Are You Ready to Comply with the New Title IX Regulations?

Amy Magee, J.D., Director, TASB Community College Services

Charli Searcy, J.D., Legal Liability Risk Consultant, TASB Risk Management Fund

The information in this presentation is provided for educational purposes only to facilitate a general understanding of the law or other regulatory matter and is not legal advice. References to judicial or other official proceedings are intended to be a fair and impartial account of public records, which may contain allegations that are not true. This information is neither an exhaustive treatment on the subject nor is this intended to substitute for the advice of an attorney. Consult your own attorney for legal advice regarding these principles. Information provided in this presentation is subject to change without notice and the presenter makes no warranties, either express or implied.

TASB™ RISK FUND

© 2020 Texas Association of School Boards, Inc. All rights reserved.

Complying with the New Regulations

- Regulations Overview
- General Provisions
- Reporting
- Complaint Policies and Procedures
- Investigations, Hearings, Dismissals, and Appeals
- Recordkeeping
- Pending Actions to Delay or Halt Implementation
- Best Practices

TASB™ RISK FUND

© 2020 Texas Association of School Boards, Inc. All rights reserved.
© 2020 Texas Association of School Boards, Inc. All rights reserved.

The New Title IX Regulations

TASB™ RISK FUND

© 2020 Texas Association of School Boards, Inc. All rights reserved.

The New Title IX Regulations

- History
- General requirements
- Consider with other laws
  - Title VII (colleges and districts)
  - Clery Act (colleges only)
  - State law (colleges only)

TASB™ RISK FUND

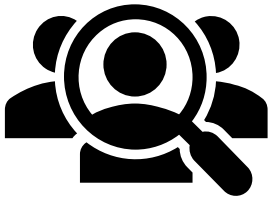
© 2020 Texas Association of School Boards, Inc. All rights reserved.

General Provisions

TASB™ RISK FUND

© 2020 Texas Association of School Boards, Inc. All rights reserved.

Updates to Title IX Coordinator Provisions



- Designate and **authorize** the Title IX Coordinator to coordinate the district or college's compliance efforts.
- Notice regarding coordinator:
  - Name **or** title
  - Office address, telephone number, and **email**
  - To **applicants** for admission and employment, **parents** or legal guardians of elementary and secondary students, in addition to students and employees
  - Through **website** and **handbooks/catalogs**

TASB RISK FUND

© 2020 Texas Association of School Boards, Inc. All rights reserved.
© 2020 Texas Association of School Boards, Inc. All rights reserved.

Updates to Nondiscrimination Notice Provisions

- Content:
  - **Removes references to the notice containing the information and being made in the manner set out by the Assistant Secretary for Civil Rights**
  - Otherwise the same
- Publication
  - Prominently on the district or college's **website**
  - "**Each handbook or catalog**" instead of "each announcement, bulletin, catalog, or application form"

TASB™ RISK FUND

© 2020 Texas Association of School Boards, Inc. All rights reserved.

New Sexual Harassment Definition

"[C]onduct on the basis of sex that satisfies one or more of the following:

1. An employee of the recipient conditioning the provision of an aid, benefit, or service of the recipient on an individual's participation in unwelcome sexual conduct; [**quid pro quo**]
2. Unwelcome conduct determined by a reasonable person to be so severe, pervasive, **and** objectively offensive that it effectively denies a person equal access to the recipient's education program or activity; or [**hostile environment**]
3. "**Sexual assault**" as defined in [the Clery Act], "**dating violence**" as defined in the Violence Against Women Act [VAWA], "**domestic violence**" as defined in [VAWA], or "**stalking**" as defined in [VAWA]."

TASB™ RISK FUND

© 2020 Texas Association of School Boards, Inc. All rights reserved.
© 2020 Texas Association of School Boards, Inc. All rights reserved.

Reporting

TASB™ RISK FUND

© 2020 Texas Association of School Boards, Inc. All rights reserved.

Schools and colleges must promptly respond in a manner that is not deliberately indifferent when they have actual knowledge of sexual harassment in an education program or activity, against a person in the United States.

© 2020 Texas Association of School Boards, Inc. All rights reserved.
© 2020 Texas Association of School Boards, Inc. All rights reserved.

General Reporting

TASB™ RISK FUND

© 2020 Texas Association of School Boards, Inc. All rights reserved.

