

**STATE OF NEW HAMPSHIRE
OFFICE OF PROFESSIONAL
LICENSURE AND CERTIFICATION**

ADVISORY BOARD OF BODY ART

**In Re: Claire’s Boutiques, Inc.
(Request for Waiver)**

CONDITIONAL ORDER OF DENIAL

Now before the Office of Professional Licensure and Certification, Advisory Board of Body Art, (the “Board”/Executive Director) are requests from Claire’s Boutiques, Inc. (the “Petitioner”), that the Board substantively waive the requirements for licensure and practice contained in Rule 601.04(b)(4),¹ Rule 601.04(b)(5),² Rule 601.05(a),³ Rule 601.06(a),⁴ Rule 602.03(b)⁵, and Rule 602.03(a),⁶ Requests for substantive waiver of a rule contained in “Chapter Plc 600 BODY ART RULES” are governed by Plc 603.01:

- (a) Applicants or Petitioners seeking waivers of specific rules in this chapter shall submit a written request for waiver to the executive director which includes the following:
- (1) Specific reference to the rule for which a waiver is being sought;
 - (2) Full explanation of why a waiver is necessary; and

¹ “Documentation of the completion of a course in sterilization pursuant to RSA 314-A:2, III, (d).” [The Executive Director notes that there is no Rule 601.04(a)(4). The Executive Director assumes there was a clerical error and the Petitioner meant Rule 601.04(b)(4).] See [Microsoft Word - Plc 600 certified.doc \(nh.gov\)](#)

² “Documentation that proves the applicant meets the requirements for licensure pursuant to RSA 314-A:2, III(c) and RSA 314-A:3...”

³ “Any person who wishes to engage in the practice of body art, but does not meet the practitioner licensing requirements of Plc 601.04, shall apply for an apprentice license.”

⁴ “An apprenticeship for an initial body art practitioner license in a single body art classification shall include: ...”

⁵ “The Petitioner shall practice in a clean and sanitary manner including only practicing in an establishment that has: ...”

⁶ “The Petitioner shall use the following infection control practices:”

(3) Full explanation of alternatives proposed by the applicant or Petitioner, which shall be equally as protective of public health as the rule from which a waiver is sought.

(b) The executive director shall approve a request for waiver if:

(1) The executive director concludes that authorizing deviation from strict compliance with the rule from which waiver is sought does not contradict the intent of the rule;

(2) The alternative proposed by the applicant or Petitioner ensures that the objective or intent of the rule from which waiver is sought will be accomplished; and

(3) The alternative proposed by the applicant or Petitioner does not violate any statutory provision.

(c) If a waiver is approved, the applicant's or Petitioner's subsequent compliance with the alternatives approved in the waiver shall be considered equivalent to complying with the rule from which waiver was sought.

(d) Waivers shall correspond with the effective dates of the license. Petitioners shall resubmit waiver requests during subsequent license periods if the waiver is still needed.

Plc 603.01.

Based upon the waiver request, the Executive Director makes the following findings of facts and conclusions of law.

A. Rules 601.04(b)(4), Rule 601.04(b)(5), Rule 601.05(a), and Rule 601.06(a).

With respect to the requests for waiver of Rule 601.04(b)(4), Rule 601.04(b)(5), Rule 601.05(a), and Rule 601.06(a), the Executive Director finds and concludes that the intent of the rules are to ensure Licensees have received sufficient technique and health and safety training, as contemplated in RSA 314-A et seq., to protect the public. Therefore, the Executive Director starts her analysis by reviewing the factual allegations contained in the request for waiver related to these rules, which are:

All Claire's staff takes part in a rigorous training program, put together with our piercing instrument supplier, Studex. This training program covers the ear-piercing process before progressing on to nose piercing. Each associate is trained in all areas of state and local regulations, hygiene, preparation as well as the physical piercing process and aftercare. All associates carry out in depth theory and practical training before carrying out supervised piercings in order to obtain certification and licensing from local authorities. You can be assured that Claire's staff is both competent and confident in the services provided and undertake regular

reassessment. In lieu of providing proof detailed in Plc 601.04(a)(4), Plc 601.04(b)(5) 601.05(a), Plc 601.06(a), our associates can present the Claire's Certification of Training, along with completing any required OSHA or American Red Cross Training Certifications.

