IN THE UNITED STATES DISTRICT COURT

FOR THE WESTERN DISTRICT OF WISCONSIN

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ANTHONY PORTER,

OPINION AND ORDER

Plaintiff,

11-cv-749-bbc

v.

CYNTHIA M. THORPE,
DR. DALIA D. SULIENE,
STEVE HELGERSON and
JENNIFER NICKEL,

Defendants.

- -

In this civil action under 42 U.S.C. § 1983, plaintiff Anthony Porter contends that defendants violated his Eighth Amendment right to be free from cruel and unusual punishment by failing to provide him adequate medical treatment for an infection of his eyes and ears. Plaintiff has filed a motion for appointment of counsel, dkt. #33, a motion for court assistance to obtain names of expert witnesses, dkt. #38, and a motion to supplement the first amended complaint. Dkt. # 42. In addition, defendants have filed a motion for summary judgment, dkt. #48, that is ready for decision.

I will deny all of plaintiff's motions. Appointment of counsel is not warranted because plaintiff has shown an adequate ability to litigate his case. The motion for court assistance is unnecessary and plaintiff has not identified any reason to amend his complaint. I will grant defendants' motion for summary judgment because in light of the extensive

medical treatment that plaintiff received for his eyes and ears, no reasonable jury could find that defendants consciously disregarded a substantial risk to his health. Plaintiff's argument that defendants should have given him additional tests or treatments suggest that at most they were negligent and that is insufficient to establish deliberate indifference.

I find the following undisputed facts from the parties' proposed findings of fact. I note that plaintiff included additional facts in some of his responses to defendants' proposed findings that expanded upon defendants' proposed facts without disputing them. Although this was contrary to the court's procedures, I accepted as fact the additional proposals where they clarified defendants' sparse proposed facts in a useful and direct fashion. E.g., Plt.'s Resp. to Defs.' PFOF ¶¶ 65, 67. However, I rejected plaintiff's additional facts when they were not responsive or were irrelevant. E.g., Plt.'s Resp. to Defs.' PFOF ¶¶ 61, 62, 122.

UNDISPUTED FACTS

A. Parties

At all time relevant to this action, plaintiff Anthony Porter was a prisoner incarcerated at the Columbia Correctional Institution in Portage, Wisconsin. Defendants were employees of the Wisconsin Department of Corrections. Defendants Dalia Suliene, Steven Helgerson and Jennifer Nickel were employed in the Health Services Unit at the Columbia Correctional Institution. Suliene was a physician and Helgerson and Nickel were registered nurses. Defendant Cynthia Thorpe was a health services nursing coordinator.

B. Health Services Unit Procedures

The Health Services Unit has procedures that allows prisoners to submit non-emergency health service requests daily. The requests are documented, triaged for immediacy of care and acted on by qualified health professionals. Non-emergency requests are reviewed and triage decisions are made daily according to health care needs, following approved protocols and without limitation by facility resources.

In an emergency situation, an inmate is to notify an officer that he needs to be seen by the Health Services Unit. If the inmate thinks he needs to be seen right away, he may go to "sick call," which is generally scheduled five days a week. During sick call, the inmate will be seen by a nurse to determine whether he should be seen by a doctor. Qualified health care professionals assess the situation, provide treatment and schedule followup appointments according to approved protocols and clinical priorities.

C. Medical Background

Methicillin-resistant staphylococcus aureus, or MRSA, is a bacteria that is resistant to a broad spectrum of antibiotics. MRSA infections often look like bumps that are red, swollen and painful. The bumps can develop into abscesses that may need to be incised and drained. An MRSA infection can penetrate the skin and cause life-threatening infection in bones, joints, the blood stream, the heart and the lungs. MRSA is diagnosed from a culture taken from the wound, the blood, urine or sputum. The laboratory results will indicate which antibiotic is appropriate to treat the infection.

D. Plaintiff's Relevant Medical Care

On January 5, 10, 11 and 12, 2010, plaintiff submitted health service requests in which he complained that his eyes were itching and his eye lids and eyes were discolored. Members of the health services staff responded to each request, noting that plaintiff was scheduled for appointments with Dr. Suliene or the optometrist. Defendant Helgerson wrote the response to plaintiff's January 10 request.

On January 12, 2010, Dr. Suliene reviewed plaintiff's recent health service requests and saw him for an appointment. In addition to addressing unrelated health complaints, she ordered that plaintiff be seen by an optometrist for his complaint of itchy eyes and she ordered artificial tears. The optometrist visit was scheduled for February 4, 2010.

On February 4, 2010, plaintiff's optometrist appointment had to be canceled and rescheduled. On February 7, 2010, plaintiff submitted a health service request, stating among other things that he had not seen an eye doctor yet, his eyes were almost swollen shut and his eye drops were gone. Helgersen responded on February 8, noting that a sick call appointment would be made.

On February 9, 10 and 11, 2010, plaintiff submitted health service requests in which he said that his sight was affected and he could not see from one side of his cell to the other. A nurse responded on February 10 and 11, 2010, noting that an appointment was scheduled. On February 11, 2010, a nurse noted in plaintiff's chart that officers had observed that his eyes "look like he's been crying," an optometrist appointment had been scheduled for February 18, 2010, and the optometrist should keep the appointment and

make plaintiff a priority. On February 12, 2010, plaintiff filed an "interview/information request" form asking to see an optometrist. A nurse responded stating that plaintiff should see his previous responses informing him that an optometrist appointment had been scheduled.

On February 14, 2010, plaintiff submitted two health service requests, stating that his eyes, eyebrows and ears itched "beyond explanation" and his ears were cracked, split and bleeding. He said that his ears had been cracked for more than a week and had not healed despite his use of antibiotic ointment. Suliene responded that "orders are issued for eye [prescriptions] from opto[metry] clinic." A nurse responded to the second request and referred plaintiff to Suliene's prior response.

On February 15, 2010, plaintiff submitted a health service request, stating that health services nurse Darci Burreson would not examine him while she was passing out medication. The same day, Burreson responded, saying that she did not see anything wrong with plaintiff's ear and his eyes did not seem excessively puffy. She informed him that he had an appointment scheduled for his eyes and that while she is passing out medications she is not there to see prisoners for other reasons.

On February 16, 2010, plaintiff submitted a health service request, stating that his eyes were itching, burning and unable to focus. He also complained about his treatment. A response noted that an optometrist appointment was scheduled. Plaintiff submitted another request about his eyes and unrelated problems on February 17, 2010. That day, he also saw defendant Nickel, who looked at his eyes and ears.

On February 18, 2010, plaintiff was seen by the optometrist. The optometrist diagnosed eyelid dermatisis (a common skin disease of the eyelids). The optometrist prescribed cold compresses, Bacitracin (a topical steroid ointment) to be spread on plaintiff's eyelids and an anti-inflammatory ointment.

