



**DIAGNOSE CTE**  
Research Project

**A case study-discussion arising from NFL settlement using  
race as a factor for payouts as to who was diagnosed with  
cognitive impairment**

5<sup>th</sup> Annual Virtual CTE Conference  
October 21-22, 2021

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# Biography & Research Background

USFL



CFL



NFL



NIA K01 award: “Accelerated Cognitive Aging and Mild Traumatic Brain Injury among Former College and Professional Football Players: Psychosocial and Neurocognitive Risk and Protective Factors.”

NIA R13 conference award: “Black Male Brain Health & Alzheimer’s Disease: Life Course Perspectives.”

GSI award: “A Mixed Methods Approach to Design an Intervention to Promote Screening and Treatment of Sleep Apnea among former college football football players and NFL athletes.”

Author of “[Not For Long: The Life and Career of the NFL Athlete](#)”  
([Oxford Press](#))

Contributor on the LeBron James HBO documentary “[Student Athlete](#).”



**NFL concussion lawsuit payouts reveal how racial bias in science continues**

**United States of America District Court – Eastern District of Pennsylvania**

**IN RE: National Football League Players Concussion Injury Litigation**

No. 2:12-md-02323-AB

MDL No. 2323

Hon. Anita B. Brody

Relates to NFL parties' appeal of qualifying diagnosis and claim determination for settlement class member Najeh Davenport

## Introduction - Najeh Davenport

- On November 21, 2019, Najeh Davenport, a former NFL Player and Class Member, filed a claim for benefits under the Amended Class Action Settlement Agreement. Finding that a qualified MAF Physician adequately performed Mr. Davenport's neuropsychological assessment, the Claims Administrator determined that Mr. Davenport merited an award for a Level 1.5 Neurocognitive Impairment.

# Najeh Davenport

- The NFL Parties, subsequently filing an Appeal, argued that Mr. Davenport's neuropsychological assessments were invalid, and that factors other than neurocognitive impairment may have been responsible for his functional impairment.
- At the request of the Special Master, an Appeals Advisory Panel Reviewer and Consultant both reviewed the Appeal, and separately recommended that it be granted, though for different reasons. In weighing all the evidence presented, the Appeal is granted in part, and remanded for further proceedings.

# Facts and Procedural Background

- Mr. Davenport received a Qualifying Diagnosis of Level 1.5 Neurocognitive Impairment on November 5th, 2019. Dr. Julie Schwartzbard, a Qualified MAF Physician, certified the diagnosis, while MAF neuropsychologist Dr. Charles J. Golden provided the relevant assessments. On December 12, 2019, the Claims Administrator issued a Notice of Monetary Award Claim Determination, approving the claim.
- The NFL Parties appealed the Level 1.5 Neurocognitive Impairment diagnostic assessment on January 13, 2020, arguing that the Claims Administrator was clearly erroneous in adopting it. According to the NFL Parties, Mr. Davenport's clinicians performed an invalid assessment, as they failed to apply **demographic adjustments** to the assessment scores and offered insufficient consideration to the possibility of medication side effects.

## Facts and Procedural Background

- On April 4, 2020, an AAP Consultant found that, while Mr. Davenport’s assessment was facially valid, the lack of demographic adjustments “clouds valid determination of the presence of cognitive impairment,” noting that had appropriate **racial adjustments** been applied, Mr. Davenport would not qualify for Level 1.5 Neurocognitive Impairment. The Consultant further added that “there is high probability that medication side-effects account for part or all the player’s functional impairments.”

## Facts and Procedural Background

On April 12, 2020, an AAP Reviewer concurred with the finding against Level 1.5 Neurocognitive Impairment, but on different grounds. The Reviewer concluded that Mr. Davenport’s functional abilities were generally consistent with scores of at least 1.0 for the CDR categories of Community Affairs, Home/Hobbies, and Personal Care.” However, the Reviewer concluded reversal was warranted given the absence of full **demographic adjustments**. On that basis, the AAP Reviewer explained that the “lack of confirmation of the degree of dysfunction by a valid neuropsychological evaluation is not generally consistent with the Settlement Agreement’s criteria,” although “it is clear that this player has both cognitive and functional impairments.”

# Facts and Procedural Background

- Since the AAP Consultant, as well as NFL Parties, noted that Dr. Golden did not provide a rationale for deciding against the use of racial adjustments during the testing regimen, the Claims Administrator directly corresponded with Dr. Golden and inquired as to his rationale for not using a “full demographic correction for the ACS norms as recommended in the BAP Clinician’s Guide.” Dr. Golden responded: **“I remain unsure what you are talking about. He was done using standard norms like everyone else. Using different racial standards is indeed discriminatory and illegal. We stand by our scores and will gladly defend them in any legal proceeding.”** The Claims Administrator shared that response with the AAP Consultant, who *“noted that it appeared that Dr. Golden was not complying with the language and intent of the settlement around demographic adjustments and therefore avoiding responding to our inquiry.”*



NFL families seek to end  
'race-norming' in \$1bn  
concussion settlement  
*The Guardian, May 2021*

Former Washington running back Ken Jenkins, 60, and his wife Amy Lewis on Friday delivered 50,000 petitions demanding equal treatment for Black players to senior US district judge Anita B Brody in Philadelphia, who is overseeing the massive settlement. Former players who suffer dementia or other diagnoses can be eligible for a payout.