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To summarize, the Petitioner requests that the Executive Director accept the aforementioned in lieu of the requirements for licensure contained in Rule 601.04(b)(4), Rule 601.04(b)(5), Rule 601.05(a), and Rule 601.06(a).

The Executive Director next considers the relevant law in this matter, starting with the statutes upon which the requested waivers are based. “‘Body piercing’ means the creation of an opening in human tissue, except piercing of the ear lobe, through which jewelry or other items are inserted.” RSA 314-A:1, I. “It shall be unlawful for any person to practice body piercing ... without a license, unless such person is exempt under RSA 314-A:4.” RSA 314-A:2. Exemptions apply to “any person licensed by the New Hampshire board of medicine”, RSA 314-A:4, and “a person or facility which performs only ear lobe piercing.” In relevant part, those seeking licensure because they do not fit an exemption must, according to statute: “ ... [have] ... been practicing body piercing ... in an establishment, under the supervision of a person practicing body piercing ... in compliance with the applicable statutes and rules of the state for not less than 3 years. Out-of-state applicants shall provide proof of at least 3 years experience as a licensed practitioner in another state”, RSA 314-A:2, III(c); and “... [have] completed a course approved by the executive director in methods and techniques for the proper sterilization of instruments and materials used in body piercing...” RSA 314-A:2, III(d).

In requesting the waivers of Rule 601.04(b)(4), Rule 601.04(b)(5), Rule 601.05(a), and Rule 601.06(a), the petitioner essentially asks the Executive Director to waive statutory requirements as they relate to RSA 314-A:2, III (c) and (d). The Executive Director has no authority to waive what the legislature has sought fit to determine are requirements:

Although **rules adopted by State agencies may not add to, detract from, or in any way modify statutory law**, the legislature may delegate the authority to administrative agencies to fill in details to effectuate the purpose of the statute. The legislature must declare a general policy and prescribe standards for administrative action. Agency regulations that contradict the terms of a governing statute exceed the agency's authority. Rules and regulations promulgated by administrative agencies pursuant to a valid delegation of authority have the force and effect of law.

In re Mooney, 160 N.H. 607, 611-12 (2010)(internal quotations and citations omitted)(emphasis added).

The training program referenced by the Petitioner is not “a course approved by the executive director in methods and techniques for the proper sterilization of instruments and materials used in body piercing.” RSA 314-A:2, III(d). Therefore, the Executive Director cannot waive Rule 601.04(b)(4) insofar as it is a statutory requirement. Similarly, the Executive Director cannot waive Rules 601.04(b)(5) and Rule 601.05(a) in the manner requested because doing so would deviate from the statutory requirements for licensure of “body piercing” as defined by statute at RSA 314-A:1, I. *See* RSA 314-A:2, III(c). Although the Executive Director notes that there is some flexibility in waiving requirements under Rule 601.06(a), as they “fill-in” details, there is no ability to waive the statutory requirement that “[a] person shall remain an apprentice for at least one year and until the supervising licensee attests that the apprentice is qualified to become licensed.” RSA 314-A:3 The Petitioner’s request, as presented, essentially requests waiver of any sort of apprenticing and thus runs contrary to RSA 314-A:3. Therefore all the Petitioner’s requests to waive Rules 601.04(b)(4), 601.04(b)(5), 601.05(a), and 601.06(a) are denied. *See* 603.01(b)(1),(2), and (3).