- Any person may report sex discrimination whether or not the person reporting is the alleged victim of the misconduct.

- He/she may report in person, by mail, by telephone, or by electronic mail, using the Title IX Coordinator's contact information.

TASB RISK FUND

© 2020 Texas Association of School Boards, Inc. All rights reserved.
© 2020 Texas Association of School Boards, Inc. All rights reserved.

- The report can also be made through other verbal or written means to the Title IX Coordinator.

- The report may also be made at any time, including non-business hours, using the telephone number, electronic mail address, or by mail to the office address listed for the Title IX Coordinator.

TASB RISK FUND

© 2020 Texas Association of School Boards, Inc. All rights reserved.
© 2020 Texas Association of School Boards, Inc. All rights reserved.

Filing a formal complaint

TASB™ RISK FUND

© 2020 Texas Association of School Boards, Inc. All rights reserved.

What is a formal complaint?

- A document filed by a complainant or signed by the Title IX Coordinator alleging sexual harassment against a respondent and requesting that the district or college investigate the allegation of sexual harassment.

TASB™ RISK FUND

© 2020 Texas Association of School Boards, Inc. All rights reserved.

Formal Complaint

Who is the complainant?

- A person who is alleged to be the victim of conduct that could constitute sexual harassment.
  - The complainant must be participating in or attempting to participate in an education program or activity of the district or college where he/she is filing the complaint.

Who is the respondent?

- A person who has been reported to be the perpetrator of conduct that could constitute sexual harassment.

TASB™ RISK FUND

© 2020 Texas Association of School Boards, Inc. All rights reserved.

Formal Complaint

3rd party reporters

- Are not authorized to file a formal complaint.

Title IX Coordinator's signed complaint

- A signed complaint by the Title IX Coordinator may trigger an investigation.

TASB RISK FUND

© 2020 Texas Association of School Boards, Inc. All rights reserved.

"Education Program or Activity"

- Includes locations, events, or circumstances over which the district or college exercised substantial control over both the respondent and the context in which the sexual harassment occurs.

TASB™ RISK FUND

© 2020 Texas Association of School Boards, Inc. All rights reserved.
© 2020 Texas Association of School Boards, Inc. All rights reserved.

Formal Complaint

- The formal complaint may be filed with the Title IX Coordinator in person, by mail, or by electronic mail, by using the information listed for the Title IX Coordinator or by another method permitted by the district or college.

© 2020 Texas Association of School Boards, Inc. All rights reserved.

Notice of Complaint

Upon receipt of a formal complaint, a district and college must provide written notice regarding:

- Grievance process, including any informal resolution process.
- Allegations of sexual harassment.
- Statement that the respondent is presumed not responsible for the alleged conduct and that a determination regarding responsibility is made at the conclusion of the grievance process.

© 2020 Texas Association of School Boards, Inc. All rights reserved.

Notice of Complaint

Notice must also:

- Inform the parties that they may have an advisor of their choice, who may or may not be an attorney.
- Inform the parties of any provision in the recipient's code of conduct that prohibits knowingly making false statements or submitting false information during the grievance process.

© 2020 Texas Association of School Boards, Inc. All rights reserved.

Consolidation

Formal complaint can be consolidated as to allegations of sexual harassment arising out of the same facts or circumstances:

- Against one or more respondents,
- By more than one complainant against one or more respondents, or
- By one party against the other party

TASB™ RISK FUND

© 2020 Texas Association of School Boards, Inc. All rights reserved.

Actual Knowledge

TASB™ RISK FUND

© 2020 Texas Association of School Boards, Inc. All rights reserved.

When does a district or college have actual knowledge of an allegation?

- K-12: A district is put on actual notice about sexual harassment, or allegations of sexual harassment, when a report is made to any employee.

- Colleges: Notice to the Title IX Coordinator or an official authority gives the school actual notice.

TASB™ RISK FUND

© 2020 Texas Association of School Boards, Inc. All rights reserved.

Best Practice Suggestion

Ensure your school or college complies with your policies and administrative procedures concerning sexual harassment reporting so **every** employee is clear as to his/her reporting duties and the correct persons to report to.

TASB™ RISK FUND

© 2020 Texas Association of School Boards, Inc. All rights reserved.

Response to a Complaint

- Must promptly contact the complainant to discuss supportive measures and explain to the complainant the process for filing a formal complaint.
- Must respect the complainant's wishes regarding the supportive measures.