## *N.F.L. Concussion Settlement Will Drop Race-Based Assessment for Payouts*

Black players dementia claims were being measured differently from white players.' The change could prompt a reassessment of hundreds of previously denied cases. *NYTimes June 2021*

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The N.F.L. said it would scrap the use of a disputed race-based method of evaluating dementia claims made by former players in the league's concussion settlement and pledged to evaluate for evidence of bias the hundreds of claims that had already been filed.

Dr. Allen Sills, right, performed a physical and mental evaluation of Jerry Eckwood, a former N.F.L. player, in 2010.



**Former NFL players ask DOJ to probe concussion settlement over ‘race-norming’** *Washington Post*  
*August 2021*

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A group of retired NFL players walk to the entrance to the Department of Justice to deliver a formal complaint over allegations of discrimination in the NFL concussion settlement.



# N.F.L. Concussion Settlement Will Drop Race-Based Assessment for Payouts.

*NYTimes, March 2021*

- As it has in previous responses, the N.F.L. denied that the use of the race-based norms was discriminatory. But in a statement Wednesday, the league said it was committed to eliminating the use of those norms and finding race-neutral alternatives with the help of specialists in neuropsychology. While those new measures have not been identified, the decision to review old dementia claims under new assessment tools could mean that potentially hundreds more players will receive payments from the settlement.
- “Everyone agrees race-based norms should be replaced, but no off-the-shelf alternative exists, and that’s why these experts are working to solve this decades-old issue,” the league said. “The replacement norms will be applied prospectively and retrospectively for those players who otherwise would have qualified for an award but for the application of race-based norms.”

# **N.F.L. Asked to Address Race-Based Evaluations in Concussion Settlement**

*NY Times, May 2021*

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Judge Anita B. Brody ordered a mediator to look into concerns about the league's use of separate scoring curves — one for Black athletes, another for white players — used by doctors to evaluate dementia-related claims that retired players say “explicitly and deliberately” discriminated against hundreds if not thousands of Black players.

Najeh Davenport



## Judge Brody Sets October 15 Deadline for Race-Norming Resolution

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U.S. District Court Judge Anita Brody has ordered all sides to submit to her court by October 15th a settlement on the highly-publicized race-norming issue. In her written order last Friday, she added that “...the parties are close to reaching a proposed resolution of the race-norming issues.” She also wrote that after the proposed settlement agreement resolving these issues is filed with her court that she will announce a procedure for soliciting input from those of you affected by this issue.



## Judge Brody Sets October 15 Deadline for Race-Norming Resolution

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Judge Brody last March wrote that her court “remains concerned about the race norming issue”. She ordered the NFL and Chris Seeger, the class attorney for the plaintiffs, to “address the concerns relating to the race-norming” before a Magistrate who has handled previous disputes in the Settlement Program.

Mr. Seeger apologized for the pain that race-norming has caused black alumni and their families.



## Trust and the historical relationship BM have with American institutions

- The legacy of racism on Black American (BA) participation in biomedical research and clinical settings has been well established (Gamble, 1993; Corbie-Smith et al., 1999; Hansen et al., 2016). Perhaps the most notable example of well-documented racial discrimination in medical research is the 1932 U.S. Public Health Service Tuskegee Syphilis Study on Untreated Syphilis in the Negro Male.
- Concerns about the disproportionate impact of the Coronavirus / COVID pandemic experienced by the AA community have done little to assuage such distrust
- Healthcare system, educational system, penal system, judicial system, & the **NFL**

# Black male health disparities

Compared to non-Hispanic White men, African American men are

- 30% more likely to die from heart disease
- 60% more likely to die from stroke
- AIDS is almost seven times as prevalent
- 9 times more likely to die from AIDS
- HIV is one of the top 10 killers of African American Men
- Twice as likely to need treatment of sever kidney disease related to diabetes
- Rates of prostate cancer and related deaths in African American men are among the highest in the world
- One overarching factor contributing to these disparities is that minority men are less likely both to get preventative care and to have access to quality health care when they get sick. (Joint Center for Political and Economic Studies, 2004)

# Papers, Papers, Papers

- Intradisciplinary
  - working within a single discipline
- Multidisciplinary
  - scientists from different disciplines working together, each drawing on their disciplinary knowledge
- Interdisciplinary
  - integrating knowledge and methods from different disciplines, using a real synthesis of approaches
- Transdisciplinary
  - creating a unity of intellectual frameworks beyond the disciplinary perspectives





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