On March 1, 2 and 3, 2010, plaintiff submitted three health service requests about his eyes, ears and groin. He said that his ears and eyes were infected and draining and that his genitals were infected, draining and sensitive to washing. Each time, a nurse responded stating that plaintiff was scheduled to see a physician. Defendant Nickel wrote the response to plaintiff's request on March 2.

On March 10, 2010, Dr. Suliene saw plaintiff and discussed with him all of the medical concerns he raised at the appointment. Her progress notes do not reflect any discussion about his ears, eyes or genitals, but in a subsequent health service request, plaintiff wrote that he told Suliene about his ears during this appointment. (Plaintiff also asserts in his response to defendants' proposed finding of fact that Suliene refused to address his ulcerated and draining ears, but he offered no evidence to support that assertion, such as his sworn affidavit to that effect.) Dr. Suliene did not take any cultures during this visit.

On March 16, 2010, plaintiff submitted a health service request about his eyes and other matters. Dr. Suliene saw plaintiff on his unit on March 18 to assess his condition. She noted that his eyes were not swollen that day. On March 21, 2010, plaintiff submitted a health service request complaining about Dr. Suliene's treatment on March 18. He wrote that he tried to ask her about the circles around his eyes and that she "yelled and screamed"

at him. Helgerson responded to plaintiff's request and noted that plaintiff could be seen for sick call if he wanted. (It does not appear that he did so.)

Around March 26, 2010, plaintiff submitted an "interview/information request" to Lori Alsum, the health services manager. He asked to be tested for vitamin D deficiency because he had dark circles around his eyes. In her response, Alsum noted that a test had ben ordered on February 25 and he would be called for the test if it had not been done already. On April 7, 2010, plaintiff submitted a health service request asking, in relevant part, whether Dr. Suliene could issue anything to remove the dark circles around his eyes. Two days later, Suliene responded, saying that there was no treatment for circles under his eyes.

On April 15, plaintiff submitted a health service request, asking the health service unit to reissue Betasept (an antiseptic scrub) for the itching and asking health services to "prescribe something" for the itching. He checked the box indicating that he did not want to be seen. Health Services Unit staff responded the next day, reissued the Betasept and instructed plaintiff that he needed to be seen before a prescription could issue.

On April 18, 2010, plaintiff submitted a health service request asking for a doctor to see his ear infection, among other matters. A sick call appointment was scheduled and plaintiff was seen by nursing staff the next day. He came in with gauze wrapped around his ears and his ears covered in ointment. In his progress notes, the nurse noted a small 2-3 millimeter laceration on the crease behind plaintiff's right ear, a small 2-3 millimeter laceration above his left eyebrow and ecchymosis (blood released under the skin similar to

a bruise) around both eyes. The nurse noted no active bleeding, no signs of infection and no drainage. The nurse told plaintiff he did not need to apply the ointment to the entire outer ear and it was healing well.

On April 19, 20 and 21, 2010, plaintiff submitted health service requests, asking to see a physician and complaining about his ears and eyes, itching on his hands and arms and his treatment on April 18. Staff responded, indicating that a sick call appointment and an appointment with the physician had been made.

On April 26, 2010, Dr. Suliene saw plaintiff for fissures (breakages in the skin) on his ears. Plaintiff stated that he had itching in his eyes and behind his ears. Dr. Suliene diagnosed dermatitis and fissures. She prescribed zinc oxide ointment to put on plaintiff's ear lobes and a Medrol dose pack (an oral steroid anti-inflammatory) for eczema or dermatitis. She also ordered Certirizine (an antihistamine) to help with plaintiff's itching.

On April 27 and 28, 2010, plaintiff submitted health service requests asking to be sent to a dermatologist for the itching. Dr. Suliene responded, stating that she had just seen him on April 26 and noted her prescription of the Certirizine. On April 29, plaintiff submitted two more health service requests, saying that he had not received the medication she had prescribed. On May 1, 2010, Helgerson responded to one of these requests, noting that a doctor's appointment had been scheduled. On May 3, 2010, Suliene responded to the second request, saying that she would check plaintiff's ears later that day. She also noted that the prescription for Certirizine had not arrived from the pharmacy, so until it arrived she gave plaintiff a prescription for chlorpheniramine and refilled his Medrol dose pack.

(Defendants contend and plaintiff denies that Dr. Suliene saw him on May 3 for a followup of his eye and ear complaints.)

On May 6, 2010, plaintiff was seen by a Health Services Unit nurse for complaints of finger pain. His finger was sore and swollen and there was a "pocket" of pus under his fingernail and a small dark area in the center. After the nurse conferred with Dr. Suliene, plaintiff was sent to the emergency room at Divine Savior Healthcare for evaluation and treatment of his finger. At the emergency room, Dr. Thomas Jackson cleaned the tip of plaintiff's finger and extracted some of the pus to be cultured. He found no foreign bodies and the wound was cleansed and dressed. The emergency room records do not indicate any problem with plaintiff's eyes or ears.

On May 7, 2010, Dr. Suliene saw plaintiff about his eyes. Plaintiff did not report any new symptoms or complications so she advised him to continue with his current treatment and prescriptions.

On May 10, 2010, the emergency room at Divine Savior Healthcare notified the Health Services Unit that the culture taken from under plaintiff's fingernail was positive for MRSA. The information was also faxed to the Health Services Unit. Defendant Nickel answered the phone call, reviewed the fax and forwarded it to Dr. Suliene. That same day, Suliene reviewed the fax and ordered plaintiff to be started on Doxycycline, an antibiotic. Suliene did not order infectious disease precautions because the finger had already been cleansed and dressed, the wound was a small area and there were no signs of infection in the finger, so the risk of spreading the infection to others was low.

On May 15, 18, 19, 20 and 22, 2010, plaintiff submitted health service requests and an interview/information requests about his eyes and ears. In response, plaintiff was seen on sick call and an appointment was scheduled with Dr. Suliene. Nickel wrote the response to plaintiff's May 20 request. Nickel also responded to plaintiff's May 22 request by going to his housing unit and seeing him that day. She noted that plaintiff had a wound on the inside of his left ear lobe and that it appeared red and swollen. Nickel did not obtain a culture. After cleaning his ear with Certaklenz (a gentle soap-free skin cleanser) and applying triple antibiotic to the wound, she applied sterile gauze because plaintiff was worried about drainage. She also told plaintiff that she would place him on the doctor's schedule.

On May 23, 2010, plaintiff filed a health service request about his ears. Helgerson responded the next day, saying that he had scheduled a sick call appointment. On May 24, 2010, Suliene saw plaintiff for a followup of the MRSA infection in his index finger. She found that the wound had healed and there were no signs of infection. Plaintiff did not report any further concerns that day.