TASB™ RISK FUND

© 2020 Texas Association of School Boards, Inc. All rights reserved.

Response to a Complaint

- Supportive measures are individualized services to restore and preserve equal access to education.

- Supportive measures are offered to the complainant or the respondent before and after the filing of a formal complaint or where no complaint is filed.

TASB™ RISK FUND

© 2020 Texas Association of School Boards, Inc. All rights reserved.

Supportive Measures

- Counseling
- Extensions of deadlines or other course-related adjustments
- Modifications of work or class schedules
- Campus chaperones
- Mutual restrictions on contact between the parties
- Changes in work or housing locations
- Leaves of absence
- Increased security and monitoring of certain areas of the campus

© 2020 Texas Association of School Boards, Inc. All rights reserved.

Emergency Removal

The district or college may remove a respondent from an education program or activity on an emergency basis if the entity:

- Undertakes an individualized safety and risk analysis.
- Determines that an immediate threat to the physical health or safety of any student or other individual arising from the allegation of sexual harassment justifies removal, and
- Provides the respondent with notice and an opportunity to challenge the decision immediately following the removal.

TASB™ RISK FUND

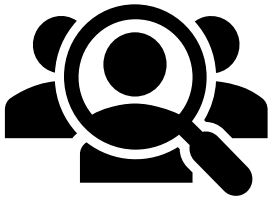
© 2020 Texas Association of School Boards, Inc. All rights reserved.

Complaint Policies and Procedures

TASB™ RISK FUND

© 2020 Texas Association of School Boards, Inc. All rights reserved.

Updates to the Complaint Process Provisions



- General requirement to have a process to resolve Title IX complaints remains.
- Adds detailed requirements for a **process to address formal complaints** of sexual harassment.
- Adds that the process only applies to **incidents that occur in the United States**.

TASB™ RISK FUND

© 2020 Texas Association of School Boards, Inc. All rights reserved.

Process for Formal Complaints

Your process must:

- Treat complainants and respondents equitably.
  - Provide remedies to a complainant where a determination of responsibility for sexual harassment has been made against the respondent.
  - Follow a grievance process before the imposition of any disciplinary sanctions against the respondent.
- Require objectivity when evaluating all relevant evidence.

TASB™ RISK FUND

© 2020 Texas Association of School Boards, Inc. All rights reserved.

Process for Formal Complaints

- Require an unbiased Title IX Coordinator, investigator, decision maker, or any person designated to facilitate an informal resolution process.

TASB™ RISK FUND

© 2020 Texas Association of School Boards, Inc. All rights reserved.

Training

Title IX Coordinators, investigators, decision makers, and any person who facilitates an informal resolution process must receive training on:

- The definition of sexual harassment
- The scope of the education program or activity
- How to conduct an investigation and complaint process, including hearings, appeals, and informal resolution processes, as applicable
- How to serve impartially

The training materials must be published online.

TASB RISK FUND

© 2020 Texas Association of School Boards, Inc. All rights reserved.

Process for Formal Complaints

- Include reasonably prompt time frames for the grievance process, appeals process, and informal resolution process.
- Presume the respondent's innocence until a determination regarding responsibility is made at the conclusion of the grievance process.
- Do not require, allow, rely upon, or otherwise use questions or evidence that constitute or seek disclosure of information protected under a legally recognized privilege, unless waived.

TASB™ RISK FUND

© 2020 Texas Association of School Boards, Inc. All rights reserved.

Process for Formal Complaints

- Describe the range of supportive measures available to both parties.
- Require an objective evaluation of all relevant evidence and provide that credibility determinations may not be based on a person's status as a complainant, respondent, or witness.
- Describe the range of possible disciplinary sanctions and remedies.

© 2020 Texas Association of School Boards, Inc. All rights reserved.

Process for Formal Complaints

- State the standard of evidence.
  - Preponderance of evidence
  - Clear and convincing evidence
- Include appeals procedures for both parties.
- May have additional procedures but the procedures must apply equally to the parties.

TASB™ RISK FUND

© 2020 Texas Association of School Boards, Inc. All rights reserved.

Informal Resolution Process

- Applies only to formal complaints if the incident is considered sexual harassment as defined by the regulations.
- District or college's option to offer, and parties must consent.
- Not available for employee harassment of a student.

