California Legislative and Regulatory Update CAPPS 2026 Legislative Policy Conference

Edward Cramp and Ayad Mathews
Duane Morris LLP

Today's Agenda

- Mission of CAPPS
- CAPPS v. Department of Financial Protection and Innovation (DFPI)
- Questions/Discussion

Mission

- “To serve the California private postsecondary sector by advocating for the interests of our member schools and student populations, enhancing and promoting the image of the sector, communicating State and National issues, and providing professional development opportunities for our sector.”
- One way CAPPs achieves its mission is by opposing and challenging governmental regulation that negatively impacts its member institutions.

CAPPS v. Department of Financial Protection and Innovation

- California Consumer Financial Protection Law (CCFPL)
- DFPI's registration mandate
- Direct impact on proprietary postsecondary institutions
- Legal challenge – current status, legal background, and arguments
- Relief sought

California Consumer Financial Protection Law

- Passed in 2020
- Regulates financial products and services in California
- To protect California consumers from “unfair financial practices”
- Created the Department of Financial Protection and Innovation
 - Modeled after the federal Consumer Financial Protection Bureau (CFPB)
 - Enforces laws that protect consumers against unfair, deceptive or abusive practices

A Targeted Regulation with Sector-Wide Consequences

- A for-profit institution of higher education offering institutional education financing to your students, must, as of February 15, 2025:
 - Register with DFPI
 - Pay non-refundable registration fees (\$350 application fee + \$500 annual registration fee)
 - Secure Commissioner Khalil Mohseni's approval
- If you offer institutional education financing and do not register, you may be:
 - Fined (up to \$5,000 per day)
 - Subject to enforcement action
 - Forced to pay investigative costs
- Rule applies exclusively to for-profit postsecondary institutions
 - Public and non-profit postsecondary institutions are exempt from registration
 - No regulatory burdens

Direct Impact on Proprietary Postsecondary Institutions

- The sector is already heavily regulated through the Private Postsecondary Education Act of 2009 and its implementing regulations
 - Oversight by Bureau for Private Postsecondary Education
 - Extensive requirements (approval to operate, student protection standards, financial and reporting obligations, financing disclosure requirements)
 - Continuous compliance monitoring and enforcement
- The DFPI regulation is another layer of mandatory registration and fees
 - Requires approval before offering institutional financing options
 - Ongoing increased compliance costs and administrative overhead
 - Creates operational barriers to essential financing arrangements
 - Risks institutional operations by impacting student enrollment
 - Disproportionate burden compared to public and non-profit postsecondary institutions

So, we sued.

Procedural Timeline

- Dec 2025: Case filed
- Feb 2026: DFPI filed motion to dismiss
- Mar 2026: CAPPS filed opposition to motion
- Apr 2026: DFPI filed reply brief

- Current status: Motion submitted to judge for decision, expected in the next few months

A Short Course in First Amendment Free Speech Jurisprudence

Heightened Scrutiny & The Speech-Conduct Distinction

- Government cannot restrict expression based on:
 - Message
 - Subject matter
 - Content
- Content-based and speaker-based regulations trigger heightened scrutiny
- Viewpoint discrimination is an “egregious form of content discrimination”
- Government cannot recharacterize a speech regulation as targeting “conduct” to avoid scrutiny

Education as Protected Speech, Prior Restraints & Underinclusiveness

- Academic freedom is a “special concern of the First Amendment”
 - Teaching and vocational instruction are protected speech
- Licensing/registration requirements conditioning speech on prior government approval are prior restraints bearing a “heavy presumption against constitutional validity”
 - Must include time limits, judicial review, and narrow standards
- Exemptions for favored speakers undermine the government’s rationale and defeat heightened scrutiny

Commercial Speech & Economic Regulation

- Commercial speech receives intermediate scrutiny under the Supreme Court's four-part test:
 - lawful, non-misleading speech
 - substantial government interest
 - direct advancement
 - no more extensive than necessary
- Government's burden is "heavy" — "mere speculation or conjecture" is insufficient
- Facially neutral economic regulations are generally immune from First Amendment scrutiny
 - But content- or speaker-based exemptions transform them into speech regulations subject to heightened scrutiny

The Arguments

CAPPS' Lawsuit Arguments

- Registration Mandate & Discriminatory Exemption:
 - The Rule imposes a registration mandate on education financing providers
 - But the Exemption categorically shields all public and private non-profit postsecondary institutions
 - Leaving only for-profit institutions like CAPPS members burdened
- Viewpoint & Speaker-Based Discrimination:
 - DFPI singles out for-profit institutions delivering vocational and career-focused education while granting blanket immunity to public/non-profit institutions engaged in the same activity
 - Exemption targets speech by disproportionately burdening an activity essential to student enrollment

CAPPS' Lawsuit- Arguments

- Underinclusiveness Defeats Consumer Protection Rationale:
 - CFPB data shows 98% of public/non-profit colleges offer tuition payment plans
 - Public universities account for ~375,000 students and \$195M in institutional debt annually—yet remain exempt
- Overinclusiveness:
 - Sweeps in every for-profit institution that offers institutional education financing irrespective of legality
- Exemption is contrary to statute and legislative intent:
 - CCFPL has a meticulous list of exemptions for covered persons—none deals with education financing
 - Legislature expressly aimed to protect all students from unfair institutional lending practices

CAPPS' Lawsuit- Arguments

- Strict Scrutiny Applies; Intermediate Scrutiny Also Fails:
 - As a content- and speaker-based restriction, the Rule triggers strict scrutiny and is presumptively unconstitutional
 - Even under Central Hudson intermediate scrutiny, the Exemption's underinclusiveness fatally undermines any claim of directly advancing the government's stated interest
- Relief:
 - Rule should be invalidated as-applied to CAPPS-member institutions, or the Exemption stricken altogether

DFPI Arguments – Motion to Dismiss

- “This is about financial regulation, not speech”
 - DFPI says the Rule only regulates financial transactions (extending credit to students), not what schools teach or say
- Schools are not required to register just to enroll students – registration is only triggered if a school chooses to offer payment plans or defer tuition payments
- Schools can still collect tuition upfront, accept financial aid, or require payment each term without ever registering
- The Rule doesn’t single out for-profit schools – it also applies to third-party lenders and other non-bank financing providers
- Consumer protection is a legitimate government interest – the state wants to monitor financial products offered to vulnerable student borrowers

DFPI Arguments – Reply Brief

- Treating different types of institutions differently is not the same as censorship – many laws impose different requirements on different types of businesses
- CAPPs hasn't shown that the Rule is designed to suppress anyone's speech or educational offerings
- The content of what a school teaches has no bearing on whether the Rule applies – a for-profit and non-profit school could swap curricula and nothing would change under the Rule
- Schools only face compliance obligations if they choose to offer financing
- The exemption for public/non-profit schools was supported by public comments during the rulemaking process and reflects a rational regulatory choice

Questions and Discussion