Plaintiff filed health service requests and interview/information requests relating to his ears and MRSA infection on May 25, 27, 28 and 30, 2010, and June 1, 2 and 7, 2010. In the requests from May 25, 28 and 30, plaintiff complained that the infection was now down in his ears and his eardrums. In the requests from May 27, 28 and 30, he asked for his blood to be tested for allergies and for MRSA. On each occasion, staff responded to these requests by noting that sick call appointments were scheduled and a doctor's

appointment was scheduled for 1-3 weeks. Helgersen wrote the responses to plaintiff's requests from May 27, 28 and 30. (The record does not reflect whether these sick call appointments occurred. Defendants allege and plaintiff denies that Dr. Suliene saw plaintiff on June 7, 2010.)

On June 1, 2010, Dr. Suliene requested approval for plaintiff to undergo a dermatology consultation at the University of Wisconsin Hospital and Clinics. The request was approved on either June 2 or June 7, 2010.

On June 8, plaintiff submitted a health service request, complaining about drainage from his ears and a headache. Staff responded stating that a sick call appointment had been scheduled. At 3:21 a.m. on June 9, 2010, a security officer from plaintiff's unit called the Health Services Unit and said that plaintiff was holding his head and moaning as if he had an earache. The nurse instructed the officer to ask plaintiff whether he wished to be seen. When asked, plaintiff refused and said that he would lie down and try to sleep. Sometime later that day, plaintiff filed two more health service requests. At 10:00 a.m., plaintiff was seen by a nurse from the Health Services Unit. The nurse noted that both ears had drainage and the left ear was blocked completely. Plaintiff was sent to the emergency room at Divine Savior Healthcare to have his ears evaluated and treated.

The physician at the emergency room, Dr. Charles Boursier, gave plaintiff a diagnosis of external otitis (inflamation of the ear canal), otitis media (inflamation of the middle ear), and possible developing chondritis (inflamation of cartilage). Dr. Boursier did not indicate that plaintiff had any evidence of an MRSA infection. He ordered a ten-day prescription for

500 milligrams of Cipro (an antibiotic). He also ordered that plaintiff's ears be cleaned with diluted hydrogen peroxide, treated with Bacitracin ointment and covered with a nonadherent bandage that should be changed twice daily. Boursier also recommended that plaintiff follow up with an ear nose and throat specialist for a recheck within seven to ten days. Suliene Aff., Ex. A, dkt. #54-1, at 54; Plt.'s Aff., Ex. 10, dkt. #61-10.

When plaintiff returned to the institution, Dr. Suliene entered orders for the antibiotics and the cleaning. She did not order a culture of the drainage in plaintiff's ear or order an ENT appointment. (Plaintiff asserts that he "received no antibiotic," Plt.'s Resp. to Defs.' PFOF ¶ 116, but the June 9 prescription was recorded in plaintiff's medical records. Also, in a health service request filed on June 10, 2010, plaintiff complained that "the antibiotics are upsetting my stomach." Suliene Aff., dkt. #54, at 166. Plaintiff's vague assertion lacking any temporal context is not specific enough to establish a genuine dispute.)

On June 10, 2010, plaintiff submitted a health service request, asking for moisturizer for his ears and eyes and noting that the antibiotics were upsetting his stomach. A nurse responded, telling plaintiff that a followup appointment was scheduled with the physician, that he should not use any irritants until seen by the physician and that he should be sure to take his antibiotics.

On June 13, 2010, plaintiff submitted a health service request, complaining of pain on the left side of his face and head and in both ears. On June 14, Dr. Suliene saw plaintiff for a followup with respect to his ear canals. Both ear canals and earlobes were affected by dermatitis. His ears were filled with debris and pus. Dr. Suliene ordered nursing staff to

flush plaintiff's ears with diluted peroxide and warm water and ordered Tobradaex (antibiotic ear drops). She also ordered cultures be taken from both ears. (Plaintiff asserts that Dr. Suliene "refused" to culture the drainage, Plt.'s PFOF ¶ 43, dkt. #66, but he has no evidence for this conclusory allegation and it is contradicted by the progress notes. Plt.'s Resp. to Defs.' PFOF ¶ 43 (citing Suliene Aff, dkt. #54-1, at 20.)) When nurses attempted to carry out Dr. Suliene's orders later that day, plaintiff refused to be seen.

On June 15, 2010, plaintiff submitted a health service request, asking what actions would be taken with respect to his ears. In the response, a nurse stated that plaintiff should quit refusing appointments and reminded him that he was responsible for keeping his appointments. On June 17, 2010, plaintiff again refused to have his ears flushed as ordered by Dr. Suliene. On June 19, 2010, plaintiff submitted a health service request, asking what was wrong with his ears and why they needed to be flushed. Helgerson responded, saying that the flushing was to assist with the healing process and that an appointment had been made with Dr. Suliene. Helgerson noted in plaintiff's medical chart that plaintiff refused to have his ears flushed again on June 19, 20 and 21, 2010.

On June 21, 2010, Dr. Suliene saw plaintiff to recheck his ears. (Suliene avers that plaintiff's ears appeared much better, the rash around his earlobes was resolved and the infection inside his ears appeared to be cleared up. Plaintiff states that the rash was not resolved and his ears remained infected. Plt.'s Resp. to Defs.' PFOF ¶¶ 138, 139, dkt. #65. Plaintiff's response cites contemporaneous interview and health service requests in which he complained about the rash and his swollen eardrum. As defendants point out, these

documents are inadmissible hearsay, Fed. R. Evid. 801, 802, but plaintiff signed his proposed findings of fact as if it were an unsworn declaration and I assume that plaintiff would testify consistently with his contemporaneous reports.) Plaintiff refused to allow Dr. Suliene to look inside his ears and left the room before she could do so. Because plaintiff continued to refuse to be seen by the Health Services Unit staff, Suliene canceled the ear flushing order and the cultures from his ears were not obtained.

Also on June 21, 2010, plaintiff submitted an interview/information request to Alsum, asking her to come see the greenish drainage coming from his ears, stating that he had pleaded with her and with Dr. Suliene to help him, and accusing them of neglect and deliberate indifference. On June 22, 2010, Alsum responded, stating that plaintiff had refused to let Dr. Suliene evaluate his ears on June 21, 2010. Alsum noted that plaintiff had been treated with Cipro and with Tobradex ear drops and she instructed plaintiff to submit a health service request if he wanted to be seen before his next scheduled appointment.

On June 29 and 30, 2010, plaintiff submitted health service requests relating to his ears. Health Services Unit staff responded on June 30, saying that an appointment was scheduled. On July 2, 2010, Dr. Suliene saw plaintiff for complaints of pus in his ears. She checked both ears and saw no pus-like drainage but did see debris in his ears. She ordered Debrax (an ear wax removal kit) for plaintiff to use to remove the debris from his ears. She also noted that his earlobes were swollen and the skin around his eyes showed dark circles.