TASB™ RISK FUND

© 2020 Texas Association of School Boards, Inc. All rights reserved.

Investigating Complaints

TASB™ RISK FUND

© 2020 Texas Association of School Boards, Inc. All rights reserved.

Investigation of a Formal Complaint

The investigator may be the Title IX Coordinator or a third party.

© 2020 Texas Association of School Boards, Inc. All rights reserved.

Investigation of a Formal Complaint

When investigating a formal complaint and throughout the grievance process, a recipient must:

- Ensure the district or college bears the burden of proof and the burden of gathering evidence.
- Provide an equal opportunity for the parties to present witnesses, including fact and expert witnesses, and other evidence.
- Not restrict the ability of either party to discuss the allegations under investigations or to gather and present relevant evidence.

TASB™ RISK FUND

© 2020 Texas Association of School Boards, Inc. All rights reserved.

Investigation of a Formal Complaint

- Provide the parties with the same opportunities to have others present during any grievance proceeding, including the advisor of their choice who may be an attorney.

- Provide written notice of the date, time, location, participants, and purpose of all hearings, investigative interviews, or other meetings, with sufficient time for the parties to prepare to participate.

- Provide both parties an equal opportunity to inspect and review any evidence obtained as a part of the investigation.

© 2020 Texas Association of School Boards, Inc. All rights reserved.

Investigation of a Formal Complaint

Create an investigative report that fairly summarizes relevant evidence and, at least 10 days prior to a hearing or other time of determination regarding responsibility, send to each party and the party's advisor for review and written response.

© 2020 Texas Association of School Boards, Inc. All rights reserved.

Hearings

TASB™ RISK FUND

© 2020 Texas Association of School Boards, Inc. All rights reserved.

Hearings at School Districts

No hearing process is required. However, written questions for the investigation are required and must afford each party the opportunity to:

- Submit written, relevant questions that a party wants asked of any party or witness,
- Provide each party with the answers, and
- Allow for additional, limited follow-up questions from each party.

TASB™ RISK FUND

© 2020 Texas Association of School Boards, Inc. All rights reserved.

Hearings at Colleges

- Decision maker may not be the Title IX coordinator or investigator.
- Participants may participate virtually, and parties may request to be in separate rooms.
- The hearing must be recorded.

© 2020 Texas Association of School Boards, Inc. All rights reserved.

Hearings at Colleges

- A party's advisor must cross-examine the other party and witnesses.
- The college must provide a party an advisor if the party does not have one.
- Decision maker must decide if a question is relevant.
- If a party or witness is not present for cross examination, then that person's statements may not be used.

TASB™ RISK FUND

© 2020 Texas Association of School Boards, Inc. All rights reserved.

Determination and Dismissal

TASB™ RISK FUND

© 2020 Texas Association of School Boards, Inc. All rights reserved.

Written Determination

The decision maker must issue a written determination regarding responsibility that includes:

- Identification of the allegations
- Description of the procedural steps taken
- Findings of fact supporting the determination
- Conclusions regarding the application of the district's code of conduct to the facts

TASB™ RISK FUND

© 2020 Texas Association of School Boards, Inc. All rights reserved.

Written Determination

- Appeals procedures
- Procedures and permissible basis for the complainant and respondent to appeal
- Written determination provided to both parties concurrently
  - Including determination regarding responsibility and any disciplinary sanctions

TASB™ RISK FUND

© 2020 Texas Association of School Boards, Inc. All rights reserved.

Formal Complaint: Mandatory Dismissal

The district or college must investigate the allegations in a formal complaint. However, the complaint must be dismissed if:

- It does not constitute the definition of sexual harassment,
- It did not occur in the district or college's program or activity, or
- It did not occur against a person in the U.S.

TASB RISK FUND

© 2020 Texas Association of School Boards, Inc. All rights reserved.

Formal Complaint: Permissive Dismissal

The district or college must investigate the allegations in a formal complaint. However, the complaint may be dismissed if:

- The complainant gives notification of his/her desire to withdraw their formal complaint,
- The respondent is no longer enrolled or employed by the district, or
- Other specific circumstances permit dismissal.

TASB RISK FUND

© 2020 Texas Association of School Boards, Inc. All rights reserved.

Appeals

TASB™ RISK FUND

© 2020 Texas Association of School Boards, Inc. All rights reserved.