B. Rules 602.03(b) and 602.03(a).

The Executive Director next turns to the requests involving Rules 602.03(b) and 602.03(a). The Executive Director finds and concludes that the intent of these rules are to ensure Licensees have sanitary and clean conditions in which to serve customers, as contemplated in RSA 314-A et seq., to protect the

public. Therefore, the Executive Director starts her analysis by reviewing the factual allegations contained in the request for waiver related to these rules, which are:

Since our stores are located in retail environments and our piercing station is located at the front of our sales floor, we aren't always able to install a plumbed sink at the piercing station. When traditional plumbing isn't available, Claire's provides their store with a modern portable handwashing sink that provides heated and pressured water on-demand. Our portable sinks are filled with freshwater on a daily basis to provide enough washings to last throughout the entire work day. Please see **Exhibit #1** which includes a photograph and a detailed blueprint of the engineering and mechanics of our portable sinks.

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The stud-and-clasp system used for nostril piercing is entirely separate from the instrument used for ear piercing. Claire's only uses FDA approved, single-use, disposable, pre-sterilized piercing nose rings to pierce our customer's nostrils. The piercing instrument never comes in contact with non-intact skin. It is not a traditional piercing gun, which uses spring-loaded power to "shoot" jewelry through the skin. It is a piercing instrument that is engineered to use only hand-pressure to piercing the skin quickly, accurately and quietly. Our pre-sterilized piercing jewelry is packaged in a full disposable, single-use, pre-sterilized cartridge that is loaded directly into the piercing instrument without ever being touched by a store associate. Please see **Exhibit #2** for more information about the piercing instrument.

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The Executive Director considers those facts in conjunction with Rules 602.03(b) and 602.03(a), which were promulgated in accordance with RSA 314-A:6, I. With respect to Rule 602.03(b), the Executive Director finds and concludes that the Petitioner has failed to provide her with sufficient information to find and conclude that waiver is appropriate. The rule contemplates use of a "sink" by "the practitioner, apprentice, and client at all times." Rule 602.03(b). The request fails to explain how the proposed set up will ensure such use as contemplated by the rule. With respect to the request for waiver of Rule 602.03(b), the Executive Director finds and concludes that it is inappropriate to grant because it contemplates having individuals not licensed in accordance with the statutory requirements of RSA 314-A:2 and 3 conducting "body piercing", RSA 314-A:1, I. Therefore, the Petitioner's requests to waive Rules 602.03(b) and 602.03(a), are denied. *See* 603.01(b)(1),(2), and (3). *See* 603.01(b)(1),(2), and (3).

Accordingly, the waiver requests of Claire's Boutiques, Inc. are denied effective 12:01 a.m. on December 13, 2022, unless, prior to 4:00 p.m., on January 13, 2023, a written request for a hearing is submitted to the OPLC. If a timely written request for a hearing is received, Claire's Boutiques, Inc.'s waiver request will not be denied and a hearing shall be scheduled to determine the issue. In any such hearing, the Petitioner shall have the burden of demonstrating that it meets the minimum requirements for waiver pursuant to Plc 603.01 and RSA 314-A et seq.

THEREFORE, IT IS ORDERED, that the waiver requests of Claire's Boutiques, Inc. shall be **DENIED** effective at 12:01 a.m. est, December 13, 2022, unless prior to 4:00 p.m. est, January 13, 2023, the OPLC receives a written request for a hearing; and

IT IS FURTHER ORDERED, that receipt of a timely filed hearing request shall automatically void this Order and a further Order shall be issued establishing the date and time of the hearing and the precise issues to be heard. This hearing shall be conducted pursuant to RSA 314-A, RSA 541-A, RSA 310-A and Plc 200 et seq. The burden of proof shall be upon the Petitioner to demonstrate its request meets the requirements of Rule 603.01. The Petitioner may request to be heard on any relevant matter of fact or law, but a full evidentiary hearing shall be conducted only to the extent the Petitioner has identified disputed factual issues which require resolution.

BY ORDER OF THE EXECUTIVE DIRECTOR THROUGH HER HEARINGS EXAMINER.⁷

DATED: 12/12/2022

/s/ Nikolas K. Frye, Esq. _____
Nikolas K. Frye, Esq., Hearings Examiner

⁷ See Executive Director Standing Order 2022-1.

Authorized Representative of the Advisory Board of
Body Art and the OPLC Executive Director and
OPLC Executive Director
New Hampshire Office of
Professional Licensure & Certification
7 Eagle Square
Concord, NH 03301