On July 15, 2010, Dr. Suliene saw plaintiff for a recheck of his ears. Plaintiff had cotton plugs in each ear. The skin around his earlobes was oily from ointment and plaintiff

was experiencing continued irritation. Dr. Suliene noted in the medical record that a dermatologist consultation had been approved and scheduled previously. During this visit, plaintiff allowed Dr. Suliene to obtain cultures from both ears. She ordered disinfecting eardrops for plaintiff. Dkt. #54-1, at 21.

On July 15, 16 and 17, 2010, plaintiff submitted health service requests, complaining about the rash on his ears and draining from his ear. He also stated that a rash had broken out on his face, chest, neck, hand, penis and groin and that he had a fever and night sweats. In response to the July 15 and 16 requests, Helgerson informed plaintiff that a sick call appointment had been scheduled. On July 18, 2010, Helgerson responded to the July 17 request, stating that Helgerson had seen plaintiff shortly after his submission of the request.

During the July 17 appointment, Helgerson observed that plaintiff's face and eyelids were slightly swollen but he was not in acute distress. (Helgerson avers that plaintiff's genitalia appeared normal. Plaintiff states that his penis, scrotum, chest, neck and face were covered with painful pustules. Plt.'s Resp. Defs.' PFOF ¶ 159, dkt. #53. Again, plaintiff supports his assertion only with his contemporaneous statements in the health service requests, id. (citing Suliene Aff., dkt. #54-2, at 186-87), but his proposed findings were signed as a declaration and I assume that plaintiff would testify similarly.) Helgerson provided plaintiff Diphenhydramine (an allergy medication) according to Health Service Unit protocol. (Defendants allege that about an hour later, plaintiff reported that his symptoms had decreased considerably and he was feeling better. However, plaintiff denies speaking with Helgerson again and he reported in a health service request on July 18 that

his condition was worsening each day.)

Plaintiff submitted health service requests about his eyes on July 18 and 19, 2010. He stated that his eyes were bloodshot, draining continuously, his vision was poor and he had a "white spot" on each iris.

On July 19, 2010, Dynacare Laboratories called with results from the cultures that Dr. Suliene had obtained from plaintiff's ears on July 15. Dynacare informed Health Services Unit staff that MRSA was present in plaintiff's right ear. Infection control precautions were initiated and plaintiff's housing unit was notified. Plaintiff was prescribed Minocycline, an antibiotic.

On July 20, 2010, plaintiff submitted a health service request, asking about the infection control precautions. He wanted to know the reason for the precaution, why he was a risk to other inmates and who signed the form. That day, a nurse visited plaintiff on his unit and informed him about the MRSA precautions and protocol. She gave him sterile bandages, gauze and tape for his right ear and asked whether he had started the oral antibiotic that Dr. Suliene had prescribed. When plaintiff responded that he had not, she urged him to start the antibiotic and finish it according to the directions and explained the importance of doing so. Plaintiff also complained about eye redness but denied any pain at that time. The nurse observed that plaintiff's eyes were completely red, with the exception of a small round white spot in each eye. She made an appointment for plaintiff with Dr. Suliene on July 21, 2010.

On July 21, 2010, Dr. Suliene contacted Dr. Reisner at University of Wisconsin

Dermatology and Dr. Maki at Infectious Disease at the University of Wisconsin to consult with them about plaintiff. She believed that the swelling in his earlobes was increasing and not showing improvement and wanted to discuss with them whether plaintiff's symptoms were dermatological or infectious. After consulting with the specialists, she decided to send plaintiff to the emergency room for further evaluation.

The same day, plaintiff was admitted to the emergency room at the University of Wisconsin Hospital, where he was evaluated, underwent numerous tests and received a blood transfusion. His intake examination noted "small papulopostules diffusely in the beard area," "an ill-defined dull red plaque with scale" on his chest, penis, scrotum and inguinal folds and "several excoriations on the scrotum and penis." Suliene Aff., dkt. #54-1, at 65. One physician wrote that plaintiff had "an eczamatous eruption with some fissuring and serious drainage on the face, ears, chest and genital region. This likely represents superinfected atopic dermatitis in a patient with previous MRSA infections." Id. at 69. ("Atopic" means "a genetically determined state of hypersensitivity to environmental allergens." Stedman's Medical Dictionary 176 (28th ed. 2006). Despite its ominous sound, a "superinfection" is "[a] new infection in addition to one already present." Id. at 1870.) Another physician noted that plaintiff's rashes and lesions were likely "atopic dermatitis with possible superimposed infection." Id. at 66. Plaintiff was discharged on July 28, 2010. His discharge diagnosis was atopic dermatitis. The discharge diagnosis did not mention MRSA.

Following the recommendations of the University of Wisconsin physicians, Dr. Suliene ordered Oxycodone, Prednisone eye drops and Bacitracin ointment. She also

ordered continued infectious disease precautions. When plaintiff returned to the Columbia Correctional Institution, he reported that he was feeling well and did not want to stay in the Health Services Unit observation cell. Dr. Suliene allowed him to return to his cell.

On August 2, 2010, Dr. Suliene saw plaintiff for followup and ordered a continuation of the treatments recommended for plaintiff by the hospital. She saw him for another followup on August 6, 2010, and obtained cultures from his ears, nose, throat and groin. She observed no drainage in any of these areas and thought that the infection in his ears and groin was resolved, so she discontinued the infections disease precautions. On August 10, 2010, the Health Services Unit received the results of the cultures, showing no active MRSA infection. Dr. Suliene discontinued all antibiotic therapy and isolation.

On November 10, 2010, plaintiff received an audiogram that revealed he suffers from "moderate hearing loss." The report does not identify the cause of the hearing loss or disclose the condition of plaintiff's hearing prior to 2010.

E. Plaintiff's Relevant Offender Complaints

Plaintiff filed five offender complaints relevant to the medical treatment at issue in this litigation. Defendant Thorpe was the reviewing authority for all five. As a regional nursing coordinator, Thorpe often served as a reviewing authority on offender complaints filed through the Inmate Complaint Review System. Thorpe never treated plaintiff personally or had any involvement in specific decisions about his treatment. She is not a physician and does not order medical treatment.

On May 18, 2010, plaintiff submitted offender complaint CCI-2010-10604. He stated that his ears and eyes itched, that he blacked out and fell once and that physicians at the University of Wisconsin Hospital had recommended a dermatology consultation but no appointment had been made. Joanne Lane, the institutional complaint examiner, investigated the complaint by contacting Lori Alsum, the manager of the Health Services Unit. Alsum informed Lane that plaintiff had been seen by a physician on several occasions and was being treated for eye and ear concerns. On June 2, 2010, Lane recommended dismissing the complaint. Her recommendation listed in detail the care and appointments that plaintiff had received for his ears and eyes and argued that complaint examiners are not qualified to second-guess medical judgments by medical staff. On June 3, Thorpe reviewed Lane's findings and followed her recommendation because Thorpe believed plaintiff was receiving adequate treatment.