Appeals Process: Mandatory Appeals

The district or college must offer both parties an appeal from a determination regarding responsibility and from the district or college's dismissal of a formal complaint or any allegation based on:

- Procedural issues that affected the outcome.
- New evidence that was not reasonably available at the time of the determination.
- The Title IX Coordinator, investigator, or decision maker having a conflict of interest or bias for or against the complainant or respondents.

TASB™ RISK FUND

© 2020 Texas Association of School Boards, Inc. All rights reserved.

Appeals Process: Permissive Appeals

District or college may offer both parties equally an appeal for other reasons.

TASB™ RISK FUND

© 2020 Texas Association of School Boards, Inc. All rights reserved.

Appeals Process: Notification

- District or college must notify the other party in writing when an appeal is filed and implement appeal procedures for both parties.

- Decision maker for the appeal cannot be the same person as the decision maker that reached the determination regarding responsibility or dismissal. Also, the decision maker cannot be the investigator or Title IX Coordinator.

TASB™ RISK FUND

© 2020 Texas Association of School Boards, Inc. All rights reserved.

Appeals Process

- Give both parties a reasonable, equal opportunity to submit a written statement in support of, or challenging, the outcome.
- Issue a written decision describing the result of the appeal and the rationale for the result.
- Provide the written decision concurrently to both parties.

TASB™ RISK FUND

© 2020 Texas Association of School Boards, Inc. All rights reserved.

Retaliation

No district, college, or other person may **intimidate**, **threaten, coerce,** or **discriminate** against any individual for the purpose of interfering with any right or privilege secured by Title IX because the individual has:

- made a report or complaint,
- testified,
- assisted, or
- participated or **refused to participate** in any manner in an investigation, proceeding, or hearing.

TASB™ RISK FUND

© 2020 Texas Association of School Boards, Inc. All rights reserved.

Recordkeeping

TASB™ RISK FUND

© 2020 Texas Association of School Boards, Inc. All rights reserved.

Recordkeeping

Must maintain for a period of seven years records of:

- Each sexual harassment investigation, including any determination regarding responsibility (includes any audio or audiovisual recording or transcript.)
- Any appeals and results.
- Any informal resolution and results.

TASB™ RISK FUND

© 2020 Texas Association of School Boards, Inc. All rights reserved.
© 2020 Texas Association of School Boards, Inc. All rights reserved.

Recordkeeping

- All materials used to train Title IX Coordinators, investigators, decision makers, and any persons who facilitate an informal resolution process.
- Supportive measures taken.

TASB™ RISK FUND

© 2020 Texas Association of School Boards, Inc. All rights reserved.
© 2020 Texas Association of School Boards, Inc. All rights reserved.

Pending Action on the Regulations

TASB™ RISK FUND

© 2020 Texas Association of School Boards, Inc. All rights reserved.

Lawsuits

Know Your IX (ACLU) v. Devos (D. Md. May 14, 2020)

Pennsylvania v. Devos (D.C. Cir June 4, 2020)

New York v. U.S. Department of Education (S.D.N.Y. June 4, 2020)

Victim Rights Law Center v. Devos (D. Mass. June 10, 2020)

TASB™ RISK FUND

© 2020 Texas Association of School Boards, Inc. All rights reserved.

Requests for Delay

Requests from American Council on Education, NSBA, and other national groups

TASB™ RISK FUND

© 2020 Texas Association of School Boards, Inc. All rights reserved.

Best Practice Suggestions for Title IX Compliance

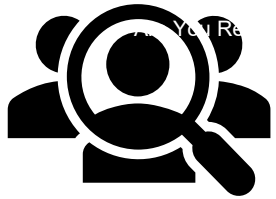
TASB™ RISK FUND

© 2020 Texas Association of School Boards, Inc. All rights reserved.

- Update policies and procedures concerning Title IX.
- Encourage and implement practices to promote equity in all aspects of your education program.
- Evaluate areas in your program that are not equitable and coordinate compliance with Title IX to correct this inequity.

TASB RISK FUND

© 2020 Texas Association of School Boards, Inc. All rights reserved.
© 2020 Texas Association of School Boards, Inc. All rights reserved.



- Identify your key Title IX team members, including your Title IX Coordinator, investigator, and decision maker. Also, ensure they are properly trained.

- Comply with your notice requirements for publishing the coordinator's contact information, non-discrimination policy, and grievance procedures.