On June 10, 2010, plaintiff submitted offender complaint CCI-2010-12137, again alleging that the treatment for his ears and eyes was inadequate. Lane contacted Alsum, who informed her that plaintiff had been seen by a doctor on six occasions; the doctor had prescribed many different treatments; plaintiff had seen an outside provider on June 9, 2010; and plaintiff had refused to allow the doctor to examine his ears during a followup on June 14, 2010. Lane also received a copy of plaintiff's medical records. On July 6, 2010, Lane again recommended dismissing the complaint because she was not qualified to challenge medical judgments made by medical staff. Thorpe reviewed Lane's findings, including portions of plaintiff's medical records, and followed her recommendation. Thorpe believed

that dismissal was appropriate because plaintiff was receiving adequate treatment.

On June 15, 2010, plaintiff submitted offender complaint CCI-2010-12336 that detailed the medical problem with his finger. Amy Millard, an institutional complaint examiner, investigated the complaint. She determined that plaintiff had been directed on June 3, 2010 to resolve his concerns through the proper chain of command but had failed to do so. Millard concluded that plaintiff was being uncooperative by failing to do so and recommended dismissal of the complaint on June 17, 2010. On June 25, 2010, Thorpe reviewed the complaint and agreed. She noted that plaintiff's complaint detailed his injury and care and it was not clear what his alleged problem was. In any case, she noted that "[a] review of medical indicates care provided."

On August 7, 2010, plaintiff submitted offender complaint CCI-2010-16446 about his ear and eye problems. He said that Dr. Suliene had not set up an ENT appointment despite the recommendation to that effect by a physician at the University of Wisconsin Hospital on June 9, 2010 and he described his subsequent emergency room visit from July 21 until July 23, 2010. On August 10, 2010, Lane rejected plaintiff's complaint because his ear and eye complaints had been addressed previously in complaints CCI-2010-10604 and CCI-2010-12137. On August 13, 2010, Thorpe reviewed Lane's finding and determined that the complaint was dismissed appropriately.

On September 9, 2010, plaintiff submitted offender complaint CCI-2010-18760. He alleged that he had a serious MRSA infection that went untreated for six months and that as a result he passed out and fell several times chipping his teeth and hitting his head. Lane

again contacted Alsum, who reported plaintiff's extensive history of treatment for various complaints, including the MRSA infection. Lane recommended the complaint be dismissed on September 22, 2010. That same day, Thorpe reviewed Lane's findings and followed her recommendation. Thorpe believed that dismissal was appropriate because of the treatment history listed in Lane's decision.

OPINION

A. Motion to Amend the First Amended Complaint

In an order entered on December 11, 2012, I denied plaintiff's previous motion to supplement his complaint because his "supplement" overlapped substantially with his original complaint. In that order, I explained to plaintiff the procedure for amending his complaint. Plaintiff has filed another motion for leave to amend his complaint under Fed. R. Civ. P. 15(a)(2). Although courts should give leave to amend freely when justice requires, I cannot determine whether leave should be granted in this instance because plaintiff has not filed his proposed amended complaint or explained what additional allegations he intends to add. Accordingly, I will deny the motion.

B. Motion for Assistance in Recruiting Counsel

On March 30, 2012, I denied plaintiff's first motion for assistance in recruiting counsel because he had not asked three attorneys to represent him and because it was too early to tell whether plaintiff lacked the ability to litigate his case. I will deny this motion

as well. Although plaintiff has now provided rejection letters from lawyers that he asked to represent him and who turned him down, he has not shown that he meets the legal standard for appointment of counsel.

Unfortunately, this court does not have nearly enough lawyers available and willing to handle all of the prisoner cases filed in this district. If it did, it would recruit an attorney in almost every case, but the court receives around 300 new pro se lawsuits every year, and relatively few lawyers are willing and qualified to accept a pro bono assignment to a prisoner civil rights lawsuit. As a result, the court has no choice but to limit its efforts to recruit counsel to the cases in which it is clear that the plaintiff must have the assistance of a lawyer.

Litigants in civil cases do not have a constitutional right to a lawyer; federal judges have discretion to determine whether appointment of counsel is appropriate in a particular case. Pruitt v. Mote, 503 F.3d 647, 654, 656 (7th Cir. 2007). They exercise that discretion by determining from the record whether the legal and factual difficulty of the case exceeds the plaintiff's demonstrated ability to prosecute it. Id. at 655.

In his motion, plaintiff states that he has a seventh grade reading level and post-traumatic stress disorder and is unable to grasp and remember what he reads. He has no contact with other prisoners because he is serving a 360-day segregation sentence. He was receiving assistance through the prisoner-to-prisoner mail routing until the Department of Corrections abolished that system. He also states that he is having difficulty conducting documentary discovery in his case and finding the employment addresses of a variety of witnesses who saw or treated his injuries. Last, plaintiff asserts that his case is more difficult

than a standard 'failure to treat' case because assessment of the adequacy of his treatment will likely require medical testimony.

Despite plaintiff's concerns about his mental abilities, his submissions to this court are logical, coherent and contain appropriate information. Plaintiff's concerns about his legal skill are shared by all persons who file cases without the assistance of a lawyer. Although, as I discuss below, plaintiff has not followed some of the court's rules for discovery, nothing in the record suggests that he was incapable of gathering and presenting evidence to prove his claims. Although plaintiff may be lacking in legal knowledge and skill, this handicap is almost universal among pro se litigants.

I turn next to plaintiff's suggestion that counsel would be better at conducting discovery than he is and would retain an expert witness to support plaintiff's claims. As in most cases in which a prisoner alleges that he received inadequate medical care, plaintiff's claims are difficult to prove without expert testimony about the applicable standard of care. However, it is not the court's practice to appoint counsel just so that a pro se plaintiff will have the assistance of an expert witness and discovery conducted at counsel's expense. Likewise, although the court may have the power to appoint an expert at defendants' expense in a particular case, Ledford v. Sullivan, 105 F.3d 354, 361 (7th Cir. 1997), plaintiff has not persuaded me that it would be appropriate to do so in this case because he has not shown that he has tried and failed to obtain an expert and it is not clear from the record that an expert would substantially aid the court in adjudicating this matter.

C. Motion for Court Assistance

Plaintiff filed a "motion for court assistance to obtain names of expert witnesses and whereabouts of prisoner witnesses." Dkt. # 38. The motion was filed seven days before plaintiff's deadline for disclosure of expert witnesses. In the motion, plaintiff states that on December 14, 2012, he filed an open records request with the records office at the Waupun Correctional Institution (his current institution) seeking the employment addresses for Dr. Thomas Jackson, Dr. Charles Boursier, G. Patrick Kennedy (a nurse practitioner at the University of Wisconsin hospital), three inmates who witnessed his physical condition and six correctional officers who either called the Health Services Unit on plaintiff's behalf or escorted him to the Health Services Unit, Divine Savior Healthcare or the University of Wisconsin Hospital. The open records request was denied.

It is not clear what assistance plaintiff is seeking. Plaintiff knows the names of the relevant witnesses. It does not appear that he has filed discovery requests with defendants related to these individuals. On July 25, 2012 a preliminary pretrial conference was held. At that time, plaintiff was provided a copy of this court's procedures for calling witnesses, which was written for the purpose of helping pro se litigants understand how these matters work. In addition, plaintiff was instructed on how to use discovery techniques, such as written interrogatories, Fed. R. Civ. P. 33, which are available to all litigants to gather evidence. As the magistrate judge explained during the pretrial conference and in the accompanying documents, plaintiff was not required to seek court approval before using these discovery processes. Accordingly, I am denying plaintiff's motion for court assistance.

Perhaps plaintiff intended to file a motion to compel discovery under Fed. R. Civ. P. 37, but I would have to deny that motion as well because plaintiff has not used the discovery techniques available to him and because plaintiff did not certify that he had conferred in good faith with defendants to obtain the discovery he wanted.

Moreover, even if plaintiff had obtained evidence from these witnesses, it would not affect the outcome of the motion for summary judgment. For purposes of summary judgment, defendants have not denied that plaintiff had a serious medical condition and I have assumed that plaintiff's description of his symptoms is true, so testimony from other prisoners or prison guards about plaintiff's symptoms would be cumulative. Plaintiff's claims fail on summary judgment not because he did not have a serious medical need but because the undisputed facts about his treatment demonstrate that defendants' decisions were not so blatantly inappropriate that they exhibit deliberate indifference.

D. Motion for Summary Judgment

1. Factual dispute regarding Dr. Suliene's May 3 and June 7, 2010 visits

Defendants assert and plaintiff denies that defendant Suliene saw plaintiff for complaints related to his eyes and ears on May 3 and June 7, 2010. Defendants supported their proposed findings of fact about these visits with (1) an affidavit by Suliene recounting the visits in detail, Suliene Aff., dkt. #54, at ¶¶ 36, 45; (2) dated entries in the "progress notes" recording Suliene's observations from the examinations, Suliene Aff., Ex. A, dkt. #54-1, at 4-5, 7; and (3) prescriptions entered on the date of each visit. Id. at 18, 19. Plaintiff's

contemporaneous statements also appear to confirm that the visits occurred. In an interview request that plaintiff dated May 3, 2010, he wrote, "Today Dr. Suliene & a new nurse visited DS-1 . . . . Suliene checked my ears, but said nothing about my eyes. The nurse had to inform Dr. Suliene that I had Zinc Ox ointment on my eyes." Id., dkt. #54-2, at 131. Similarly, in a health service request that plaintiff dated June 7, 2010, he wrote, "Dr. Suliene, I'm sorry to bother, but I returned to my cell *after you examined me* to find the extra mattress that I've had since being at CCI gone." Id. at 158 (emphasis added).

Nevertheless, plaintiff contends that these visits did not occur. With respect to the May 3 visit, plaintiff asserts that "Dr. Suliene did not see plaintiff, because if she had, she would have noticed his ears and eyes condition was rapidly deteriorating." Plt.'s Resp. to Defs.' PFOF ¶ 70, dkt. #59. Similarly, he asserts that "Dr. Suliene did not see plaintiff on 6-7-10." Id. at ¶¶ 102, 103. Although his assertion that these visits did not occur is not supported by a separate affidavit, he signed his responses to the proposed findings of fact under 28 U.S.C. § 1746. Although this violated the court's procedures for summary judgment, plaintiff has personal knowledge about whether these visits occurred and has sworn to his statement that they did not occur. Defendants argue convincingly that plaintiff's statements are contrary to his prior statements and the medical record, but it is not the court's role to make credibility assessments on summary judgment. Plaintiff's sworn statements are sufficient to establish a dispute about whether the visits occurred. Payne v. Pauley, 337 F.3d 767, 771 (7th Cir. 2003) (rejecting argument that "self-serving, uncorroborated and conclusory statements" do not establish genuine disputes of fact).

Nevertheless, as explained below, the disputes are not sufficiently material to preclude the entry of summary judgment in defendants' favor.

2. Eighth Amendment standard

The Eighth Amendment gives incarcerated persons a right to humane conditions, including adequate medical care. Without the opportunity to seek their own medical care, prisoners are dependent on prison and jail officials for the care they need for their serious medical needs. The Eighth Amendment does not require prison officials to provide any and all kinds of care a prisoner wants, but they are liable if they are aware of a substantial risk of serious harm to a prisoner and act or fail to act with deliberate indifference to that risk. Farmer v. Brennan, 511 U.S. 825, 836 (1993). For the purpose of summary judgment, defendants did not contest whether plaintiff's ear and eye infections were serious medical needs. Accordingly, the only question to be decided is whether any of the defendants acted with deliberate indifference to that need. To avoid summary judgment, plaintiff must provide evidence from which a jury could infer that defendants were "subjectively aware of [his] serious medical needs and disregarded an excessive risk that a lack of treatment posed" to his health. Wynn v. Southward, 251 F.3d 588 (7th Cir. 2001).

With respect to medical professionals, "medical malpractice, negligence, or even gross negligence does not equate to deliberate indifference." Johnson v. Doughty, 433 F.3d 1001, 1013 (7th Cir. 2006); Duckworth v. Ahmad, 532 F.3d 675, 676 (7th Cir. 2008); Gil v. Reed, 381 F.3d 649, 664 (7th Cir. 2004). It is not enough for plaintiff to show that

defendants should have ordered different tests or tried different treatments. Estelle v. Gamble, 429 U.S. 97, 107 (1976) ("[T]he question whether an X-ray—or additional diagnostic techniques or forms of treatment—is indicated is a classic example of a matter for medical judgment. A medical decision not to order an X-ray, or like measures, does not represent cruel and unusual punishment. At most it is medical malpractice."). Plaintiff must show that defendants knew that a particular test or treatment "was necessary and then consciously disregarded that need." Johnson, 433 F.3d at 1013. Deliberate indifference can be inferred from medical treatment decisions only if the decisions are "so far afield of accepted professional standards that no inference can be drawn that the decisions were actually based on medical judgment." Norfleet v. Webster, 439 F.3d 392, 396 (7th Cir. 2006) (citation omitted).

3. Defendant Dalia Suliene

Plaintiff contends that Dr. Suliene exhibited deliberate indifference because she (1) either did not examine or treat his eyes or ears from January through July 2010 or failed to treat his ear condition quickly enough; (2) ignored the faxes about MRSA in plaintiff's finger wound sent by Divine Savior Healthcare on May 10, 2010 (and a reference to it in a subsequent fax); (3) ignored Dr. Boursier's recommendation that plaintiff see an ear, nose and throat specialist; (4) chose not to culture the drainage leaking from plaintiff's ears until June 14, 2010; and (5) disregarded the Department of Corrections' infectious disease policy. I discuss each argument separately below but the discussions share a common theme. Dr.