- Understand and properly implement the procedure for formal complaints and the informal resolution process.

© 2020 Texas Association of School Boards, Inc. All rights reserved.
© 2020 Texas Association of School Boards, Inc. All rights reserved.

- Educate your staff on their duty to report all sexual harassment allegations and establish a clear reporting hierarchy.

- Ensure written determination is sent to all necessary parties in a timely manner, and inform the parties of their right to appeal and the procedure for doing so.

- Practice good recordkeeping, ensuring all requirements for retaining documents and evidence are met.

TASB RISK FUND

© 2020 Texas Association of School Boards, Inc. All rights reserved.
© 2020 Texas Association of School Boards, Inc. All rights reserved.

Questions?

TASB™ RISK FUND

© 2020 Texas Association of School Boards, Inc. All rights reserved.

Texas Association of School Boards

TASB College eLaw

TASB College eLaw is a collection of free higher education law resources for community college officials and the college community.

Coronavirus
Discrimination and Harassment
Governance
Elections and Tax
Business
Safety and Emergency Management
Personnel
Instruction

Coronavirus

Families First Coronavirus Response Act Employee Leave Provisions (pdf) summarizes the Families First Coronavirus Response Act Emergency Paid Sick Leave and the Emergency Family Leave Expansion provisions and associated guidance.

Responding to the Risk of Infectious Disease in the College Community (pdf) answers frequently asked questions that arise as community colleges are planning for, or engaging in, infectious disease response.

Postponing the May 2, 2020 Election (pdf) provides additional information for community colleges considering postponement of the May 2, 2020 election to November 3, 2020, pursuant to the

myTASB login

Watch for a new myTASB look for select members on July 15!

User ID

Password

Log In

Forgot user ID or password?
Request access?
Need help?

Tweets by @tasbcolleges

TASB Colleges
@tasbcolleges

Decision-makers, including elected trustees, at public Texas #comm_colleges may call TASB to get answers to legal questions ☎ #TXCommunityColleges

colleges.tasb.org/elaw

Personnel Issues During Disasters, Emergencies, and College Closings (pdf) is a Q&A answering frequently asked questions about compensating employees during college closings. The appendix to the Q&A includes four resolutions (docx) also available in an editable word format.

Texas Governor Suspends Certain Provisions of Open Meetings Act Due to Coronavirus (COVID-19) (pdf) provides a quick summary of the Texas Open Meetings Act (OMA) provisions temporarily suspended by the governor in response to the Coronavirus (COVID-19) disaster.

Sample Notice/Agenda: Board Meeting by Videoconference or Telephone Call During Disaster Due to COVID-19 (docx) is a sample posting that allows boards to conduct virtual board meetings in compliance with the governor's orders during the Coronavirus (COVID-19) disaster.

Discrimination and Harassment

Incorporating the New Title IX Regulations into Policy (pdf) provides an overview of the Title IX regulations recently issued by the U.S. Department of Education to address complaints of student and employee sexual harassment and related local policy considerations.

Title IX Regulations and State Law Side-by-Side (pdf) presents the Title IX regulations issued in May 2020 and the state law sexual harassment policy provisions to enable a comparison between the legal requirements.

Governance

Notice of Candidate Filing Period for November 3, 2020 Election (pdf) advises community colleges of the requirement to notify the public of the filing period for running for college trustee on November 3, 2020. The deadline to post this notice is June 18, 2020.

Trustees and Technology (pdf) explores various legal issues implicated by a trustee's use of technology, such as open meetings, records retention, public information disclosure, information security, social networking, and cyberharassment.

Regular Meeting Notice/Agenda Sample (docx) is a sample posting that gives boards maximum flexibility within the bounds of the Texas Open Meetings Act (OMA) notice requirements.

Emergency Meeting Notice/Agenda Sample (docx) provides a sample emergency posting that complies with OMA notice requirements.

Embed View on Twitter

© 2020 Texas Association of School Boards, Inc. All rights reserved.

Contact Us

Charli Searcy
Legal Liability Risk Consultant
charli.searcy@tasb.org

Amy Magee
Director of TASB Community College Services
800.580.1488
colleges@tasb.org | @tasbcolleges

TASB RISK FUND

© 2020 Texas Association of School Boards, Inc. All rights reserved.
© 2020 Texas Association of School Boards, Inc. All rights reserved.