Suliene did not consciously disregard plaintiff's medical needs; on the contrary, she provided numerous treatment for his atopic dermatitis and his MRSA infection. Although plaintiff believes Dr. Suliene should have treated his illnesses more aggressively, the evidence does not establish that she was even negligent, let alone deliberately indifferent.

Plaintiff's first argument is contradicted by the undisputed facts. Dr. Suliene examined and treated plaintiff's eyes and ears on numerous occasions, including January 12, March 10 and 18, April 26, June 14 and 21 and July 2 and 15. Between January and late April 2010, each time plaintiff filed a health service request about his skin condition, Dr. Suliene saw him within seven to eight days. Even if Dr. Suliene did not see plaintiff on May 3 or June 7 (the dates that plaintiff disputes), the delays around those dates are insufficient to establish that she disregarded a substantial risk to his health. Plaintiff complained about his ears itching on April 27, just one day after his last visit with Dr. Suliene, and she saw him again on May 7, 2010. During those ten days, she ordered a new antihistamine and refilled his Medrol dose pack. After plaintiff complained that his inner ear had become infected on May 25, 2010, he was not seen for 13 days, when he was sent to the emergency room. These delays are not long enough to establish that Dr. Suliene was deliberately indifferent. Gutierrez v. Peters, 111 F.3d 1364, 1374 (7th Cir. 1997) (three delays of between six and fourteen days in treatment of infected cysts did not constitute deliberate indifference). Moreover, plaintiff has no medical evidence that these two delays contributed to his injury. Langston v. Peters, 100 F.3d 1235, 1240 (7th Cir. 1996) ("[a]n inmate who complains that delay in medical treatment rose to a constitutional violation must place *verifying medical*

evidence in the record to establish the detrimental effect of delay in medical treatment to succeed") (quotation omitted).

The undisputed facts also show that Dr. Suliene provided plaintiff with treatment and did not continue with treatments that she knew were not working. Arnett v. Webster, 658 F.3d 742, 754 (7th Cir. 2011). In January 2010, she scheduled an optometry appointment for his itchy eyes. In April 2010, she ordered various treatments for his skin conditions and followed up on those treatments in May. When she determined in early June that her prescribed skin treatments were not working, she scheduled a dermatology appointment. After plaintiff returned from the emergency room on June 8, Dr. Suliene followed Dr. Boursier's orders to treat his inner ear infection with antibiotics and ear flushing (when plaintiff would permit it) and followed up on this treatment later. In July, when it appeared his skin infection was still not improving, she consulted with specialists and the University of Wisconsin and decided to send plaintiff for emergency evaluation.

Plaintiff's second argument also conflicts with the undisputed facts. Dr. Suliene did not ignore the May 10 fax showing plaintiff's finger wound was infected with MRSA. She ordered antibiotics for plaintiff the same day that she learned about the fax. She examined his finger around two weeks later and noted that the wound had healed and there were no signs of infection.

Plaintiff's third argument fails because his disagreement with Dr. Suliene's course of treatment is not enough to establish deliberate indifference. Berry v. Peterman, 604 F.3d 435, 441 (7th Cir. 2010). On June 8, 2010, Dr. Boursier recommended that plaintiff

receive a recheck at an ENT appointment within seven to ten days and Dr. Suliene did not schedule the suggested appointment. Although several courts have held that a defendant's decision to ignore a specialist's orders can imply deliberate indifference, e.g. Gil v. Reed, 381 F.3d 649, 662-64 (7th Cir. 2004), those cases are not analogous to plaintiff's situation. In Gil, the court concluded that deliberate indifference could be inferred where a prison doctor canceled a specialist's prescriptions and substituted a medication that the specialist had specifically warned was dangerous for persons with plaintiff's condition. Id. at 664. In another case, Jones v. Simek, 193 F.3d 485, 490 (7th Cir. 1999), the court found that deliberate indifference could be inferred where plaintiff submitted evidence that a prison doctor waited six months before making a promised referral to a neurologist and then, once he did, refused without explanation to follow the neurologist's orders.

Dr. Suliene avers that she did not schedule the ENT appointment "because [a] Dermatology consult at UW [had been] approved by DOC and was scheduled already for [the] same condition in [the] skin around his ears." Plaintiff argues that this explanation is unsatisfactory because dermatology and ENT are different specializations. (He also argues that Dr. Suliene wanted to retaliate against him for a prior lawsuit and did not want the specialist to see his "deplorable" state. I will disregard these allegations because they were raised for the first time in his brief and he submitted no evidence of either illicit motivation.)

Whether an additional ENT consultation was warranted is a medical decision. Plaintiff has submitted no evidence that Dr. Suliene's choice not to schedule the ENT consultation was negligent, much less a substantial departure from accepted professional

standards. At most, plaintiff has shown that his doctors disagreed about the need for an followup ENT appointment. Such disagreement is insufficient to establish deliberate indifference. Estate of Cole by Pardue v. Fromm, 94 F.3d 254, 261 (7th Cir. 1996) (difference of opinion among medical providers about best treatment does not amount to deliberate indifference). Dr. Suliene's decision not to schedule the appointment must be viewed in light of her other actions. She ordered Dr. Boursier's prescriptions for his ear infection, including the antibiotics and cleaning. She followed up on the treatment and determined the infection was resolved. Plaintiff has not shown that her failure to order the appointment exhibited conscious disregard for a substantial risk to his health.

Plaintiff's fourth argument is that Dr. Suliene exhibited deliberate indifference by not testing his ears for MRSA sooner. She learned on May 10, 2010 that plaintiff had an MRSA infection under his fingernail, and plaintiff requested an MRSA test several times between May 27 and June 7, but Dr. Suliene did not order a culture from his ears until June 14. (The delay after June 14 was caused by plaintiff's refusal of treatment.) A delay in the provision of necessary care may constitute deliberate indifference. Gutierrez, 111 F.3d at 1374.

However, plaintiff has no evidence that the delay in testing his ears for MRSA was negligent, much less a substantial departure from professional standards. He argues that his ear fissures were likely infected with MRSA because his finger wound contained MRSA, but that is a medical judgment and he has no medical evidence to support his opinion. Plaintiff's ears and eyes had been itching since January, and there is no evidence that the itching had any relation to the MRSA in his finger wound. Dr. Suliene treated the MRSA in his finger

immediately and her followup indicated the finger wound had healed and showed no further sign of infection. In the meantime, plaintiff was receiving other forms of treatment for his ears. Even assuming Dr. Suliene should have ordered a culture to test his ears for MRSA, her failure to do so was negligent at most. Dunigan ex rel. Nyman v. Winnebago County, 165 F.3d 587, 591 (7th Cir.1999) (court "must examine the totality of an inmate's medical care when considering whether that care evidences deliberate indifference.").

Last, plaintiff argues that Dr. Suliene failed to follow the infectious disease policies of the Wisconsin Department of Corrections after learning about his MRSA infection. He has submitted a hand-written document that he claims is Department of Corrections Policy 716.02 about preventing the spread of infectious disease. He supports this allegation only with his personal affidavit but does not explain how he knows about the policy. In fact, the policy he cites is maintained by the Prairie Du Chien Correctional Institution, not the Columbia Correctional Institution, and was described in Shelley v. Bartels, No 06-cv-479-s, 2006 WL 3834213, *1 (W.D. Wis. Dec. 29, 2006) (Shabaz, J.). Defs.' Resp. to Plt.'s PFOF 9, dkt. #66. As described in Shelley, the policy was:

> When HSU is notified of a possible MRSA infection the affected inmate is called to the HSU for evaluation and Policy 716.02, Preventing Spread of Infectious Disease, is initiated. If the wound is draining, a culture will be obtained and sent to the hospital laboratory for culture processing. The inmate is started on antibiotics and taught ways to prevent the spreading of MRSA such as good hand washing, cleaning his room and shower and handling laundry. The wound is covered and the dressing is changed twice a day. The inmate cannot use recreation equipment or go to work. If the wound cannot be contained by dressings the inmate is confined to his unit with infection control measures in place until the wound is no longer draining.

Id. Plaintiff has not shown that this policy applies to the Columbia Correctional Institution.

In any case, even if the policy applied to the Columbia Correctional Institution and Dr. Suliene's treatment departed from it (which is not clear), a violation of this policy would not establish deliberate indifference. Although a plaintiff in a negligence suit may argue that institutional policies define the standard of care, the mere fact that a defendant's conduct violated an institutional policy does not establish that the defendant's care of the plaintiff was such a departure as to be blatantly inappropriate. Taylor v. Adams, 221 F.3d 1254, 1259 (11th Cir. 2000) ("[F]ailure to follow procedures does not, by itself, rise to the level of deliberate indifference because doing so is at most a form of negligence."); Thompson v. City of Chicago, 472 F.3d 444, 454 (7th Cir. 2006) (police regulations on use of force should not be used to determine whether use of force was unreasonable and thus excessive within meaning of Fourth Amendment). Moreover, it would be problematic to rely on an infectious disease policy to establish the standard of reasonable care for treatment *of the infected patient* because such policies are meant, at least in part, to prevent *transmission* of infections diseases to others.

4. Defendant Jennifer Nickel

Plaintiff argues that defendant Jennifer Nickel exhibited deliberate indifference because she (1) failed to culture the drainage and wound that she observed on the inside of plaintiff's left ear lobe on May 22, 2010; and (2) failed to inform him about his MRSA infection during her May 22 visit although she had learned about it on May 10. (Initially, defendants proposed that this visit occurred on June 8, 2010, because they misread the

medical record, but Nickel's affidavit and the medical record state clearly that the visit occurred on May 22, 2010. Nickel Aff., dkt. #53, at ¶ 9; Suliene Aff., dkt. #54-1, at 7. In any case, the dispute is not material.) Neither argument establishes deliberate indifference.

Nickel learned on May 10 that plaintiff's *finger* was infected with MRSA. She passed this information on to Dr. Suliene, who ordered antibiotics. When Nickel came to plaintiff's cell on May 22, she was responding to complaints about his *ear*. Plaintiff has no evidence to suggest that it was medically appropriate to culture his ear in light of his finger infection. In any case, Nickel treated plaintiff's ear. She cleaned his ear, applied antibiotic ointment to the fissures and covered the ear with a sterile bandage. Plaintiff then saw Dr. Suliene on May 24. Even if Nickel should have cultured plaintiff's ear or informed him about the MRSA diagnosis in his finger, her failure to do so would exhibit negligence at most. Plaintiff has not shown that defendant Nickel was aware of a substantial risk of harm to plaintiff and consciously disregarded that risk.

5. Defendant Steve Helgerson

Plaintiff argues that defendant Helgerson exhibited deliberate indifference because Helgerson (1) saw plaintiff frequently between January and July 2010 and turned a blind eye while plaintiff's health deteriorated and (2) failed to treat plaintiff adequately when he visited plaintiff at his cell on July 17, 2010. (Plaintiff raised several new allegations about Helgerson's treatment on July 17 in his brief, but I have disregarded these allegations because they were raised for the first time in a brief and were supported by no evidence, in

violation of this court's summary judgment procedures.)

Plaintiff first argument is insufficient to establish liability. As recounted in detail above, plaintiff received numerous treatments over this seven-month period, some of which were precipitated by Helgerson. With respect to Helgerson's treatment on July 17, 2010, plaintiff's version of events suggests at most that Helgerson was negligent. Even assuming that plaintiff had rashes on his face, chest and groin and that Helgerson diagnosed plaintiff's condition incorrectly as an allergic reaction, it is undisputed that Helgerson ordered antihistamines according to prison policies. Plaintiff argues that Helgerson should have taken a culture, but Dr. Suliene had taken a culture just two days earlier and the results were still pending. Plaintiff's argument that Helgerson should have done more is not enough to establish that Helgerson was aware of a substantial risk of harm to plaintiff and consciously disregarded it.

6. Defendant Cynthia Thorpe

Plaintiff argues that defendant Thorpe is liable under the Eighth Amendment because she failed to exercise her authority as the medical reviewer to intervene in his medical treatment. He argues that she could not have known whether plaintiff was being treated adequately without investigating the complaint herself and she was not entitled to rely on the investigation of Lane, who was a lay person without medical training. Because the undisputed facts demonstrate that the other defendants were not deliberately indifferent to plaintiff's medical problems with his ears and eyes, Thorpe cannot be liable as the medical

complaint reviewer for failing to intervene in their medical treatment of plaintiff.

ORDER

IT IS ORDERED that

1. Plaintiff Anthony Porter's motion to supplement the first amended complaint, dkt. #42, is DENIED.

2. Plaintiff's motion for assistance in recruiting counsel, dkt. #33, is DENIED.

3. Plaintiff's motion for "court assistance to obtain names of expert witnesses and whereabouts of prisoner witnesses," dkt. #38, is DENIED.

4. The motion for summary judgment, dkt. #48, filed by defendants Cynthia M. Thorpe, Jennifer Nickel, Steve Helgerson and Dalia D. Suliene, is GRANTED.

5. The Clerk of Court is directed to enter judgment for defendants and close this case.

Entered this 10th day of May, 2013.

BY THE COURT:
/s/
BARBARA B. CRABB
District Judge